EMPLOYMENT TRIBUNALS

Claimant: Miss G Petrou

Respondent: Partner Retail Services Limited

Heard at: Bury St Edmunds Employment Tribunal (remote via CVP)

On: 22, 23, 24 and 26 August 2022; and
25 August 2022 (in Chambers)

Before: Employment Judge K Welch
Mrs K Knapton
Mr K Mizon

Representation

Claimant: Mr M Davis, Legal Consultant
Respondent: Mr L Bronze, Counsel

WRITTEN REASONS

1. Oral reasons having been given to the parties on 26 August 2022, the respondent made an application for written reasons by email dated 31 August 2022.

The Proceedings

2. The Claimant brought claims for unfair dismissal, automatic unfair dismissal for having made protected disclosures, wrongful dismissal (breach of contract), failure to provide written reasons for dismissal and detriment on the ground of having made protected disclosures.

3. The claimant withdrew her claims for ordinary unfair dismissal and failure to provide written reasons for dismissal due to her insufficient length of service. The claimant's breach of contract claim was for a failure to follow the respondent's disciplinary procedure and was pursued.
4. The claim form was presented on 24 September 2019, following a period of early conciliation from 19 July to 19 August 2019.
5. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The Tribunal considered it was just and equitable to conduct the hearing in this way.
6. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. The participants were told that it was an offence to record the proceedings.
7. The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. From a technical perspective, there were no major difficulties with the hearing being held remotely.
8. The Tribunal was provided with an agreed a bundle of documents and references within this Judgement to page numbers refer to page numbers within that bundle. The Tribunal was also provided with witness statements from 9 individuals, although three of these witnesses did not attend the Tribunal to give sworn evidence, and therefore the Tribunal gave such weight to this evidence as it considered appropriate in light of this.

9. The Tribunal therefore heard from the following witnesses:
    9.1. the claimant herself;
    9.2. Mr K Rainey; a former manager of the respondent's Milton Keynes store;
    9.3. Mr N Doolan, Head of People for the respondent;
    9.4. Mr G Green, the claimant's line manager and manager of the respondent's Stratford store; and
    9.5. Mr M Beer, manager of the respondent's Oxford Street store.

10. The Tribunal ensured that each of the witnesses, who were mostly in different locations, had access to the relevant written materials, which were unmarked. The Tribunal was satisfied that the witnesses were not being coached in their separate locations.

11. Prior to the hearing, there had been three preliminary hearings. The first on 14 May 2020 was a case management hearing, which listed an open preliminary hearing to consider whether the claimant had made any protected disclosures as set out in the list of issues, and to go on to make appropriate case management orders. At this first case management preliminary hearing, the claimant withdrew her ordinary unfair dismissal and failure to provide written reasons for dismissal claims.

12. During this first preliminary hearing, the claimant indicated that she wished to make an application to amend her claim to include a complaint that her dismissal, the failure to follow a disciplinary procedure and the immediate removal of her phone on dismissal were unlawful discrimination because of age and/or nationality (race). The claimant was ordered to write to the Tribunal explaining the basis for these claims, and why she had failed to include these allegations in her original claim form.

13. The claimant was also ordered to provide further information on the detriments she alleged to have suffered by virtue of making protected disclosures, which she did on 6 July 2020 [P42-46].

14. At the open preliminary hearing on 13 January 2021, Employment Judge Cassel found that the claimant had made three protected disclosures, but dismissed the fourth. Counsel for the respondent requested confirmation at the start of the hearing as to whether it was open to the respondent to revisit whether protected disclosures had in fact been made. It was made clear that, as this had been decided by an Employment Judge, and as this had not been appealed by the respondent, the panel were bound by the findings of Employment Judge Cassel and that therefore it was not possible to revisit whether or not protected disclosures had been made. It was made clear in the case management order sent to the parties that the issues to be considered at the final hearing would not include whether protected disclosures had been made.

15. At the end of this open preliminary hearing, there was insufficient time to deal with the claimant's application to amend her claim, and therefore this was relisted and heard by Employment Judge Cassel on 25 February 2021. The application to amend was dismissed.

16. Therefore, the claims were confirmed at the start of the hearing as automatic unfair dismissal under section 103A Employment Rights Act 1996 ('ERA') (for making a protected disclosure), detriment under section 47B ERA on the ground that the claimant has made a protected disclosure and breach of contract (for failing to following a disciplinary procedure). The issues were agreed at the start of the hearing as follows:

Issues

17. The claimant made the following protected disclosures:

    17.1. On 10 May 2019, a verbal disclosure in a Whatsapp voice note to her line manager Grant Green, in which she said that a trainer in a group training session she had attended on 10 May 2019 referred to being on a 'cocaine diet' to keep his weight down and was aggressive towards her, pointing his finger and saying, 'Shut your mouth'.

    17.2. On 13 May 2019, a verbal disclosure in a meeting with Grant Green at which the claimant gave a statement to Mr Green. She repeated her previous disclosure, and also said that the trainer had showed a clip from the film Magnolia in which unprofessional and inappropriate language was used.

