EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MS J MARSHALL**
MR D WILKS (by CVP)

BETWEEN: **MS M FARNAN** **CLAIMANT**

AND

INFOR (UNITED KINGDOM) LIMITED **RESPONDENT**

ON: **20-23 and 26 September (and in chambers 27th and 28th September 2022**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr C McDevitt, counsel (by CVP on 26th September)**

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant was not dismissed because she made a protected disclosure.
(ii) The Claimant's claim for victimisation fails and is dismissed.
(iii) The Claimant's claim for unpaid wages fails and is dismissed
(iv) The Claimant's claim for breach of contract in relation to her expenses fails and is dismissed.
(v) The Claimant's claim that she was entitled to a period of notice and that she was wrongfully dismissed fails and is dismissed
(vi) All claims are dismissed.

REASONS

Claims and Issues

1. The Claimant, Miss Farnan, was employed by the Respondent as a Senior Account Manager from 17 July 2017 until her dismissal without notice on 15th March 2019. She has insufficient service to bring a claim for “ordinary” unfair dismissal. Claims for direct sex discrimination and disability discrimination were struck out earlier in the proceedings. An allegation that an alleged breach by Mr Thompson of his contractual duties to his former employer, SAP, when he shared with colleagues a SAP training manual, was a protected disclosure was struck out following the failure by the Claimant to pay a deposit.

2. The remaining issues in this case are set out in the schedule to these reasons. Essentially the Claimant claims that she was dismissed because she complained of sex discrimination in her written grievance and in the grievance hearing (relied on as protected acts and protected disclosures). She also says that the way Mr Niesler treated her when she was dismissed was an act of victimisation because she had complained in her grievance of sex discrimination. She also claims that the Respondent has failed to pay expenses that were due, that they failed to pay her company sick pay when she was off sick, and that she was dismissed without notice in breach of contract.

3. At the start of the hearing Claimant also alleged that she had applied to amend her claim to include a further qualifying disclosure namely that Mr Thompson had been involved in what she referred to as a “data breach”, in that Mr Thompson had breached confidentiality obligations to his former employer by distributing among his team his former employer’s sales leads information. This was, she said, different, and in addition, to the allegation which had been struck out. She said that the application had been made but that Tribunal had not responded. (This had been raised before EJ Klimov in November 2021 and he advised that the allegation was not in the particulars of claim, and if she wished to include it she would have to make a properly pleaded application to amend.) We spent a considerable amount of time on the first day seeking to locate this application. The Claimant was unable to produce any evidence of it and the Respondent denied it had been made. On the 4th day of the hearing the Claimant did produce a document on which she relied, but it was not a properly pleaded application to amend. In any event, the Claimant’s witness statement did not identify when or how she made any such disclosure (what she said, to whom it was said or when it was said.)

Evidence

4. The Tribunal heard evidence from the Claimant. The Claimant also provided (unsigned) statements from Mr East (her former line manager)

and Mr Bird (a former colleague), though in the event neither attended to give evidence.

5. For the Respondent we heard from:
   a. Mr Young, the dismissing officer
   b. Ms Smitten of HR, who attended the disciplinary hearing
   c. Ms Lawrence who heard the Claimant's grievance and;
   d. Mrs Gill of HR who attended the Claimant's grievance meeting with Ms Lawrence.

   Mr Thompson the Claimant's line manager at the time of her dismissal, had provided a signed statement. The Respondent had been expecting him to attend to give evidence, but he was abroad, had left the Respondent's employment, and in the event did not attend.

6. As we explained, witness statement by witnesses who do not attend may be given limited weight in respect of disputed issues.

7. The Tribunal also had a bundle of documents running to some 655 pages.

<u>The Claimant's evidence</u>

8. While it is clear that the Claimant feels aggrieved about the way she has been treated by the Respondent, her evidence to the Tribunal was muddled and inconsistent. It was evident that she had not fully prepared for hearing and had not complied with various orders from the Tribunal, including an order to provide a schedule of loss. This was particularly important because part of the Claimant's case was that the Respondent had failed to pay her some £27,000 in expenses and these had not been itemised. More seriously, there was nothing in the Claimant's witness statement that dealt with her expenses claim, beyond a brief reference in paragraph 10 in which she said that she would charge travel to Israel on her personal credit card.

9. During the hearing the Claimant asserted that documents in the bundle had been altered and did not reflect the documents that she had been sent at the time. She said she had the documents that she had been sent in her bag and they were different. We allowed her to produce these, and the documents were in fact the same as the documents in the bundle. It was surprising that the Claimant had not checked this before making those (serious) assertions.

