EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR M BEN HASSEN	V	GROUP EMPLOYMENT SERVICES LIMITED

HELD AT: LONDON CENTRAL **ON: 7-11 FEBRUARY 2022**

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MS D KEYMS
MR D SHAW

REPRESENTATION:
FOR THE CLAIMANT **In person**
FOR THE RESPONDENT **Mr R Lyons (counsel)**

JUDGMENT

1. The claims of unfair dismissal, age discrimination, automatic unfair dismissal, and public interest detriment, fail and are dismissed.
2. The claim of race discrimination is dismissed on withdrawal.

REASONS

1. Reasons were provided at the Hearing, written reasons were requested with 14 days of the judgment being sent to the parties. I apologise for the time it has taken to provide written reasons, caused in part by absence from work.

The Issues

2. The claimant was employed as a Security Officer from April 2018, based at Selfridges London, to his dismissal on two weeks' notice on November 2020. The respondent says that the reason for dismissal was his conduct, he received a written warning for failing to following the respondent's procedures within the period of a live final written warning. The claimant says his dismissal is unfair.

3. The claimant was managed by Mr David Dayle, against whom he raised a grievance which contained, he says, a whistleblowing allegation. He says that he was dismissed as a consequence and claims automatic unfair dismissal. He says also that he was dismissed on grounds of his age, being aged 46 at dismissal, in comparison to younger security guards.

4. The respondent supplies security services under contract to Selfridges. It argues his dismissal was fair - that the only reason for dismissal was his repeated failures to follow procedures which resulted in several warnings through his employment. It says that his dismissal was, as the legal test says, "within the range of reasonable responses of a similar sized and resourced employer". A big factor was the high standards required by Selfridges of the respondent's security team. It denies that the claimant made a whistleblowing disclosure, or that age was any factor in his dismissal.

5. The claimant withdrew his race discrimination claim on the morning of day 3 of the hearing, and this claim is dismissed on withdrawal.

6. No list of issues has been produced. There was some discussion about the claims being brought, in particular whether a whistleblowing claim had been made. The claim form has ticked unfair dismissal, race and age at box 8.1. The claim starts saying that he had sent a "grievance and whistleblower letter" to HR. He said that Mr Dayle, the subject of the whistleblowing complaint, knew about it, that as a consequence he had been subject to investigations on 3 occasions in 1 month. He says he was dismissed as a consequence. Mr Lyons disagreed that these were issues within the claim.

7. The tribunal concluded that there was on the face of the claim form both whistleblowing detriment (the disciplinary sanctions) and whistleblowing dismissal claim. His claim form references on several occasions Mr Dayle bullying the claimant, that Mr Dayle became aware of his grievance and told him to *"watch his back"*. We concluded that there is enough within the wording of the claim form to show the claimant is making an allegation of detriment, also that he was dismissed because he had made a whistleblowing allegation.

8. The claimant argued that his age discrimination claim also relates to a refusal to give training which would give him experience on system-based duties, rather than shop-floor duties, that new joiners and "younger" employees were given this training. On consideration of the claim we noted that the age claim has been set out in the Tribunal's Order dated 12 July 2021 as being dismissal-related; there is no reference to training within the claim form. We concluded that the age discrimination claim set out in the claim form relates to his dismissal and the disciplinary process undertaken, and no other matter.

9. After discussion with the parties we concluded that the following were the issues to be determined:

10. Age discrimination claim:

    a. Was the claimant subject to less favourable treatment in comparison to other younger employees and/or a hypothetical comparator by being dismissed?

11. Whistleblowing detriment claim

    a. The Claimant argues that the reason for the written warnings was the making of protected disclosures contrary to s103A ERA 1996.

    b. Was the disclosure of the claimant that Mr Dayle was taking drugs outside of work a disclosure in the public intertest?

    c. Was the reason for the written and final written warnings in any way connected to the claimant's whistleblowing?

12. Ordinary/Automatic Unfair Dismissal

    a. What was the reason for dismissal?

    b. The Respondent relies upon the potentially fair reason of conduct.

    c. The Claimant argues that the principal reason for dismissal was the making of protected disclosures contrary to s103A ERA 1996. Was the disclosure of the claimant that Mr Dayle was taking drugs outside of work a disclosure in the public intertest?

    d. Alternatively, he argues that there was no potentially fair reason for dismissal.

    e. In the event that the Respondent can establish a potentially fair reason for dismissal, was the dismissal fair having regard to the following:

        i. The size and resources of the Respondent;
        ii. Equity and the substantial merits of the case;
        iii. The procedure adopted which led to dismissal;
        iv. The availability of alternatives to dismissal?

Witnesses and Tribunal procedure

13. We heard evidence from the respondent's witnesses first:
    a. Mr Peter Vlad, Site Supervisor
    b. Mr Peter Nottage, employed by Selfridges security team
    c. Mr David Dale, Deputy Manager and the claimant's line manager and dismissing manager
    d. Mr Diageo Pacaiolla, the respondent's National Operations Manager who heard the claimant's appeal against dismissal.