    17.3. On 29 May 2019, an email disclosure to the respondent's Head of People, Neil Doolan, in which the claimant repeated her previous disclosures and also said that Mr Green had warned her that she 'needs to be careful about who she goes against as people dismissed for complaining'.

Detriments on the ground of protected disclosures (Employment Rights Act 1996, section 47B)

18. Did the respondent subject the claimant to any detriments? Included within this issue are the questions of what happened as a matter of fact, and whether what happened was a detriment to the claimant as a matter of law.

19. The alleged detriments relied on by the claimant are as follows:

    19.1. That she was harassed and bullied;

    19.2. That she was not supervised or included in line with her management position;

    19.3. That she was isolated and ostracised;

    19.4. That she was given unrealistic objectives.

20. The claimant confirmed that she was not pursuing allegation number 18 in her list of detriments [P42-44]. Therefore, the claimant specifically alleges that she was subjected to the following detriments [pages 42-46] which are summarised below:

    20.1. Between 13 and 29 May 2019, Grant Green warned the claimant to be "careful who I go against in the company as people get fired for doing so", and asked whether the claimant was recording their conversation;

    20.2. On or around 3 June 2019, Mr Green indicated that he 'hate[d] this guy' because he had complained about him;

    20.3. On 4 June 2019, Mr Green aggressively refused the claimant support from a colleague to carry out an assessment centre;

    20.4. On 5 June 2019, Mr Green asked the claimant 'did you tell Aaron your age?';

    20.5. On 7 June 2019, emails between the claimant and Mr Doolan were deleted from the claimant's work email account;

20.6. On 13 June 2019, Mr Green asked the claimant to speak and be 'tough with' Mr Williams about him not bringing his work tablet to work, when Mr Green had already spoken with him about it;

20.7. On 13 June 2019, Mr Green told the claimant, ' I know we will have a problem with [a colleague] as I believe [he] is [dyslexic] ' and told the claimant to keep this conversation 'between us';

20.8. On 12 June 2019, the claimant was informed by the recruitment agency that another candidate, Vanessa, was on hold for the post of Deputy Manager (the Claimant's role);

20.9. On 17 June 2019, the claimant was told by Mr Green that she shouldn't have sent the email to Mr Doolan since they had spoken about these issues on 13th May;

20.10. On or around 17 June 2019, when discussing a cancelled date, Mr Green said '… you are too old to be going on dates' and laughed as if it was a joke;

20.11. On 18 June 2019, Mr Green imitated the claimant's accent and was laughing;

20.12. On 20 June 2019, Mr Green said when discussing Brexit, 'Britain will be great again now that all the foreigners will be kicked out.";

20.13. On or around 18 June 2019, Mr Green said to the claimant that if she didn't drink a glass of wine with him she would be transferred to another store;

20.14. On 6 June 2019, the claimant was followed by Mr Rainey at the request of Mr Green;

20.15. Mr Green said '… you are just menopausal' on 22 June 2019;

20.16. Mr Green told the claimant on 18 June 2019 to 'take [two colleagues'] phones and hide them and don't say anything …let them look for them because they need to learn. Do it or you will have the problem';

20.17. On or around 22 June 2019, Mr Green lied to the claimant that a candidate made a complaint about her to the recruitment agency for being rude;

20.18. On 5 July 2019, Mr Green and Mr Beer lied to the claimant that Mr Williams had made a complaint against her;

20.19. On 5 July 2019, the claimant was given conflicting instructions from Mr Beer and Mr Green in relation to the remainder of her training in the Oxford Street Store;

20.20. Not being allowed to interview or meet the other candidate, Vanessa, who was to report into the claimant. The claimant believes Vanessa was offered the claimant's position in early July 2019;

20.21. On 8 July 2019, Mr Green failed to meet with the claimant in a private and professional location and said to the claimant, 'Georgia I am busy I have no time for your drama';

20.22. On 9 July 2019, Mr Beer aggressively asked the claimant what she was doing, despite having a schedule showing this;

20.23. On 16 July, the claimant was sent by Mr Green to attend service training in Milton Keynes without informing the store manager that she was attending;

20.24. On 17 July 2019, Mr Green removed the claimant from all store chat groups hours before her termination;

20.25. On or around 15 July 2019, Mr Green told Mr Sequeira not to speak to her but speak to him;

21. Was any detriment done on the ground that the claimant made one or more protected disclosure(s)?

Automatic dismissal because of protected disclosure (Employment Rights Act 1996. section 103A)

22. The claimant was dismissed on 17 July 2019. What was the reason or, if more than one, the principal reason the claimant was dismissed, and was it that she had made one or more protected disclosure?