10. The Tribunal sought to assist the Claimant in presenting her case by reminding her of the issues that were in play, and allowing her to give additional evidence in chief, but much of the Claimant's witness statement dealt with issues that were not before the tribunal - such as the claims of bullying and sex discrimination and somewhat vague references to what the Claimant referred to as a "data breach" made by Mr Thompson. The Claimant also claimed that the Respondent had failed to disclose documents but was unclear what documents had not been disclosed, and often it appeared the documents were already in the bundle. She also alleged, very broadly, that a covert recording of the disciplinary appeal

hearing "directly contradicted" the Respondent's notes, but after she was asked to identify the relevant parts and feed them back to the Respondent, she conceded that there was nothing of significance to reveal. We admitted several additional documents on behalf of the Claimant during the course of the hearing - despite the deadline for disclosure having passed, although in the end none of them were of any assistance to the Claimant's case.

The law.
Victimisation.

11. Section 27 of the Equality Act 2010 provides that

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because–
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act–
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

12. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts she will fail – a mere feeling that there has been unlawful victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and victimisation is presumed unless the Respondent can show otherwise. (See Ayodole you v City Link and another 2107 EWCA Civ 1913)

Whistleblowing

13. Section 103A of the Employment Rights Act 1996 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".

14. The term "protected disclosure" is defined in Section 43A of the Act as a "qualifying disclosure" (as defined in Section 43B) which is made in accordance with sections 43C to 43H. 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*

(amongst other matters not relevant here) *...."that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject".*

15. In considering the public interest test, the workers belief that the disclosure was made in the public interest must be objectively reasonable (even if it is wrong), but the disclosure does not need to be in the public interest per se. Nor are the worker's reasons for making the disclosure strictly relevant.

16. A disclosure must involve the provision of information in the sense of conveying facts. In Kilraine v London Borough of Wandsworth 2018 EWCA civ 1436 the Court of Appeal said that "In order for a statement or disclosure to be a qualifying disclosure., it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

17. Guidance on how to approach the question of whether a protected disclosure has been made was given in Blackbay Ventures Ltd v Gahir 2014 IRLR 416

    a. identify each disclosure by reference to date and content;
    b. identify each alleged failure or likely failure to comply with the legal obligation and/or that matter giving rise to the endangering an individual's health and safety;
    c. Save in obvious cases the source of the obligation should be identified by reference to statute or regulation. It was not enough for the tribunal to lump together a number of complaints, some of which might not show breaches of legal obligations;
    d. determine whether the claimant had the necessary reasonable belief;
    e. where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act;
    f. determine whether the disclosure was made in the public interest.

Wrongful dismissal

18. Where an employee is contractually entitled to a period of notice, an employer who dismisses an employee without giving him or her notice will be in breach of contract. An employer is entitled to dismiss an employee without any notice where there has been repudiatory conduct by the employee justifying summary dismissal. To amount to a repudiatory breach the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. The degree of misconduct necessary for the employee's conduct to amount to a repudiatory breach is a question of fact for the Tribunal to decide. The issue here is whether at the time of dismissal there were in fact grounds for summary dismissal and not whether those grounds were the employer's reason for the dismissal (*Boston Deep Sea Fishing v Ansell 1888 39 Ch D 339.*)

19. In *Briscoe v Lubrizol Ltd 2002 IRLR 607* he Court of Appeal approved the

test in *Neary v Dean of Westminster* where the Special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in that particular contract that the employer should no longer be required to retain the employee in his employment".

Unpaid wages and expenses.

20. The issue here is to establish what amounts were payable to the Claimant in connection with her employment (section 27 of the Employment Rights Act 1996). An employer may not deduct wages properly payable to the Claimant – and a deduction includes a failure to pay. Wages are defined in section 27of the Employment Rights Act 1996 and does not include expenses. Expenses can be recovered by way of a breach of contract claim if the Respondent is contractually liable to reimburse the Claimant for them.

Findings of Relevant fact.

21. The Claimant was employed by the Respondent as a Senior Account Manager. The Respondent is a provider of business cloud software and computer services.

22. The Respondent's annual leave policy (202) provides that holiday dates have to be approved in advance and put into the Respondent's online tool (the PTO system). "*Your manager must sign off all applications for holiday via the PTO online tool".* It provides that the usual minimum notice required to book a holiday of one week is 2 weeks. It also provides that "*Employees should be aware that, if they take a period of leave that has not been approved, they may be subject to disciplinary action upon their return to work*." (205)

23. Initially the Claimant's manager was a Mr Richard East. He left the Respondent's employment in July 2018 and Mr Thompson took over as her manager.

24. On 13th July, before Mr East left the Respondent, the Claimant attended a meeting with him in which he reprimanded her for a number of issues. This was followed up with a "letter of concern". Amongst other matters the letter noted that requests for holiday must be submitted in a timely manner, using the Respondent's absence management system and that the Claimant should ensure that her absences were up to date on the system. (216) The Claimant says that she did not receive this letter in July – but a copy was provided to her subsequently on 29 August 2018. The Claimant alleges that this letter has been altered by Mr Thompson in order to set up a predetermined outcome for her dismissal. She alleges it was not written either in this form or at all by Mr East. She alleges that Mr East did not raise issues of holiday booking with her at that time and that the meeting was simply a "heads up" to tell her that others within the organisation had disapproved of the way she had booked upgraded flights without authorisation. The Tribunal does not accept that. The letter of concern reflects the internal emails sent by Mr East to HR at the time (138/139).