14. We then heard evidence from the claimant. He also provided statements from two employees, Mr Mustapha Berrehail; Mr Jakub Nuhiju who were not called as witnesses. We considered both statements as part of the case.

15. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process. It incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

16. Security guards employed by the respondent at Selfridges operate under rules and procedures which are given on employees' induction and in operational briefings given by Duty Managers at the start of shifts. Some instructions for some tasks are also provided in writing, for example how to open, close and lock security and disabled-access floors, the issue which led to the claimant's dismissal.

17. Security guards are designated to work in specific roles and areas of the store while on their shift. All security guards have an earpiece, and they are expected to operate under the instruction of Selfridges control room during their shift. Instructions and a briefing is given at the start of shifts by Duty Managers. Selfridges control room, which contains its cctv operations, is staffed and controlled by Selfridges personnel.
    .
18. There was an issue whether the claimant had received full induction training at the beginning of his employment. The claimant was TUPE'd to the respondent, and the respondent's witnesses were unable to confirm the training received by the claimant. The claimant says he got little induction training. The Tribunal accepted that the claimant's induction was not complete. However, we also accepted that the claimant was aware of all the relevant rules which he was alleged to have beached during his 3 disciplinary hearings; in fact the claimant admitted so in his evidence.

19. Issues with the respondent's employees undertaking their duties on the shop floor are often picked up by the cctv operatives, who will inform the respondent's

managers. If Selfridges managers consider a disciplinary investigation is merited, they tell the respondent's Duty Manager on shift.

20. On 27 December 2018 an incident occurred and was escalated by Selfridges to the respondent. The issue was investigated as a potential disciplinary issue; the respondent's investigation notes are titled *"unlawful stop of customer".*

21. In the investigation, the claimant said that he heard a request for an available officer, he answered this request, and was instructed by a store detective to watch a suspicious customer. The customer went outside, the claimant followed, and he says that a police officer indicated that he should approach the customer; he did so, he tapped the customer on the arm, and the customer was then stopped by the police officer.

22. Selfridges operational policy is that Security Guards are not to stop anyone outside of the store. The allegation was proven, and the claimant was given an informal written warning, a *"letter of concern"*, which states that the claimant had stopped a person of interest outside of the store which is *"…against our client's policy … the clients policies and procedures are imperative to the running of our operations…"*. The claimant did not appeal.

23. The next issue of significance was in April 2019; the claimant had a photo taken with the former footballer Edgar Davids while on station at a store exit; the cctv showed a small queue at the door while this was happening, and the claimant held up his hand for them to wait. Selfridges Duty Security Manager said that this will *"require a temporary removal of store approval while investigated by yourselves".*

24. In his investigation interview, the claimant argued that Mr Davids was known to him as Mr Davids was shortly to marry into his wife's family, that they chatted and Mr Davids suggested the photo.

25. The claimant was informed that there would be a disciplinary hearing to address the following allegations: he behaved inappropriately having his photo taken; the public could not access or exit the premises; dereliction of duties, and the client had requested he be removed from site. He was told he could be accompanied by a colleague or union rep, that the possible outcome could be a formal disciplinary warning (78-9).

26. At the disciplinary hearing the claimant accepted he had been aware he was not allowed to take pictures, but he argued that he had not had a proper induction. He accepted that he should not have had the photo taken and that he was not doing his duties as expected. The decision was a written warning. It was accepted that there was no evidence he attended a full induction, that here may have been *"gaps"* in his knowledge. It was recommended that training be given to staff to deal with similar scenarios; it was accepted that his work ethics and standards are *"not an issue and you have expressed clear regret.."* (80-83).

27. On 23 August 2019 the claimant made a complaint against Mr Dayle, saying that he is argumentative and abusive, would fight with staff, he never answers phone or emails, he is unprofessional and childish, that he smokes drugs outside of work and this affects his attitude with staff. He said he had been overlooked for training. He asked for his name to be kept anonymous and he asked to move to a different job (84).

28. The claimants allegations were investigated by Ms Boswell. On being overlooked for training, Ms Boswell's notes show that he said he had been overlooked for training, but new training had been organised and he was happy with this. He was concerned that holiday requests have been yet to be approved. He said that staff do not see Mr Dayle on site; Ms Boswell considered this was resolved as there was a difference in expectation about Mr Dayle's working hours and the fact he was often called to meetings.

29. On the drug taking allegation, the note records that the claimant has no proof, but that he contended Mr Dayle hung around a local corner at the end of shifts smoking drugs. The note records that the claimant did not wish to continue with a formal grievance (85). He was told that the issues would be addressed *"informally ensuring that you remain anonymous"* (90).

30. The claimant takes issue with the notes of evidence - he argues now that he said that Mr Dayle was smoking drugs at work and not outside of work. We do not accept that this is what he did say, we accept that the notes are an accurate account.