Wrongful dismissal (breach of contract)

23. Did a contractual disciplinary process apply to the claimant?

24. If so, did the respondent fail to follow the contractual disciplinary process when dismissing the claimant?

Time limits / limitation issues

25. Were all of the claimant's complaints presented within the time limits set out in 48(3)(a) & (b) and 111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred, whether there was an act and/or conduct extending over a period; whether it was not reasonably practicable for a complaint to be presented within the primary time limit.
26. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 May 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Remedy

27. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Findings of fact

28. The claimant was employed by the respondent from 22 April 2019 as a Deputy General Manager in the respondent's soon to be opening Stratford store. Whilst the store was waiting to open, staff recruited for the new store trained and worked at the respondent's other stores, including Oxford Street and Milton Keynes in order to be trained up and ready when the store opened. They also attended some off the job training.
29. The claimant's contract of employment [P74-78] provided:

"*The first 6 months of employment shall be a probation period during which time your performance and suitability for continued employment will be assessed. If you do not successfully complete your probation period or if you are deemed unsatisfactory during the probation period, your employment will be terminated on one weeks' notice*."

"10. *Policies, Procedures & Codes of Conduct*

We have various policies, processes and procedures and codes of conduct, in order to comply with legal requirements and in the interest of good employee relations. …. We will review, amend replace and / or withdraw these policies and procedures at our discretion."

30. Extracts from the company handbook appeared at pages 79-93. This included at page 84 the following statement:

"*This Handbook tells you about the policies and procedures that govern the relationship between PRS and yourself. The contents of the Handbook do not form part of your contractual terms and conditions of employment unless specified otherwise in your individual Contract of Employment. Should your contractual terms and the content of this Handbook differ, the contractual terms will prevail*."

31. The claimant attended a training course on 9 and 10 May 2019 provided by some of the respondent's trainers. On 10 May 2019, the claimant was unhappy about elements of the training, including that one of the trainers told her to 'shut her mouth'. In addition, he referred to being on 'a cocaine diet' and an inappropriate video had been shown containing offensive language. One attendee was under the age of 18 and the claimant clearly thought this to be inappropriate.

32. On the same day, ie 10 May 2019, the Claimant messaged Mr Green, her line manager, who had been employed by the respondent a short while before the claimant. She left 2 recorded messages detailing her complaints which were transcribed at pages 102-3. This was found to be a protected disclosure as set out in paragraph 17.1 above.

33. Mr Green held a meeting with the claimant on 13 May 2019. A note of this meeting appeared at pages 104-5. The claimant signed the minutes of the meeting at the time, but gave evidence that these were not a true reflection of the full contents of the meeting.

34. The claimant said that she signed the minutes as she felt threatened due to a comment that Mr Green had said about being 'careful who you complain about, as the company could dismiss'

you. However, the claimant confirmed when questioned that this alleged threat, dealt with below, took place after she signed the minutes of the meeting. It was therefore unclear why she signed minutes if she did not consider them to be a satisfactory reflection of what was discussed.

35. From Mr Green's evidence, he made a note of the claimant's complaints and discussed methods for dealing with this issue. The claimant agreed that feedback could have been given to the trainers at the time, and the claimant was informed that she was free to raise any concerns with her line manager, Mr Green. Mr Green thought that the issue had been resolved following their conversation. We accept his evidence in this regard.

36. After the minutes for this informal meeting had been signed by the claimant, the claimant alleges that Mr Green said, "be careful who you go against in the company as they could easily fire" her. Mr Green's evidence was that he did not say this but informed the Claimant of the requirement to follow the correct internal procedures in respect of any issues raised and to be clear and concise in any complaints, as she would need to have future relationships with business stakeholders. On balance, we prefer Mr Green's evidence. We find it implausible for an individual to make a comment along the lines of what the claimant suggests, especially in light of Mr Green's short time with the company. We accept that the claimant saw his comments as a threat, but we do not accept that that was what had occurred.

37. The claimant escalated her complaint by sending an email to Mr Doolan, Head of People, on 29 May 2019 [P107-8]. This email complained about the training on 10 May, and Mr Green's alleged threat.

38. Mr Doolan acknowledged receipt of the claimant's email on 30 May [P106] asking for further information about some of the complaints on the training. Mr Doolan emailed back to say, "we are an ethical company and do not just dismiss managers on a whim." The claimant replied on the same day [P106] to say that the training was good, but re-iterating her concerns.

39. Mr Doolan's evidence was that he spoke to the trainer at some point after 30 May 2019. We considered the fact that Mr Doolan had used the term "coke" in his reply rather than "cocaine" as the claimant had used in her complaint, and therefore queried whether Mr Doolan had in fact spoken with the trainer prior to his response on 30 May. However, on balance, we did not believe that he had spoken to the trainer before his response, and did not therefore consider that this materially affected the evidence we heard from Mr Doolan.
40. Mr Doolan investigated the allegations concerning the training. As a result of his investigations, the trainer stated that he was referring to a diet of coca cola/coke and not cocaine but was coached on how his words could be misinterpreted. The claimant had indicated the outcome that she wanted was for the training not to use the video again, for there to be no more inappropriate language, and for the matters complained of not to happen again. [P106]. The video is no longer being used in the respondent's training.
41. Mr Doolan does not appear to have done anything about the allegation concerning Mr Green.
42. Mr Doolan met with the claimant on 4 June 2019 at a recruitment day, and spoke with her privately regrading her complaints. He considered that the matter was resolved and that this meeting concluded this.
43. The claimant was subjected to two probation reviews prior to the one leading to her dismissal. We accept that the reviews raised some issues about the claimant's behaviour/ performance, as reflected by the claimant in her own evidence.