25. When Mr Thompson took over, he considered that the Claimant was not performing. In September he reallocated a significant bid on which the Claimant was working (the Ormat bid) to another manager and placed the Claimant on a formal performance improvement plan.

26. One of the goals set out in the performance improvement plan issued by Mr Thompson in September 2018 was to "*Manage requests for leave of absence responsibly in line with HR policies and in a timely fashion. Please ensure all absences are up to date on the system*." (219) In cross examination the Claimant alleged that the performance improvement plan that she had received was not the same as the document in the bundle. However, when she produced the document she had received, it was clear that the 2 documents were identical.

27. The Claimant had booked a holiday to Bali in March or July of that year (the evidence was inconsistent) - leaving the UK on Friday 12th October 2018 and returning to work on 22nd October. It was the Claimant's evidence that the holiday request had been "*added to my diary, added to the HR system and approved by Richard East."* Her evidence was that Mr Thompson was aware of that holiday as it was "a constant topic of conversation with him". In cross-examination she explained that Mr East had stood over her when she had entered her holiday into the electronic booking system, and that she had subsequently checked the system to see that he had approved her request. She said that she had subsequently learned from a colleague that when an individual's manager changes, leave which has been approved within the system will revert to "draft" and that when she explained this to HR, she had been told that "it has been known to happen". In evidence she repeatedly said that there must have been a system error.

28. The Respondent's evidence on the other hand was that the Claimant had not made a request for paid time off until 8 October 2018 (i.e., on the Monday before the Friday when she was due to leave) and that this was an extremely busy period for the Respondent. Mr Thompson declined to approve the request.

29. The Claimant's evidence in the Tribunal is not consistent with the contemporaneous documents. On 10th October (194) the Claimant sent an email to HR in which she said this: "*As discussed, we know what was the likely issue here and that was likely Richard did not confirm holiday requests within the HR system prior to leave*". This is in direct contradiction to her evidence that she was aware that Mr East had approved her holiday in the system. On 11th October the Claimant sent a text or WhatsApp message to Mr Thompson asking him to sign off her holiday saying *"tough lesson to learn – it will not happen again*." The clear implication of this WhatsApp is that she knew she had not had a holiday approved.

30. The system report from the Respondent system (231/232) identified that the first entry made by the Claimant in relation to that holiday was on 8 October 2018. We accept the evidence of Ms Smitten that if the Claimant had applied for leave before that date (and it had somehow reverted to

draft or disappeared) this would have been reflected on the system. We also accept, as Ms Smitten explained, that the system does not revert approved leave to draft on the change of a manager. There were about 40 changes of manager per month at the Respondent and the system would be unworkable if approved leave moved to draft when a manager changed.

31. The Claimant's evidence is also inconsistent with a letter from her solicitors sent in January 2019, in which the position being taken by them is that the Claimant had sent Mr East a calendar invite which he had accepted and that it was unnecessary to book holiday via the online system. (176). In the Claimant's particulars of claim (21) at paragraph 26 the Claimant's case was that while she had entered her leave into the HR system Mr East had <u>not</u> approved the request before leaving the Respondent employment.

32. In the Claimant's disciplinary appeal hearing the Claimant says that *"my holiday was not unauthorised, it was authorised. It was authorised verbally by Richard East."* She refers to having sent Mr East a diary invite. This is not the same as entering it into the system and having it approved. (277)

33. It is also relevant to note that whenever an individual's leave is approved by the manager in the system an automatic email is generated and sent to the individual notifying them that their leave has been approved. The Claimant was alerted to this by HR at the time that she was querying her approval but was unable to provide the email to that effect at any time prior to her disciplinary hearing.

34. We are satisfied that the Claimant first entered the request into the Respondent's system in draft on 8 October at 10:46 a.m., and that she submitted it 5 minutes later at 10.51.

35. When Mr Thompson received the request from the system for holiday approval he was not pleased. He told the Claimant he was unable to approve it as it had been made at such short notice and because the holiday time was at a quarter end which was very busy. He did not accept that her leave had been approved by Mr East "*had it been so it would have been reflected in HCM and you would have had an email confirming that it was approved*" (154). He told the Claimant that should she decide to continue taking the leave without approval it would be considered as unauthorised. The Claimant responded that her leave could not be cancelled. HR wrote to the Claimant (153) informing her that if her leave had not been approved it would be considered to be unauthorised and advised her that, in line with the Respondent's policy, "*The company will treat any instances of unauthorised leave as a serious matter. Employees should be aware that, if they take a period of leave… that has not been approved, they may be subject to disciplinary action on their return to work".* Further emails followed, with the Claimant appealing to HR and HR reiterating the policy.