31. An incident occurred on 17 September 2019, the claimant was investigated *for "failing to follow instructions from control".* In his evidence the claimant accepted that there was a *"live situation on the shop floor"* with a suspected shoplifter and there had been an instruction for Security Officers to keep clear from the area, so as not to jeopardise the security operation. He argued that he had been on a break, his radio was playing up, and he went down the escalator to the area where the suspect was in order to patrol the floor. He says that a manager asked him to watch the suspect.

32. Mr Dayle's evidence was that when the Control room is following a suspect there are *"constant communications"* and that Security Officers are *"trained to listen and avoid the area"*; but the claimant *"… walked past the suspect, which goes against all procedures…".* In his evidence the claimant accepted that the investigation into this incidents was instigated by Selfridges.

33. There was a further incident on 8 October 2019. The claimant was seen on cctv speaking to a staff member, and blocking a fire exit; he was not at his correct station, and he had his hands in his pockets. In his evidence the claimant said that the staff member spoke to him and he had to reply; that he had his hands in his pockets for a couple of seconds. He disputed that Selfridges had picked up on this incident, that *"staff do worse with no complaints".*

34. The two incidents were investigated by Mr Dayle. The claimant's account was that his hands were in his pocket to rest his shoulders and he is was in pain because the door is often open; he has pain when in this position and has to wear a back brace. He accepted that he had left his station and stood outside to help with an arrest. He said that he did not follow anyone. He said he had acted on his initiative and wanted to offer support in the arrest, that his radio was not working. (95-104). The claimant's evidence at tribunal was that he had been *"set up"* by Control *"who were all friends"* of Mr Dayle.

35. The claimant was invited to a disciplinary hearing, the allegations being he had failed to follow a clear order from control room to stay out of view, and he had followed a suspect down the escalator; he had blocked exits while speaking to colleague, and with hands in pockets and had left his position without authorisation from control. The claimant was given the right of representation and he was provided with documentation in advance (105-6).

36. Ms Boswell conducted the hearing, and the outcome was a final written warning sent by post on 15 November 2019 to his home address. The reason he received a final written warning was because he was already on a live written warning. The final written warning was live for 12 months, expiring 15 November 2020.

37. The reasons for the final written warning were that he had failed to follow an instruction from control, and that it was his obligation to ensure his equipment was working properly. *"When you are given an instruction, it is imperative that you follow it to the letter… I expect you to take this on board moving forward."* On the hands in pockets and speaking to a staff member allegation, the letter records that the claimant said he said he was providing intelligence which he relayed to the control room. He mentioned his shoulder brace that he was struggling to find a comfortable position. Miss Boswell stated that adjustments could have been considered had he brought this to attention of the management team.

38. On the allegation he had left his position, Ms Boswell records that he had accepted he was aware of the correct procedure but had argued the process is not always clear. Ms Boswell concluded this was *"incorrect"* and there is no reason for him to be out of position. She concluded he had failed to follow clear instructions he had obstructed an entrance and have behaved in an *"unprofessional manner whilst on duty".*

39. The claimant's case is that he did not receive the final written warning, had he done so he would have appealed. In his evidence the claimant said that he was *"not sure"* if he had received this letter. The Tribunal accepted that he had received it; he was expecting a decision to be made on the disciplinary, and he would have chased this up if he had not received the outcome.

40. On 5 October 2020 the claimant was subject to another investigation. The allegation was that he had had been seen on cctv and he had *"forcefully closed and locked"* an automatic door. The investigator was Mr Moore.

41. An employee who was with the claimant at the incident, Mr Itua, was also interviewed. He said that the door was broken and that he called his supervisor to assist in shutting and locking the door. The claimant then turned up, and without warning pushed the door closed and asked him to hold it while the claimant locked it (120-22).

42. Mr Itua was not subject to a disciplinary process: the reason was that the cctv showed him waiting by the door, the claimant then turned up and shut the door; at which point Mr Itua held the door shut.

43. The claimant said at his investigation interview that he had been told that the door was broken and that it needed to be pushed hard to lock. He said that he had not been told that in fact the door was now working and would close on its own by resetting the door from night to day mode, for which a key was required. He said he did not have the key for this door with him. He accepted that he knew the correct procedures for closing and opening this door, and that he had shut it in the past, the last time was 2 days previously (117-119B).

44. A “”New Door User Guide” (179) was created in 2018 when the doors were installed, because it was identified that here was a potential for the doors to be damaged if opened manually; that this was presented in staff briefings. Mr Nottage’s evidence that disabled doors have sensors to stop people being trapped that *“Sometimes the sensors go crazy and have to be reset”*; this can be done be resetting the day/night mode with the key, sometimes it may require an engineer, that the *“whole security team are aware of this”*. To restate, the claimant accepted at the investigation interview that he was aware of the correct procedure for this door.

45. The claimant’s case is that the key for the day/night mode was missing from the key bunch; we accepted the respondent’s evidence that the key was not missing from the bunch; that even if it had been missing, all bunches carry the same day/night key which is identical for all the doors, which are 10 metres apart.