    <u>Alleged Detriments</u>
44. The claimant's evidence was that the relationship between herself and Mr Green/ Mr Beer deteriorated over time, although she could not identify the exact date on which this began. She believed that it had commenced following her protected disclosures on 10 May, 13 May and 29 May 2019. We do not accept this to be the case and do not find that the claimant was ignored, unsupported or given the cold shoulder, as she alleges.

45. The claimant failed to give evidence on a number of the detriments she specifically relied upon for her claim, as briefly set out in paragraphs 20.1 to 20.25 above, and as fully set out in pages 42-46 of the bundle. Additionally, in the main, the evidence given by the respondent's witnesses about these detriments was not challenged by the claimant's representative. As a result of this we make the following findings in respect of those alleged detriments:

    45.1. We do not accept that Mr Green asked to see the claimant's phone and asked whether she was recording him on 29 May 2019, within an hour of sending her email to Mr Doolan. There was no evidence put before us concerning this. Mr Green denied that this occurred, and gave evidence that he was not made aware of the complaint about him until some time later, which was not challenged by the Claimant's representative. Therefore, we accept that this did not take place.

    45.2. We do not accept that the claimant was told by Mr Green that he hated a colleague as he had complained against him. This was not in the claimant's evidence, was denied by Mr Green and was not challenged by the claimant's representative.

    45.3. We do not find that the claimant was denied support in carrying out her first assessment centre by Mr Green. There was no evidence to support this from the claimant, it was denied by Mr Green and was not challenged by the claimant's representative.

    45.4. We do not find that the claimant was asked whether she had told a colleague her age on 5 June 2019. This was denied by Mr Green, who gave evidence that it was counterproductive to forming good relationships with his team, and we accept his evidence.

    45.5. We accept that the claimant's emails with Mr Doolan went missing from her account on or around 7 June 2019, although accept the evidence of the respondent's witnesses that the Respondent did not delete them. We find it implausible that they would seek to delete emails, which could be recovered in any event. Also, this is supported by the fact

that Mr Doolan provided the claimant with a copy of these emails when he became aware that she no longer had them in her email account.

45.6. We accept that the claimant was asked by Mr Green to speak to Mr Williams about forgetting his tablet on 13 June 2019. When she did so, Mr Williams had already been spoken to about this by Mr Green himself. Mr Green gave evidence that this was due to a crossover, which we accept.

45.7. On 13 June 2019, we accept that there was a discussion between the claimant and Mr Green over a colleague's possible dyslexia. We accept Mr Green's evidence that this was a conversation between managers concerning a colleague who may require additional support.

45.8. We accept that another applicant for a Deputy General Manager role in the Stratford Store, Vanessa, was unsuccessful initially; the role having been given to the claimant. However, Vanessa was noted as being a good candidate and was on hold whilst the respondent tried to negotiate a less senior role for her. We accept that the claimant was not involved in interviewing her or meeting her initially, but accept Mr Green's evidence that this was due to training and other commitments. We accept that the claimant was informed by the recruitment agency that Vanessa would be on board soon, but not that this related to being offered the claimant's role. We accept that Vanessa only became Deputy General Manager after the claimant had been dismissed.

45.9. We find that there was a discussion between Mr Green and the claimant on 17 June 2019. The claimant raised her concerns that her email to Mr Doolan had been deleted. We accept that Mr Green told the claimant that she should have raised her complaints with him as her line manager rather than go to Mr Doolan, as at this time he was not aware that the complaint included an allegation against him. We accept this to be the case.

45.10. We do not find that the claimant was told that she was too old for a date by Mr Green on 17 June 2019. We accept Mr Green's evidence that he and the claimant had a good

working relationship during her employment with the respondent and that they discussed many issues including personal matters. It was also noted that the claimant was taken to lunch by Mr Green on 17 June 2019 to thank her for all her hard work.

45.11. We accept that the claimant and Mr Green regularly imitated accents and therefore accept that this occurred on 18 June 2019. In addition, both the claimant and Mr Green gave evidence of them each imitating an Egyptian accent. We therefore accept that the claimant was imitated for her accent on this date, as part of regular conversations between Mr Green and the Claimant that happened throughout their employment together.

45.12. We do not find that Mr Green, when discussing Brexit on 20 June 2019, said that 'Britain will be great again when the foreigners have been kicked out'. This was denied by Mr Green who gave evidence that this was against what he believes, particularly as his partner is Irish. Mr Green was not challenged by the claimant's representative in this regard.