36. The Claimant made it clear nonetheless that she would not be cancelling

her holiday (155). She duly flew to Bali on the 12th October. She said she could not join a call due to take place on 12 October as she would be in the air, but that she would try and join a call on the 15th.

37. On 15th October Mr Thompson emailed the Claimant noting that she should not join the call as she was on leave. However, as her leave had been unauthorised, a disciplinary hearing would be scheduled on her return to work. (157).

38. The Claimant returned to work on 22nd October. In an email sent by the Claimant at 15:21 to Mr Thompson she says that she had been ill on holiday, she felt hot and faint and was going to leave the office soon. (162). On 23rd October the Claimant worked from home. The same day she received an email inviting her to a disciplinary hearing at 9 a.m. on 25 October in the Solihull office (163). It was accompanied by a number of enclosures as set out in that letter.

39. The Claimant responded that she could not go to Solihull, but could travel to the Farnborough office. The Respondent said that as she was required to travel as part of her job it was not unreasonable to expect to attend in Solihull. The Claimant then responded that she had a dentist appointment at 9.15 in London (not referred to in her first email) but that she could attend a meeting in Farnborough or London in the afternoon. Mr Thompson pointed out that the dentist appointment had not been entered in the online absence management tool.

40. In any event, on 24th October the Claimant reported that she was unwell (160) and would not be in the office for the rest of the week. She said that she would make an appointment with HR on her return to document a complaint about Mr Thompson. In response Mrs Gill wrote to the Claimant to ask her to submit a formal grievance and provided her with a copy of the grievance policy. Mrs Gill chased this on 31st October. As the Claimant was unwell the disciplinary process was put on hold.

41. Clause 8.5 of the Claimant's contract of employment provides as follows:" *You shall not be entitled to any Company sick pay where the period of absence commences after you have been notified that you are required to attend a disciplinary, investigatory interview or a disciplinary hearing, after you have been suspended pending a disciplinary investigation or whilst you are otherwise subject to disciplinary proceedings."*

42. When the Claimnt notified the Respondent that she was unwell on 24th October the Respondent wrote to her (527) to inform her that, in line with company policy, as her sickness absence had started after she had been notified that she was required to attend a disciplinary hearing, she would be paid SSP rather than company sick pay. The Claimant subsequently provided a fit note dated 29 October 2018 advising that she was not fit to work from 22nd October to 5th November for a tropical illness. Subsequent fit notes then signed the Claimant off for stress.

43. On 5th November the Claimant sent an email to Mrs Gill saying that she

would be submitting a formal grievance, that the draft complaint was with her solicitor and would be submitted shortly. (534) In the event the Claimant did not submit her grievance until 10th January despite various email reminders from Mrs Gill on 13 November, 15 November and 5 December. In December the Claimant asked for a meeting to discuss her grievance but when dates were offered the Claimant said that she was not available.

44. The Claimant returned to work on 9th January. Ms Smitten emailed the Claimant the same day asking her to attend a disciplinary hearing to be held at 1.30 on 14 January in the Solihull office. As the Claimant had said that she wished to raise a complaint against Mr Thompson, the Claimant was informed that Mr Young would conduct the hearing. The Claimant was also reminded to submit her grievance.

45. The Claimant submitted her grievance on 10th January saying that she had been too unwell to submit it before then. The grievance contained a number of allegations of sex discrimination and less favourable treatment by Mr Thompson. It is recorded that during the grievance hearing the Claimant said that 2 colleagues had holiday booked in October and that they had not been subjected to a disciplinary. The following exchange then takes place (326)

> Ms Lawrence "so you are alleging that this is because you are a woman?"
> Claimant: "No not really, but my lawyer has said that."
> Ms Lawrence: "You don't feel this has happened because you're a woman?"
> Claimant: "My lawyer said that this is sex discrimination because that would not have happened if you were not a woman. Very black-and-white in my lawyer's eyes."

46. In cross-examination, when it was being put to the Claimant that she had been repeatedly asked, but failed, to put in the grievance until she had been called to a disciplinary hearing the Claimant responded, "*I had said to HR that if this goes to disciplinary, I will put in a grievance".*

47. In the meantime, the disciplinary hearing was postponed a number of times. Initially this was to do with the availability of the Claimant's representative but then the Claimant again became ill and was signed off for 8 weeks. Ultimately, the disciplinary hearing did not take place until after the Claimant had returned to work in March and after her grievance process had been concluded. The grievance outcome was sent to the Claimant on 25 February 2019 and her grievance was not upheld. The Claimant missed the deadline for her appeal and no appeal took place.