46. On 9 & 10 October 2020 the claimant submitted email complaints arguing that the investigation meeting had been a breach of data protection and he was forced to sign the meeting notes on 9 & 10 October 2020.

47. The claimant attended a disciplinary hearing on 15 October 2020 , chaired by Mr Dayle. The allegation was that he had *“failed to follow site protocol and forcefully closed and locked”* the door; that this had the potential to damage the respondent’s relationship with its client. He was provided with the meeting notes, and was given the right to be accompanied. He was told that as he was on a final written warning, the possible outcome could be dismissal (123-4).

48. The disciplinary notes record the claimant saying that he not was in charge of the doors *“I was just there to help”*. He said that he had *“no idea how to close”* the doors, then saying *“I mean I know how to close them but sometimes there are issues…”*. He said that other supervisors force the door and this is what he had done. He apologised. He said it was both him and his colleague who

closed the door and did not accept the cctv footage would only show himself closing the door (129-135).

49. Because he had not seen the cctv footage, a rearranged meeting was held on 26 October to allow him to do so.

50. In-between the disciplinary hearings, the complaint of an alleged breach of data protection - being forced to sign the meeting notes - was investigated. The claimant said that he wished to withdraw its grievance *"I would just like to put it to an end. There's no need for it…".* Paul Knight who was undertaking the investigation asked on several occasions whether he was sure and the matter was closed.

51. At the rearranged disciplinary the claimants disputed that he had shut the door himself, saying that he had been assisted by his colleague who had helped hold the door shut while he locked it. He also changed his story as to when he had last locked the door – at investigation this had been 2 days previously; he now said it was 10 days before, he had been forced to sign his statement at the investigation hearing, under duress (138-145B).

52. The outcome was a written warning: *"despite being aware of the correct procedure you have forcefully closed the door before locking them which could've resulted in significant damage to our client's property. I do not understand why you would not radio and ask for assistance when you established that the door is faulty".* Mr Dayle records the written and final written warnings, that the final written warning remains active. *"As you were already on a final written warning and your conduct has not improved, the addition of this written warning makes me believe you have taken on no learning from previous meetings. In light of this, I have taken the decision to dismiss you from the organisation."* The claimant was placed on garden leave for his two week notice period, his final date of employment was 12 November 2020 (146-7).

53. The claimant appealed, saying he had been forced to sign the notes of the investigation by Mr Moore, that the procedure was not right, he was not given a further chance.

54. The appeal was heard by Mr Paciolla. At the appeal hearing he said that Mr Dayle had made a false statement; he reiterated the points about the door; he said that the disciplinary and investigation notes were incorrect; he referred to witnesses who had seen staff forcing the door; he complained of issues in the investigation and process. He referred to his grievance against Mr Doyle in 2019.

55. On 11 November 202 he submitted a grievance; he said that his personal information had been left in the open by Mr Dayle, he had been 'blackmailed" by Mr Dayle *"by calling me to the control room to see the video".* He quoted the Data Protection Act (161). It was agreed by the claimant that Mr Paciolla would deal with his grievance as well as appeal against dismissal.

56. The appeal was rejected by Mr Paciolla on 20 November 2020; details of the claimant's points of appeal are addressed and rejected. In summary Mr Paciolla says *"I feel that you have failed to acknowledge any wrongdoing on your part, and this causes me great concern that you will continue to behave in this manner. Unfortunately we have lost all trust and confidence placed in you and cannot be certain that similar events will not re-occur in the future. It is therefore my decision to oppose the original decision"* (170-3).

The Law

57. Equality Act 2010

s.13 Direct discrimination

1. A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

s.23 Comparison by reference to circumstances

1. On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

s. 24 Irrelevance of alleged discriminator's characteristics

1. For the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic.

s.136 Burden of proof

1. This section applies to any proceedings relating to a contravention of this Act

2. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

3. But subsection (2) does not apply if A shows that A did not contravene the provision.

55. Employment Rights Act 1996 – Pt.IVA Protected Disclosures & Pt.V Detriment

s.43A Meaning of "protected disclosure".

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

s.43B Disclosures qualifying for protection.

1. In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

    a. …
    b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
    c. …

5. In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

s.43C Disclosure to employer or other responsible person.

1. A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –
    a. to his employer
    b. …

s.47B Protected disclosures.

1. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

56. <u>Employment Rights Act 1996 – Pt X Dismissal</u>

s.94 The right

a. An employee has the right not to be unfairly dismissed by his employer

s.98 General

1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

    a. the reason (or, if more than one, the principal reason) for the dismissal, and
    b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2. A reason falls within this subsection if it—

    a. …
    b. …

c. is that the employee was redundant…

3. ….

4. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the issue

s.103A Protected disclosure.

1. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Relevant case law

57. We considered the general case-law principles set out below, along with cases referred to by the parties in their closing submissions.