45.13. On balance, we do not accept that the claimant was told by Mr Green that if she did not drink a glass of wine with him, she would be transferred as he could not work with someone who doesn't drink. We accept Mr Green's evidence that he rarely drinks, as was supported by the unchallenged evidence of Mr Doolan.

45.14. The claimant was not followed by Mr Rainey on 6 June 2019. Nor did Mr Green request that he did so. This was denied by both Mr Green and Mr Rainey, a former employee of the respondent, who appeared a credible witness. Whilst it is possible that Mr Rainey was going the same way as the claimant, we consider it very implausible that he followed her or was requested to do so.

45.15. The claimant was not told on 22 June 2019 that she was 'just menopausal'. This was denied by Mr Green and was not put to him in cross examination.

45.16. We do not find that the claimant was told to hide phones on 18 June 2019. There was no evidence of this before the panel and it was denied by Mr Green, which was unchallenged.

45.17. The claimant was informed of complaints about her made by a candidate at an assessment centre on 22 June 2019. This was an informal discussion. Whilst there was no supporting evidence of the complaint within the bundle, there was reference to it in the amended response at pages 52-53. Mr Green gave plausible evidence concerning the complaint and what was discussed with the claimant and the reasons for doing so. We accept his evidence and find that there was a complaint which was discussed informally with the claimant. Therefore, the claimant was not lied to about the existence of this complaint.

45.18. We also accept that there was some form of complaint by Mr Williams about the claimant's management of him. Whilst the claimant genuinely believes that there was no such complaint, due to having a good relationship with Mr Williams, we accept Mr Green's unchallenged evidence that a verbal concern had been raised, and was therefore discussed with the claimant. Again, we do not find that the claimant was lied to about the existence of this verbal complaint.

45.19. We accept that the claimant had been given different priorities to concentrate on by Mr Green and Mr Beer whilst working in the Oxford Street store, but accept that the claimant was required to undergo training and undertake management activities in the store whilst working there.

45.20. As stated above, we do not accept that Vanessa was recruited into the claimant's role until after the claimant's employment had been terminated.

45.21. We accept that there was a meeting between the Claimant and Mr Green on 9 July 2019 (as opposed to 8 July 2019). It appeared to us that there were 2 meetings between Mr Green and the claimant on this day, as supported by the claimant's evidence. In the

morning, a meeting took place in the loading bay behind the store, during which the claimant raised the lack of support for her and lack of involvement, that she felt picked on and had not been given clear directions. It was alleged that Mr Green made a comment saying, "Georgia I am busy, I have no time for your drama." We accept on the balance of probabilities that this comment was made by Mr Green.

Towards the end of the day, the claimant had a further meeting with Mr Green in the loading bay behind the store. During this second meeting, the claimant complained about Mr Beer's behaviour. As a result of this, it was agreed that the claimant would continue her training at the Milton Keynes store, following a period of leave from 11 to 15 July 2019.

There was some conflicting evidence about how public or secluded the loading bay area was. We accept that this loading bay fronts onto a public side street behind Oxford Street, which has a coffee shop on the corner. How busy it is depends upon the timing of any meetings.

The Respondent's witnesses gave evidence that this is sometimes used for meetings with staff, when no other room is available. Due to training additional staff at Oxford Street prior to the opening of the Stratford store, and the additional staff attending the store at this time, we accept that rooms were often unavailable for meetings during this period.

45.22. We accept that on 9 July 2019, Mr Beer asked the claimant what she was doing. As she failed to respond, she was asked again. We can understand why Mr Beer asked the claimant these questions, and may have done so in an assertive way, particularly as she did not respond, but simply pointed to her notebook. We know that Mr Beer subsequently apologised for how his manner may have come across, and we therefore accept that he may have asked the claimant these questions in a direct and seemingly aggressive way. Whilst Mr Beer denies being aggressive, we can see that his approach clearly upset the claimant.

45.23. We do not accept that the claimant was lied to about the training due to take place in Milton Keynes on 16 July 2019. It was agreed that the claimant would complete her training in Milton Keynes due to the complaints she had raised against Mr Beer. Whilst we accept both parties evidence that the store manager at Milton Keynes did not know of her intended training, we further accept that this unfortunately happened within the company from time to time, as evidenced by Mr Rainey.

45.24. We accept that the claimant was removed from the Teams chat group relating to the Oxford Street store on 17 July 2019. The claimant's evidence was that this was prior to her dismissal, and that she was telephoned by Mr Green to inform her that herself and 2 others were to be taken off the Oxford Street group chat. This appears to be supported by the unsworn, unsigned statement of Mr Sequeira, who was dismissed by the respondent for gross misconduct. Mr Green's evidence was that she was removed shortly after termination. We find it difficult to give much weight to Mr Sequeira's comments, and find it implausible that Mr Green would give advance warning to the claimant of her removal before the termination of her employment. We therefore find that the claimant was removed shortly after her termination on 17 July 2019.