48. The Claimant had, as part of her grievance, (234) said that 2 colleagues had had holiday booked in October and felt that they had not been treated the same as her. This extract of the grievance was sent to Mr Young as part of the disciplinary pack and he interviewed Mr Thompson on this point on 27th February (246) who said that one colleague had only booked 2

days holiday while the other colleague had 3 days holiday. In both cases they had formal approval. Mr Young had checked this as part of his investigation prior to the hearing and had established the formal approval had been given by managers other than Mr Thompson (257/258). There was no valid comparison therefore between the Claimant's case and that of her colleagues.

49. The Claimant eventually attended a disciplinary hearing on 12th March. While Mr Young was going through the preliminaries the Claimant interjected to say that she thought it would be best to cut short the process. She said that she would resign and on terms that (i) she would withdraw her grievance (ii) the disciplinary should removed from her file (iii) she would be placed on gardening leave for the notice period (iv) she should receive a 6 months payout to cover lost earnings not paid during the process and (v) she should be paid any holiday that she was owed. The Claimant denies that she said that she would withdraw the grievance but we do not accept that. We accept the notes of the hearing (and sent to her with the letter detailing the reasons for her dismissal) are an accurate record of what she said.

50. After a brief adjournment the Respondent rejected the terms on which the Claimant had offered to resign and said that if the Claimant resigned at that time she would simply be paid one months pay in lieu of notice in line with her contract of employment. (254**)** The Claimant then said she was not willing to proceed with the disciplinary hearing. She was warned that if she left the meeting the hearing would go ahead in her absence. Nonetheless the Claimant left, and the meeting continued.

51. Having considered the evidence provided, Mr Young decided that the Claimant should be dismissed. On 15th March he emailed her to give the Claimant the outcome of the disciplinary hearing and told her that he was satisfied that she had committed a "*serious insubordination and deliberate failure to follow reasonable management instructions in relation to the unauthorised absence between 12 and 19 October*." He notified her that she was being summarily dismissed with effect from that day (15th March) and that a letter confirming the reasons behind the outcome would be sent to her the following week.

52. It was the Claimant's case that she did not receive the email from Mr Young before Mr Niesler "frog marched" her out of the office. Although not strictly relevant to the issues we have to decide, that seems unlikely. In the Claimant's grounds of appeal against dismissal (270) she complains that "*On 15 March 2019, when I received the email dismissing me, Simon Niesler marched me out of the office in front of everyone*".

53. In the Claimant's evidence in chief she states that on 15th March Mr Niesler had marched her out of the office with the whole office hearing him tell her that she was being dismissed for gross misconduct. In the particulars of claim the Claimant says that Mr Niesler had taken her into his office to tell her that she was dismissed but that he had the door open so that another team could hear. She said that he then demanded that she

pack up her things while he waited, but then became impatient and asked his PA to accompany her to the exit.

54. We were unclear what the Claimant meant by being “frog marched” out of the door (as opposed to being escorted off the premises) and it was not clear if Mr Niesler or his PA did so. The tribunal has not heard from Mr Niesler, but it is common practice for individuals who have been dismissed to be required to pack up their belongings and leave the premises immediately. While the Respondent accepts that Mr Niesler was aware that the Claimant had complained of sex discrimination in her grievance, there was no evidence which would suggest that Mr Niesler’s limited involvement in the Claimant’s dismissal was influenced by that fact.

55. On 18th March the Claimant received the detailed reasons for her dismissal and was sent a copy of the notes of the meeting. Mr Young explained that he had found that she was aware, prior to taking leave, that it was unauthorised, and she might be subject to disciplinary action on her return, that the Claimant had previously been made aware that she was required to book her annual leave in the Absence Management system and, that there was no evidence that she had submitted her request prior to 8th October. As part of his deliberations Mr Young had reviewed an extract from the grievance hearing notes (234/235) in which the Claimant complains that 2 colleagues had holiday booked in October which had been approved. In evidence Mr Young said that he was aware that the Claimant had submitted a grievance, but he was not aware of the content of the grievance beyond the extract in the bundle. We accept that evidence although we note that, in the extract provided to Mr Young, the Claimant says that she felt that Mr Thompson could not work with women, which would indicate to him that she had complained about sex discrimination. .

56. The Claimant appealed the decision to dismiss. Her appeal was heard on 2 May 2019 but not upheld. (283) We have not heard from Mr Bradshaw, but apart from a challenge to the notes (see above) the Claimant as not led any evidence about the appeal.