58. Direct Discrimination

a. Has the claimant been treated less favourably than a hypothetical comparator would have been treated on the ground of his age? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of age. Importantly, it is not possible to infer discrimination merely because the employer has acted unreasonably (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *"reason why"* the claimant was treated as he was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure; if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA*

*Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

d. *Law Society v Bhal[2003] IRLR 640* - the fundamental question is why the discriminator acted as he did. Was the claimant (in this case) treated the way he was because of his age? It is enough that a protected characteristic had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [the protected characteristic]? Or was it for some other reason..?"

e. *Nagarajan v London Regional Transport [1999] IRLR 572, HL.* "What, out of the whole complex of facts … is the effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

f. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

1. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

2. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*.

3. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC).

4. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of protected characteristic of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

5. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

6. It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

7. As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

g. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

59. Public Interest Disclosure

a. *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT* it is not sufficient that the claimant has simply made *allegations* about the wrongdoer: "… the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information."

b. *Smith v London Metropolitan University [2011] IRLR 884, EAT:* the raising of grievances about the claimant's workload is not a 'disclosure'.

c. *Western Union Payment Services UK Ltd v Anastasiou* UKEAT/0135/13: - applying *Cavendish* distinction between information on the one hand and the making of an allegation or statement of position on the other: 'the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive.'

d. *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436, [2018] IRLR 846. Per Cavandish, what it decided was that whatever is claimed to be a protected disclosure must contain *"sufficient factual content and specificity"* to qualify under the ERA 1996 s 43B(1). The position is that in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (*Cavendish*), a disclosure may contain sufficient information even if it also includes allegations. Moreover, the very term 'information' must grammatically be construed within the overall phraseology which continues 'which tends to show …'. Ultimately, this will be a question of fact for the ET, which must take into account the context and background.

e. *Darnton v University of Surrey* [2003] IRLR 133, *EAT*. The test is whether or not the employee had a reasonable belief at the time of making the relevant allegations that they were true. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

f. *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2017] IRLR 837, *[2017] ICR 731*: In a case of mixed interests (personal contractual and public), it is for the tribunal to rule as a matter of fact as to whether there was *sufficient* public interest to qualify under the legislation. "The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion … In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case…" The CA adopted as a "useful tool" the following submission: (a)

the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest. Additionally, 3 points of guidance: (1) the very term 'public interest' is deliberately not defined by Parliament, leaving it to be applied by tribunals; (2) the mental element imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing - 'the necessary belief is simply that the disclosure was in the public interest' and 'the particular reasons why the worker believes it be so are not of the essence'. (3) the necessary reasonable belief in that public interest may (in an atypical case) arise on later contemplation by the employee and need not have been present at the time of making the disclosure (though as an evidential matter, the longer any temporal gap, the more difficult it may be to show the reasonable belief).

g. *Parsons v Airplus International Ltd UKEAT/0111/17 (13 October 2017, unreported)*the EAT pointed out that the determination that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest does *not* prevent a tribunal from finding on the facts that it was actually only one of them. Thus, where the claimant made a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a disciplinary dispute with the employer which eventually led to her dismissal for other reasons, the tribunal was held entitled to rule that they were made *only* in her own self-interest and so her claim of whistleblowing dismissal was rejected. The judgment of the EAT makes two subsidiary points of interest in a case such as this: (1) the fact that in these circumstances a claimant *could* have believed in a public interest element is not relevant; and (2) a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination.

h. *Bolton School v Evans [2006] IRLR 500, EAT* : "It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise *to a potential legal liability.*' (emphasis added)'

i. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT*, Judge Serota said that, outside that category, 'the source of the obligation should be identified and capable of certification by reference for example to statute or regulation'.

k. *Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06 (3 May 2006, unreported)* "As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following: (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on. (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

l. *Babula v Waltham Forest College [2007] EWCA Civ 174*, *[2007] IRLR 346*, "Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute."

m. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT* "a. Each disclosure should be separately identified by reference to date and content. b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified. c. The basis upon which each disclosure is said to be protected and qualifying should be addressed. d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures. e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA

1996, … whether it was made in the public interest. f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act. g. The Employment Tribunal … should then determine … whether the disclosure was made in the public interest."

n. *Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73*, *[2020] IRLR 374*. "In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. *There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment*. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. The employer stated that *all* the claimant surgeon's allegations against the hospital had been dismissed by the relevant professional bodies, whereas in fact some had not been. The Court of Appeal held that this sort of half-truth is capable of qualifying as a detriment; but the motivation of the employer was to defend the hospital and had not been because of the whistleblowing: "In short, the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.

p. *Harrow London Borough v Knight [2003] IRLR 140, EAT: The* act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial influence) the act complained of.

q. *Fecitt v NHS Manchester [2012] ICR 372 CA:* the protected act must materially influence the employer's treatment of the whistleblower:

r. Panayiotou v Kernaghan [2014] IRLR 500: it is a defence that the reason for the detrimental treatment was not the doing of the protected act in question, but the unacceptable way in which it was made.