45.25. The claimant gave evidence that Mr Sequeira was told to speak to Mr Green, when requesting to speak with her. The claimant's alleged detriment at P46 was that Mr Sequeira was asked to speak to Mr Green when requesting to speak to the claimant. In her witness statement, this changed to become, "speak to [Mr Green] **only**" [emphasis added]. The claimant became aware of this, through Mr Williams telling her what Mr Sequeira had allegedly said. We accept that Mr Green did ask Mr Sequeira to speak with him as the claimant was away from the store.

<u>Events on 9 July 2019</u>

46. The claimant attended the Oxford Street store on this day. As stated at paragraph 45.22, the claimant had been upset about the way that Mr Beer had allegedly spoken to her, when asking

what she was doing. She complained to colleagues about this, and from Mr Beer's evidence, he had been told that she had been "badmouthing" him to "any colleague who would listen". We accept that to be the case.

47. Ms Doyle asked whether the claimant wished to "vent" to her outside. They went into the loading bay to have a chat. During this conversation, the claimant was clearly very upset, and whilst she gave evidence that she was not shouting or cursing, we accept that she may have raised her voice when speaking with Ms Doyle. The claimant was alleged by Ms Doyle in her written statement [P129] to have said, "*she wanted to say to Miles, when he asked if she was training, "No! I'm just fucking sitting here playing with my pussy!!" "He can suck my fucking pussy*" quite loudly. The claimant admitted saying the first part save that she said "scratching" rather than 'playing with', but not the second.
48. We accept that the claimant used similar words to Ms Doyle to those alleged to have been said by her.
49. The claimant was off work from 11 to 15 July 2019, and on return went to the Milton Keynes store, for her training. As stated, the manager was not aware that she was training in the store that day. However, we find nothing sinister in this.
50. On 13 July, the claimant emailed Mr Doolan [P130-132], which was not a protected disclosure for the purposes of this hearing. This email contained many complaints about her treatment and highlighted that she believed that she was being set up to fail her probation.
51. The claimant worked on 16 and 17 July in the Milton Keynes store. On 16 July, she was called by Mr Green to inform her that he was coming to have a chat with her and that Mr Doolan was to attend also.
52. On 17 July 2019, the claimant worked until the meeting with Mr Green and Mr Doolan.
53. The claimant was called into what the Respondent termed a probation review meeting. This was clearly a disciplinary hearing to discuss the claimant's behaviour on 9 July 2019. The evidence

from the respondent's witnesses was that they were going to hold a probation review and investigate the events of 9 July 2019.

54. The handwritten notes for this meeting appeared at pages 149-150. These were prepared by Mr Doolan on the day of the meeting, but it was noted that the claimant did not see them at this time. The claimant contended that she had been unable to read the notes as they were handwritten, although we find this not credible, since all members of the panel could easily read them.

55. The minutes were not a verbatim account of what was discussed. At best, they are a summary of some of the points discussed.

56. The claimant was informed that the meeting was to discuss the "probation performance, her actions on 9th July and her engagement". Firstly, the claimant was told that the emails regarding her complaints, had already been sent to her. On the claimant's evidence there was a discussion over her performance generally. The claimant was then asked to explain what had happened on 9 July. She mentioned the discussion with Mr Beer, but that she remained professional throughout. She was asked to think whether anything else had occurred and said no, on more than one occasion. Ultimately, Mr Green read out Ms Doyle's written statement to which the notes say that the claimant said, "Oh yes that happened. I guess I trusted the wrong person". When asked in the meeting if this was acceptable behaviour, she said it was outside the shop and Mr Beer had been rude to her.

57. There was a difference in evidence between whether the statement was read out or given to the claimant The claimant's evidence was that she was given the statement and then it was snatched back, whereas Mr Green and Mr Doolan gave evidence that the statement was read out. We prefer the evidence of Mr Doolan and Mr Green.

58. Following a short break, the claimant was informed that her employment was to be terminated for failing to pass her probation, and that she would be given her 4 weeks' notice.

59. A letter confirming the claimant's dismissal was sent dated 9 August 2019 [P159] which gave the following reasons for termination:

> "*Breach of Trust and Confidence, namely:*
>
> *Undermining your manager and their peers, specifically discussing your managers ability to manage and the behaviour of other managers to lower level colleagues*
>
> *-Lying to your Manager and HR regarding an incident in Oxford street store and outside of the store*"

60. We were referred to documentation relating to other short service employees, who were dismissed for gross misconduct and who attended formal disciplinary hearings, and for which the respondent appeared to have followed the ACAS code of practice. These employees were dismissed summarily (ie without notice) from the respondent's employment.

Submissions

61. The respondent provided written submissions and both parties addressed us orally on the case. In brief, the Respondent contended that the claimant's subjective view of what amounts to a detriment is not determinative. It was not clear the basis for some of the detriments, and some were clearly not detriments. The Tribunal should examine very carefully the knowledge each of the accused had and their motives. The protected disclosure has to have materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. The Claimant had struggled to provide evidence of causation of the purported detriments and in evidence stated that she could not link detriment 4 to having made a protected disclosure.