57. Unpaid wages. During the Claimant’s sickness absence the Claimant was only paid SSP. Clause 8.5 of the Claimant’s contract of employment provides as follows: “*You shall not be entitled to any Company sick pay where the period of absence commences after you have been notified that you are required to attend a disciplinary, investigatory interview or a disciplinary hearing, after you have been suspended pending a disciplinary investigation or whilst you are otherwise subject to disciplinary proceedings.”*

58. Subject to that, and to complying with company procedure, the Annex to the Claimant’s contract provided that those who had been employed for 1 year but less than 2 (as in the Claimant’s case) were entitled, during periods of absence for sickness, to 4 weeks full pay and 9 weeks half pay in any period of 12 consecutive months. (130)

59. Expenses. Clause 5.1 of the Claimant’s contract of employment provides

as follows: "*If you incur travelling expenses (other than travel to and from work), accommodation or other expenses in the course of carrying out your duties, you will be reimbursed for these by the Company on production of appropriate vouchers or receipts in accordance with the Company's current policy on expenses, a copy of which is available from the HR Department."* (123). The relevant policy (616) provides that expense reports should be entered on the company's online system, submitted within 60 days of incurring the expense and that receipts must be scanned and attached. There are detailed instructions as to the receipts and information to be provided.

60. As we have said, the Claimant's witness statement did not explain what expenses were due and for what. The Claimant had not set these out in her schedule of loss, and the updated schedule of loss that the Claimant provided during the hearing did not do so either. The Claimant's case in relation to her expenses is however set out in the particulars of claim in which the Claimant alleges that she had "*submitted her expenses in summer 2018 but the receipts were not received and so the Claimant updated her expenses and finalised the supporting information in October and November by inputting it into the respondent's HCM 8 system which needed to be done before the system was updated to a new version. The Claimant was advised that the expenses should be submitted, and any errors would be addressed by the respondent's team in India. Mr Thompson did not sign off the claimant's expenses while the Claimant was off sick, and payment was delayed. The claimant chased this on her return in January 2019 and was told she had re-enter all of her expenses into HCM 10. The claimant was working with the Finance team to complete this when she was dismissed and only four new claim reports were* processed. *The Claimant is owed approximately £27,000 in unpaid expenses*"

61. Mrs Gill gave evidence that the Claimant had, throughout her employment, repeatedly failed to comply with the expenses policy. She says that the Claimant's expenses were outstanding because she had not provided receipts, or sufficient detail for them to be approved. When she returned to work in January 2019 the Claimant's temporary line manager (Mr Winder) provided the Claimant with an Excel spreadsheet which set out the details and evidence which she needed to provide regarding the expenses which were outstanding so that those could be progressed. She says that the Claimant did not do so. She says that despite the requirement to submit expenses within 30 days, the Claimant was given a further 60 days after she had left the Respondent's employment to submit any remaining evidence for approval and processing. She had not done so.

62. We accept that the Claimant had input expenses into the system (as evidenced by the document in the bundle) but we also accept, contrary to the Claimant's evidence, that many were not inputted correctly, and that the Claimant had not provided receipts for most of the entries.

63. The Claimant's evidence as to the provision of receipts was inconsistent. She said that in 2017 she couldn't find her receipts and that *"after I left I posted them all to Birmingham and Jane would not take my calls".*

However elsewhere in her evidence the Claimant said that she had provided all her receipts.

64. The Respondent had provided (482– 484) a list of the Claimant's expenses with comments by the finance team in which errors and failures to provide receipts had been highlighted. Internal correspondence between the Claimant and Ms Landon (of the expenses team) evidences that Ms Landon had queried some expenses and approved some (468 – 470). By way of example it is apparent that in March 2019 Ms Landon is checking expenses from 2017 and 2018 and asking her to amend the entries *"as I believe there is a duplication and dates do not match – also can you separate the airfares and booking fees".* On 20th March 2019 the Claimant was suggesting that she should pay someone from the expenses team to sort it all out for her.

65. The Tribunal has no doubt that there are amounts which the Claimant has spent legitimately relating to work expenses, and which have not been reimbursed to her. However, the evidence also suggests that the Claimant had failed to comply with the Respondent's policies in inputting her expenses correctly, that she had been given multiple chances to correct the errors that she had made, and had failed to do so; so that by the time she left the Respondent's employment she herself no longer knew what was owed and what was not. In the absence of firm evidence from the Claimant as to what she had done to comply with the Respondent's policy and what amounts were owed and for what, we can make no finding that the Respondent was in breach of contract in failing to pay the Claimant her expenses.

66. Submissions were made by both parties on the facts

<u>Conclusions</u>

67. <u>Victimisation.</u> The Respondent has accepted that the Claimant's grievance letter of 10th January amounted to a protected act for the purposes of section 27 of the Equality Act 2010.

68. We accept that Mr Young was kept out of the details of the grievance, and that his knowledge was confined to the extract of the hearing notes provided to him for the purposes of the disciplinary hearing. He may have broadly aware from her comment that Mr Thompson could not work with women that she had alleged sex discrimination, but that was all. There was no evidence from which the tribunal could conclude that Mr Young had been influenced by the allegations of sex discrimination made by the Claimant in her grievance.