60. Automatic unfair dismissal

a. *Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT*: the protected disclosure must be the reason or the principle reason for dismissal; it was the wrong test to find that s.103A is satisfied when the whistleblowing had been 'on the Respondent's mind' when dismissing.

b. *El-Megrisi v Azad University (IR) in Oxford UKEAT/0448/08:* held that where an employee alleges that she has been dismissed because she made multiple public interest disclosures, s 103A does not require a tribunal to consider each such disclosure separately and in isolation, as their cumulative impact can constitute the principal reason for the dismissal. This is so even where (as in *El-Megrisi*) some of the disclosures have taken place more than three months before the claimant's dismissal. Where a tribunal finds that they operated cumulatively, the question must be whether that cumulative impact was the principal reason for the dismissal.

c. *Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401:* It is necessary in the context of section 103A to distinguish between the questions (a) whether the making of the disclosure was the reason (or principal reason) for the dismissal; and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act. “I accept that the first question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. But the second question is of a different character and the beliefs of the decision-taker are irrelevant to it. Parliament has enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. It seems to me inescapable that the intention was that the question whether those conditions were satisfied in a given case should be a matter for objective determination by a tribunal; yet if [counsel for the hospital] were correct the only question that could ever arise (at least in a dismissal case) would be whether the employer *believed* that they were satisfied. Such a state of affairs would not only be very odd in itself but would be unacceptable in policy terms. It would enormously reduce the scope of the protection afforded by these provisions if liability under section 103A could only arise where the employer itself believed that the disclosures for which the claimant was being dismissed were protected. In many or most cases the employer will not turn his mind to the question whether the disclosure is protected at all…. In my view it is clear that, where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question whether that disclosure was protected falls to be determined objectively by the tribunal."

d. *Royal Mail Group v Jhuti [2019] UKSC 55, [2020] IRLR 129*. "In the present case … the reason for the dismissal given in good faith by [the decision-maker] turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here … Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here

inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

61. Unfair dismissal – conduct

a. The ACAS Code of Practice on Disciplinary and Grievance procedures: 'Disciplinary situations include misconduct and/or poor performance. …
— Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
— Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
— Employers should allow an employee to appeal against any formal decision made.'

b. *British Home Stores Ltd v Burchell [1978] IRLR 379*: "What the tribunal have to decide every time is, broadly expressed, whether the employer … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. … First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. … The test, and the test all the way through, is reasonableness …".

c. *Sneddon v Carr-Gomm Scotland Ltd [2012] IRLR 820* : The reasonable investigation test will often require a tribunal to undertake a detailed review of what the employer had done to investigate .

d. *Graham v Secretary of State for Work and Pensions (Jobcentre Plus) [2012] EWCA Civ 903*: "…once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief. If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the

> ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable…. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice."

Closing Arguments

62. Mr Lyons referred first to the 'burden of proof', that it is for the claimant to prove facts that the respondent treated the claimant less favourably than it did or would have treated others. As the claimant is not comparing himself with a real employee, a hypothetical comparator is needed: a comparator would be an employee with similar experience who was on a final written warning when further misconduct allegations arose: he argued that the same employee – younger or otherwise – would have been dismissed *"the same evidence, cctv footage, with the same type of excuse given to the same kind of questions"*.

63. At no point has the claimant provided any evidence "no hint" that discrimination was an issue during his employment.

64. Mr Lyons argued that the claimant did not have a genuine belief that drug-taking had occurred; there was no reasonable belief that this was in the public interest as a criminal offence. There was no genuine belief "We say it's an attack and he wanted to get Mr Dayle into trouble, that in any event this is withdrawn. He has changed his position from this occurring outside work to into work; that there were no threats made by Mr Dayle towards the claimant. He does not raise the issue until after dismissal – he does not say that Mr Dayle cannot investigate matters.

65. The claimant cannot show any influence of this disclosure on the decision to discipline and dismiss him; the disciplinary issues have arisen as a result of the independent actions of the control room "it's a conspiracy theory…". This theory ignores the claimant's admissions, and that it's the ccvt which caught him. Also, Mr Dayle was not responsible ft he final written warning.

66. Dismissal – while this is a conduct dismissal, there is also an issue of trust – the claimant has made "no learnings" from prior issues at work and trust "creps into" the decision; Mr Lyons argued that 'some other substantial reason' is also a factor in his dismissal. The claimant cannot show that the principle reason he was dismissed was because of his complaint about Mr Dayle in 2019. This also ignores the final written warning which was unconnected to Mr Dayle.

67. What are the facts in the mind of the employer (Abernathy v Mott) in when dismissing the claimant? Mr Lyons argued the evidence from the Minutes, the cctv and documents show there was an *"independent and clear"* reason for

dismissal; there was an issue that merited an investigation. The claimant changes his story – see 130 where he says he has no idea how to close the door, then changes his mind, and then he accepts that he knows that if there is an issue with the door, *"you call Control"*.