62. The test for automatic unfair dismissal is different, namely was the reason or principal reason for the dismissal that she made a protected disclosure. The claimant was dismissed consequent upon her actions on 9 July 2019 and her failure to be honest about it in the meeting. Whilst a disciplinary invitation was not given, the respondent reserved its right to amend its procedures for short service employees.

63. The claimant's submissions were that, prior to joining the Respondent, the claimant had a long and successful career; she is ambitious and hardworking. Following the making of protected disclosures, the respondent did not undertake what one would expect. Following disclosures, the relationship between the claimant and management suffered; it changed from that point. She became the subject of criticism and jokes about age and accent. There were disputes of evidence in this case, over what was said and the nature of the place in which they were said. The manner of dismissal did not follow the ACAS code of practice, was not in accordance with the respondent's policy and differed from the dismissal of other employees with short service.
64. Finally, the issues raised by the Claimant, namely intimidation and bullying had occurred once the disclosures had been made. After a relatively short period following those disclosures, she was dismissed from her post. She had had two reviews in which it was confirmed that she was doing well, then suddenly another review was called and she was dismissed. This was clearly connected to her protected disclosures being just weeks away.

LAW

Detriment for making a protected disclosure

65. Section 47B of the Employment Rights Act 1996 (ERA) says that: "*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*."
66. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower. This is a different test to the test for automatic unfair dismissal because of a protected disclosure (referred to below), where the focus is on the reason or the principal reason for dismissal.
67. In a complaint of detriment, section 48(2) ERA provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Where the claimant can show that there was a protected disclosure, and a detriment to which she was subjected to by the

respondent, the burden will shift to the respondent to show that the detriment was not done on the ground that the claimant had made a protected disclosure.

68. A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL.

Automatic unfair dismissal for making a protected disclosure (section 103A ERA)

69. A dismissal is automatically unfair if the reason or principal reason is that the person dismissed has made a protected disclosure (s103A ERA). Where, for want of two years' qualifying service, the employee is not protected against 'ordinary' unfair dismissal, she bears the burden of proving the 'automatic' ground relied upon.
70. Section 103A ERA provides that "*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*."
71. In a complaint under section 103A ERA, an employee does not need to have two years' continuous employment. Where an employee does not have two years' service however, the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair one, lies with the employee (Smith v Hayle Town Council 1978 ICR 996).
72. A Tribunal can draw an inference as to the real reason for the dismissal in coming to its decision.

Conclusion

73. In reaching our conclusions we have carefully considered the evidence before us, the legal principles set out above, and the written and oral submissions made by the parties. The following conclusions are made unanimously.
74. Whilst the list of issues contained questions over whether any of the claims were out of time, we were provided with no evidence concerning this, and no one addressed us on it in their

submissions. On the face of it, it did not appear that any of the claims were presented out of time.

Breach of contract claim

75. The claimant's claim for breach of contract for failing to follow a disciplinary procedure must fail. We accept that the ACAS code of practice was not followed in this case, and that it should have been. However, in order for the claimant to succeed in her breach of contract claim, she would need to show that the disciplinary procedure was contractual. In this case, it was clear from the documentation provided, namely the contract of employment and employee handbook that the disciplinary procedure was non-contractual. Therefore, in failing to follow this procedure, the respondent committed no breach of contract. This claim is therefore dismissed.

Detriment for having made protected disclosure(s)

76. As Employment Judge Cassell had already found that the claimant had made the protected disclosures set out at paragraphs 17 above, we had to consider whether the claimant had been subjected to detriments as set out in her further particulars dated 6 July 2020 [P42-45] and whether or not those detriments were made as a consequence of the protected disclosures she had made.

77. Due to our findings of fact, the only incidents that we found happened as described by the claimant were the following:

    77.1. Allegation numbered 20.5 (deletion of emails).

    77.2. Allegation numbered 20.6 (being asked to speak to Mr Williams when Mr Green already had);

    77.3. Allegation numbered 20.7 (discussing SW's possible dyslexia);

    77.4. Allegation numbered 20.8 (not being involved in the recruitment of Vanessa);

    77.5. Allegation numbered 20.9 (being told that she should have raised concerns with Mr Green and not gone to Mr Doolan);

    77.6. Allegation numbered 20.11 (mimicking accents by Mr Green);

77.7. Allegation numbered 20.19 (being given different priorities by Mr Beer and Mr Green);

77.8. Allegation numbered 20.21 (being told 'no time for your drama' by Mr Green);

77.9. Allegation numbered 20.22 (being asked by Mr Beer aggressively what the claimant was doing); and

77.10. Allegation numbered 20.25 (Mr Green telling Mr Sequira to speak to Mr Green when requesting to speak to the claimant).

78. Of these, we consider that a number of them were not detriments in accordance with employment law as required for a claim to succeed under section 47B ERA. We do not consider that allegations numbered 20.6, 20.7, 20.11, and 20.25 amounted to detriments ie one which a reasonable worker would or might take the view that she has been disadvantaged in the workplace.