69. The Respondent had notified the Claimant that she would be subject to disciplinary process very many months before the Claimant had submitted her grievance. He concluded, for good reasons, that she had gone on holiday in the knowledge that her absence would be treated as unauthorised, and that she would be subject to a disciplinary process on her return. Even if Mr Young was aware that she had alleged sex

discrimination, there was no evidence from which we could infer that his decision might have been different had she not made those allegations. The Claimant had chosen not to participate in the hearing in any meaningful way.

70. We did not hear from the appeal manager (Mr Bradshaw). The Respondent accepted that he was aware that a complaint of sex discrimination been made but there was no material from which we could infer that an act of victimisation had occurred.

71. As for the allegation that she was victimised by Mr Niesler our conclusions are set out at paragraph 54. We acknowledge that the Claimant found it humiliating to be escorted off the premises and that a conversation took place which others may have been able to hear, but that was in consequence of the Claimant's dismissal for gross misconduct and not because she had made allegations of sex discrimination.

<u>Whistleblowing. Unfair dismissal</u>

72. The protected disclosures relied on are the allegations of sex discrimination in the Claimant's grievance and in the grievance hearing. It is the Respondent's case that no protected disclosure have been made as, in their submission, the Claimant did not have a reasonable belief at the time of disclosing the information, that it tended to show that there had been sex discrimination. In submissions Mr McDevitt points to the following:

    a. the disclosure was made in response to the disciplinary process
    b. the information was not disclosed and so until 2 or 3 months after the events had occurred
    c. the Claimant herself said at the grievance hearing that she did not think there been any sex discrimination
    d. the Claimant had been willing to abandon the grievance at the disciplinary hearing.

73. We accept that the Claimant submitted her grievance in response to the disciplinary process. The Claimant's own evidence was that she told HR that she would submit a grievance **if** the disciplinary process went ahead. The delays in, and the timing of, the submission of her grievance indicate that she did so in response to the disciplinary. That of itself, however, does not mean that the Claimant did not have a reasonable belief in the information disclosed. Many individuals may choose not to rock the boat until they feel they have little to lose. Although the Claimant's response to Ms Lawrence during the grievance hearing (reproduced above) may indicate that the Claimant did not really believe that there was sex discrimination, the question related to only one aspect of the grievance, namely the holiday booking, but the Claimant's grievance covered a number of other matters.

74. On balance, though this was borderline, we accept that the Claimant had a reasonable belief at the time she made the disclosures in the grievance

that the information tended to show there had been a breach of a legal obligation not to discriminate against employees because of their sex. We accept that she had made protected disclosures.

75. However, there was no material from which the tribunal could infer that the principal reason for the Claimant's dismissal was that she had made such disclosures. It was made very clear to the Claimant, even before she went on holiday, that taking leave which her manager had not approved would be regarded as a disciplinary matter. The process was well in train before the Claimant submitted her grievance alleging sex discrimination. For the reasons set out in paragraph 69 above in relation to the Claimant's claim of victimisation, we do not find that the Claimant was dismissed because she made any disclosures of information tending to show that the Respondent had breached a legal obligation.

76. <u>Unlawful deduction from wages.</u> The contractual position is set out above. The Claimant's first day of absence was 24th October. Although the Claimant says she was ill while on holiday, she was at work on 22nd and 23rd October, and clause 8.5 refers to an individual not being entitled to company sick pay where the period of *absence* commences after a notification of disciplinary proceedings. It was clear that the Claimant was notified on 15 October 2018 and again on 23 October 2018 that she would be required to attend a disciplinary hearing. Both dates precede her period of absence for ill-health.

77. In a judgment declining to order a deposit as a condition of the Claimant continuing to argue that there had been an unlawful deduction of wages, Employment Judge James identified that clause 8.5 of the Claimant's contract could arguably be read as being subject to the implied term of trust and confidence/good faith, and that if we were to find as a fact that the disciplinary proceedings that were taken against the Claimant were not made in good faith (because the holiday had been approved or/approved in principle and/or that other male colleagues had holiday approved at that time at short notice and the Claimant was treated differently) Clause 8.5 might not apply.

78. We have found that the holiday had not been approved. Mr East's witness statement, produced by the Claimant, notes that the Claimant had *"shared with me her plans for holidays which I approved in principle but advised her that the dates planned time off must be entered into the in for staff time recording records prior to her taking any leave and must be approved status before making any firm travel arrangements*." The Respondent's rules are clear as to the need to input holidays into the management system. We do not accept as a matter of fact that the Claimant did so. We do not accept that the disciplinary proceedings were brought against the Claimant in bad faith. The cases of her male colleagues who had their holidays approved were not comparable to the Claimant's case as referred to above. We find that Clause 8.5 did apply n the Claimant's case.

79. We find that the Respondent has not deducted wages that were properly due to the Claimant in respect of company sick pay.

80. Expenses As set out at paragraph 65 above, in the absence of clear evidence as to any amounts due in respect of the Claimant's expenses we can make no finding that the Respondent was in breach of contract in failing to pay the Claimant her expenses.