68. It was also reasonable for the respondent to conclude he has *"taken on no learning from previous incidents",* that there was no acknowledgement of wrongdoing over the door, that it had lost trust and confidence in him.

69. He is offered a representative, but is happy to proceed, saying he will talk to his rep later. The notes are no fabricated, there is no procedural failing. The claimant is shown the cctv, Mr Dayle has *"gone the extra mile"* to ensure a fair process.

70. On the fact that 50 weeks of the final written warning had expired on dismissal; but there is a need to consider how a similar employer would act: there was a demanding client with very high standards. In the industry a failure to obey Control is a major issue, "so see in the context of the industry…".

71. If the claimant's dismissal was unfair, under the Polkey principle he would have been dismissed in any event; he also contributed 100% to his dismissal.

72. Mr Ben Hassen's arguments: we first discussed the concept of comparators – like for like – and Mr Ben Hassen accepted that the employees he referred to (including Arun) did not have a final written warning; also other employees were moved from Selfridges but were never sacked. He argued that Selfridges will investigate and remove the respondent's employee's; the respondent does nothing.

73. He argued that the reason for his dismissal was because of his complaint about Mr Dayle; that as a consequence the Control room were watching him "they keep following me with the camera, they have been told to keep an eye on me".

74. On the doors, Mr Ben Hassen argued that Mr Itua asked him for help, for instructions to close the doors, why did Control not call him and say wait for someone to come? He argued that he had never worked on these doors. He argued that the doors were forced closed many times, even when the supervisor is called the doors are forced closed.

75. He argued that was targeted over the 'hands in pockets' incident, and when he went outside "this is what we do all the time…".

Conclusions on the facts and the law

Age discrimination claim

76. For the claim of age discrimination, we first considered how a comparator, a younger employee, would have been treated. The legal test says that a comparator must have the same or very similar relevant circumstances. This younger employee would have had the same record at work, would have been

previously disciplined and on a final written warning, where Selfridges control room had asked for the incident to be investigated, and who gave similar answers at the disciplinary investigation and hearing.

77. We concluded that Selfridges would have asked for the matter to be investigated, no matter the identity or the age of the employee. The reason why: for Selfridges it was important to close the doors properly as forcing them shut can damage them. At the investigation and disciplinary hearings, the claimant had a range of answers - I have not worked these doors, I have not been trained, I worked elsewhere, there was no key, everyone knows the doors were broken, lots of employees forced them shut.

78. We concluded that a younger employee would have been treated in exactly the same way; the claimant has not been able to show that there is any difference in how he was treated against actual employees, or against hypothetical comparators. The reason why he was dismissed was because he was on a final written warning and he had shown no remorse or insight into what he had done wrong with the doors. A younger employee on a final written warning would have been treated in exactly the same way.

79. On the fact that other employees were removed to other sites but remained employed by the respondent: we accepted that this may have occurred, but this was a consequence of Selfridges request to remove them from the store in circumstances where the respondent believed that it could continue to have trust with that employee. This was not the case with the claimant.

80. We accepted that with the claimant, the respondent genuinely believed that with his disciplinary record, and lack of remorse and insight it had no trust in him not to act in a similar way in the future – the same would have been true of a younger employee.

81. The claimant was not treated less favourably than a younger employee – actual or hypothetical - and the claim of age discrimination therefore fails and is dismissed.

<u>Public interest disclosure detriments and dismissal claim</u>

82. We concluded that the claimant did raise a public interest disclosure in alleging that he believed an employee was taking drugs which adversely affected this employee at work. We doubt that the claimant was right in what he was alleging, but we accepted that this was a genuine belief. We also concluded that at the time, when he raised it with his employer, he was genuinely concerned about the effect of this; he believed this was affecting the way Mr Dayle interacted at work.

83. The claimant was alleging a criminal offence, we considered that he was doing so with a genuine belief a criminal offence was being committed. We considered in context that this was a reasonable belief. We accepted that this was a qualifying public interest disclosure.

84. Was the claimant subjected to any detriment as a consequence – i.e. the disciplinary decisions to discipline him, give him warnings and then the final decision to dismiss?

85. We noted that the claimant submitted this grievance on 25 August 2019; within 3 weeks the respondent initiated an investigation – 17 September 2019 (91). The claimant says that this is more than a coincidence – that there is a clear link between his grievance and this investigation.

86. The allegation is that the claimant "failed to follow instructions from Control". We concluded that this allegation was initiated by Selfridges control. The claimant accepted that he heard the Control instructions – he signed the notes of the hearing.

87. We also accepted that the 8 October 2019 investigation was initiated by Selfridges as he was spotted with hands in pockets talking to a staff member and blocking an exit when he had left his static position. We accepted that this was for the claimant more than a coincidence: within 6 weeks of his grievance he is facing more disciplinary charges. But we also accepted that leaving his position and blocking an exit is, for Selfridges and therefore for the respondent, a serious issue.