79. We consider that allegation numbered 20.6, where the claimant was asked to speak with Mr Williams and found that he had already been spoken to by Mr Green, does not amount to a detriment. We accept the respondent's evidence that this was a crossover of events, and was something which might easily occur between managers.

80. We fail to see how allegation 20.7 (speaking about a colleague's potential dyslexia) could amount to a detriment for the claimant. Even though the claimant may have been asked to keep this information to herself, there is nothing to suggest that this was a detriment, but, in fact, was in accordance with not discussing a colleague's health conditions with others.

81. Allegation 20.11 concerning the mimicking of accents – we do not accept this to be a detriment. It was clear that both Mr Green and the claimant mimicked accents on a regular basis during the claimant's employment. This was acceptable behaviour between them.

82. Finally, we do not accept that allegation 20.25 was a detriment. Mr Green asking one of his subordinates to speak to him when the claimant was not available was, in our view, a reasonable response.

83. Having found that the claimant was subjected to detriments numbered 20.5, 20.8, 20.9, 20.19, 20.21, , and 20.22 we, therefore, have to consider whether the claimant had been subjected to these detriments on the ground that she made protected disclosures.

84. We find no causal link between these detriments and the protected disclosures relied upon for the detriment complaint. Even had we found that the other allegations (numbered 20.6, 20.7, 20.11, and 20.25) were detriments, these would also fail as we do not consider that they were linked in any way to the claimant's disclosures. We find that none of the allegations complained of were done on the ground that the claimant had made a protected disclosure.

85. We accept that Mr Green and Mr Doolan believed that the complaints raised by the claimant in her voicemessages on 10 May, in the meeting on 13 May and in her email to Mr Doolan on 29 May 2019 had been resolved and fully dealt with.

86. In particular, we are satisfied that Mr Beer did not know of the protected disclosures and therefore the allegations that he subjected the claimant to detriment by asking her what she was doing in an aggressive manner (allegation numbered 20.22) on the ground that she made a protected disclosure is bound to fail.

87. There was no evidence that the deletion of the claimant's emails was carried out by Mr Green or Mr Doolan (allegation 20.5). We find that there was no sinister reason for the deletion of emails. The respondent gave copies back to the claimant, albeit somewhat belatedly, when she complained that they had been deleted. We consider that either there was some glitch or error in the claimant's inbox, she had mistakenly deleted them herself, or her mailbox was full and they had been automatically deleted. In any event, we do not consider that to have happened on grounds that the claimant made protected disclosures.

88. We accept that the reason the claimant was not involved in the interviewing process with Vanessa (allegation 20.8) was due to the claimant's limited availability at the time, and nothing more.

89. We accept that many line managers would say to their junior staff to come to them with any concerns before raising them higher within the organisation (allegation 20.9).

90. We consider that the different priorities given by different managers is something which happens when someone is working and reporting into two people (allegation 20.19). Mr Beer was not aware of the protected disclosures, and therefore cannot have subjected the claimant to this on the ground that she made them. We do not accept that Mr Green gave differing instructions/ objectives on the ground that the claimant had made her complaints which amounted to protected disclosures.

91. The final detriment, namely allegation 20.21, where Mr Green informed the claimant that he did not have time for her drama, was not on the ground that the claimant made protected disclosures. Rather, it was because the claimant was a relatively new recruit who was consuming a lot of management time in her short period of employment. We do not consider that this was on the ground that she had made the complaints about the training and/or Mr Green's alleged threat.

92. Therefore the claims for detriments on grounds of making protected disclosures is also dismissed.

<u>Automatic unfair dismissal – section 103A ERA</u>

93. We had to consider whether the reason or principal reason for the claimant's dismissal was the fact that she had made a protected disclosure.

94. The respondent's failure to follow a fair and reasonable procedure has no bearing on this decision. Only if the claimant had the requisite service to claim ordinary unfair dismissal would this have been material.

95. We have to focus on the reason for the dismissal. We find the true reason to be the claimant's actions on 9 July 2019, when bad mouthing Mr Beer to other members of staff together with what she said to Ms Doyle in the loading bay. We note the claimant's assertion that this was a private conversation, away from the shopfloor and was, in her view, in a secluded area, and one

in which some meetings took place between managers. However, we accept that this behaviour was deemed unacceptable, and formed the reason for the decision to dismiss the claimant.

96. We find no issue with the fact that the letter of dismissal gave two grounds for dismissal on the basis of a breach of trust and confidence, namely: undermining the claimant's manager and their peers, specifically discussing her manager's ability to manage and the behaviour of other managers to lower level colleagues and lying to the claimant's manager and HR regarding an incident in Oxford street store and outside of the store.

97. We have no basis on which infer an alternative reason for dismissal. We do not accept that the reason or principal reason was because the claimant made the protected disclosures found by EJ Cassell.

98. Therefore, all claims are dismissed.

Employment Judge Welch
Date: 2 September 2022

SENT TO THE PARTIES ON

8 September 2022

GDJ
FOR THE TRIBUNAL OFFICE