81. Wrongful dismissal. Clause 14 of the Claimant's contract of employment provides that the Claimant's notice period was one calendar month. However at Clause 14.2 the Respondent reserved the right to terminate her employment without notice if she was in serious breach of the terms and conditions of her employment or in the case of gross misconduct. It is well established law that the question of whether or not an employee is in repudiatory breach of contract is a question of fact for the tribunal to decide.

82. We considered that the decision to dismiss the Claimant was a harsh one. Nonetheless, the Claimant had disobeyed a clear management instruction and had failed to observe a clear policy. We have no doubt that the Claimant, in deciding to go on holiday knowing (i) that the holiday was unapproved and (ii) that if she did so disciplinary action would be taken against her, had chosen to disregard an essential term of her contract entitling the Respondent to terminate her contract without notice.

83. All the claims are dismissed.

EJ Spencer
28th September 2022

JUDGMENT SENT TO THE PARTIES ON

29/09/2022

FOR THE TRIBUNAL OFFICE

THE SCHEDULE
ISSUES

Victimisation

1. The Claimant claims victimisation under section 27 EqA 2010. The questions for the Employment Tribunal to consider are:-

a. Did the Claimant's grievance letter of 10 January 2019 amount to a protected act for the purposes of s27 EqA?

b. If there was a protected act, did the acts or omissions set out in the Particulars of Claim occur as alleged or at all? The Claimant is relying on the following acts/omissions:

i. 15 March 2019 – The manner of the Claimant's

dismissal undertaken by Simon Niesler; and

ii. 18 March 2019 – Dismissing the Claimant for gross misconduct

c. If so, did those acts or omissions amount to a detriment for the purpose of the EqA?

d. If so, did the Respondent subject the Claimant to a detriment as a result of the protected act?

Automatic Unfair Dismissal Following a Protected Disclosure

2. The Claimant claims her dismissal was automatically unfair under s.103A ERA. The questions for the Employment Tribunal to consider are:

   a. Did the Claimant make a qualifying disclosure within the meaning of s.43A ERA either in her written grievance of 10 January 2019 or in her grievance meeting on 22 January 2019 as set out in the particulars of claim at paragraphs 6 and 40 in relation to:

      i. A complaint of sex discrimination.;

      [Nb ii. *Struck out for non payment of a deposit}*

   b. In respect of the alleged qualifying disclosures the Employment Tribunal will need to consider:

      i. Did the Claimant make a disclosure of information?

      ii. Was that disclosure made to the Respondent?

      iii. Was the disclosure, in the reasonable belief of the Claimant:

         1. In the public interest?

         2. Tending to show one or more of the acts or omissions under the subsections of s.43B(1) ERA?

   c. If yes, was the reason or the principal reason for the Claimant's dismissal due to the Claimant's protected disclosure(s) as set out in s103A ERA?

Unlawful Deduction from Wages

3. The Claimant is claiming that she was entitled to company sick pay for the months of November and December 2018 and January 2019 and claims that the payment of SSP only amounted to an unlawful deduction from her wages contrary to s.13 ERA. The questions for the Employment Tribunal to consider are:

   a. Did the Claimant have an implied or express contractual right to receive company sick pay during the months of November and December 2018 and January 2019?

   b. If yes, did the company sick pay amount to 'wages' within the meaning of s.27(1) ERA?

   c. If yes, has there been an unlawful deduction?

Breach of Contract Relating to Expenses

4. The Claimant claims that the Respondent has breached her contract of employment by failing to reimburse her for alleged outstanding expenses. The questions for the Employment Tribunal to consider are:

    a. Was the Claimant contractually entitled to the alleged outstanding expenses?

    b. If yes, did the Respondent breach the Claimant's contract by not paying the alleged outstanding expenses?

    c. If yes, Did the Claimant suffer damage as a result of the breach?

Wrongful Dismissal

5. What was the notice pay due to the Claimant under her contract of employment?

6. Was the termination in breach of the Claimant's contract of employment?

7. Is the Claimant entitled to notice pay?

Quantum

8. Even if the Claimant succeeds on liability, the Respondent denies that the Claimant is entitled to any form of compensation as claimed or at all.

9. In circumstances where the Claimant is successful in her claims, the questions for the Employment Tribunal to consider are:

    a. What, if any, compensation would be just and equitable in accordance with the EqA 2010, including any award for injury to feelings?

    b. What, if any, compensatory award is appropriate in accordance with the ERA 1996?

    c. If established, whether the Claimant's complaints of whistleblowing, were made in good faith?

    d. Whether the Claimant has taken sufficient steps to mitigate her loss?

    e. Should there be any uplift for the Respondent's failure to follow the ACAS code as alleged under or at all?

    f. Should any interest be awarded?

    g. Should there be a reduction to the Claimant's compensation to reflect the principles of *Polkey?*