88. We therefore concluded that there was no link between the act of whistleblowing and the disciplinary sanction he received of a final written warning. There was a coincidence of timing between the grievance and the final written warning, but we concluded that the disciplinary issues were initiated by Selfridges Control room spotting issues and requesting the respondent address them – that there was no link whatsoever with his acts of whistleblowing. There was no evidence that Mr Dayle in some way influenced the Control room to pick on the claimant – the fact is that the ccvt footage showed the claimant acting in a way he was not meant to be.

89. To put it another way, we concluded that had the claimant not made a whistleblowing complaint, these incidents would still have been picked up by Selfridges, and the respondent would still have investigated, and the claimant would still have been given a final written warning.

90. We accepted again that dismissal within 2 weeks of the expiry of a final written warning looks as though it could be more than a coincidence. But we also accepted again that this disciplinary investigation was initiated by Selfridges after the claimant was seen pulling a door shut against the proper process. The investigation was in no way linked to the claimant's whistleblowing disclosure.

91. What of the fact that Mr Dayle made a decision to dismiss the claimant? Again, we concluded that there was no link whatsoever with the claimant's complaint and this decision. The claimant gave contradictory information at interviews, and Mr Dayle was entitled to conclude that the claimant had committed an act of misconduct in failing to follow process which ran the risk of damaging the door. We accepted that this was Mr Dayle's genuine belief.

92. Again, we accepted that even if the claimant had not made a prior disclosure, the same sanction of a written warning and dismissal would have been imposed by Mr Dayle.

93. Accordingly the claims of whistleblowing detriment and automatic unfair dismissal fail and are dismissed.

Dismissal

94. Did the respondent have a genuine belief in the misconduct of the claimant? We concluded yes, that this was the reason for dismissal. The decision was carefully made after two interviews at which the claimant watched the cctv footage. He was given an opportunity to be accompanied. We accepted that this footage showed the claimant attending and shutting the door with Mr Itua only participating to hold the door shut after the claimant had pushed it shut. This was the reason Selfridges was concerned enough to ask the respondent to investigate and this is the reason why the claimant was dismissed – a failure to follow process in shutting the door, running the risk of significant damage to the door.

95. We noted the legal test – the range of reasonable responses, that we are to consider whether the respondent acted within this reasonable range in dismissing the claimant; that we cannot substitute our own views of what we would have done with that of the respondent.

96. We considered how a similar employer, who is working for a large and prestigious department store client which controls a sophisticated security apparatus and which requires highly professional security personnel, would have reacted when that client pointed out what it considered to be wrongdoing and failure to follow process.

97. We accepted that when such incidents are pointed out by the client, any employer would in this circumstance, have to investigate. Failure to do so would not look good with client and could put contract at risk. We concluded that the decision to investigate was therefore within the range of reasonable responses.

98. We noted that Mr Itua was also investigated, even though the cctv showed him not to be an active participant. He was interviewed and a decision taken that he was not at fault. We accepted that the respondent was entitled to treat the claimant differently.

99. We concluded that this was an investigation which was within the range of reasonable responses: staff were interviewed, the claimant was given the opportunity to consider the cctv and comment on it. When shown the cctv the claimant did not deny it was him who was pulling the door shut, however he attempted to pin the blame on Mr Itua.

100. We concluded that the respondent was entitled to take account of the fact that the claimant appeared reluctant to accept that he was at wrong. We

also concluded that the respondent believed that the claimant was aware how to operate the door and the importance its client placed on correct operation of the doors. We accepted that the respondent believed the claimant had properly shut the doors 2 days earlier – the claimant said so.

101. We therefore concluded that the respondent's investigation, its disciplinary process and its conclusion that the claimant had committed an act of misconduct which merited a written warning was within the range of reasonable responses of a similarly sized and resourced employer.

102. The claimant was dismissed having received a written warning: was the sanction of dismissal fair? Should they instead have ignored or discounted the final written warning?

103. This again is a 'range of reasonable responses' test. We accepted that some similarly sized and resourced employers *may* have issued a warning and then decided to transfer the claimant elsewhere and not dismiss him. But, this does not mean that the claimant's dismissal was outside the range of reasonable responses. We noted the factors that Mr Dayle took into account – the repeated nature of disciplinary issues, the fact the claimant attempted to pin the blame elsewhere, he appeared not to learn from his mistakes; he alleged the notes of meetings were false. This was a lack of insight that Mr Dayle and Mr Paciolla on appeal were entitled to take into account, they were reasonable factors to consider.

104. Accordingly, in concluding that the claimant's repeated acts of misconduct meant that it had no confidence the claimant would not commit similar acts in future, the respondent was acting within the range of reasonable responses of a similarly sized and resourced employer. The claimant's dismissal was therefore fair.

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EMPLOYMENT JUDGE M EMERY

Dated: 10 July 2022

Judgment sent to the parties
On: 12/07/2022

For the staff of the Tribunal office

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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