EMPLOYMENT TRIBUNALS

Claimant: Ms A. Walker

Respondent: Anglian Windows Ltd

Heard at: Watford **On:** 14, 15 and 16 September 2022

Before: Employment Judge McNeill KC
Mr A. Scott
Ms K. Turquoise

Appearances
For the Claimant: Ms Walker, in person
For the Respondent: Mr N. Ashley, Counsel

Reasons for the Judgment sent to the parties on 29 September 2022, as requested by the Claimant on 29 September 2022

REASONS

1. This claim arose in the context of a redundancy exercise carried out by the Respondent when the Covid-19 pandemic had a substantial impact on its business. The Claimant was given notice of termination of her employment by a letter dated 23 September 2020 headed "Notice of Termination of Employment on Grounds of Redundancy". The date of termination of her employment was stated to be 16 November 2020. This date was subsequently amended to 30 October 2020 and a payment in lieu of notice was paid for the period from that date to 16 November.

2. The Claimant accepted that there was a genuine redundancy situation but claimed that her dismissal was unfair. She contended that the reason or principal reason for her dismissal was that she had made one or more protected disclosures so that her dismissal was automatically unfair. She also claimed that her dismissal was unfair because the decision to dismiss was influenced by a grievance she had raised on 20 November 2019 against the Area Sales Leader (also known as Showroom Manager) at her place of work, Mr Tim Doyle. That grievance included a complaint that the Regional Sales Manager, Mr Adam Smith, had not dealt with the complaints made by the Claimant to him about Mr Doyle. Mr Smith was the decision-maker in relation to an application the Claimant made for alternative employment during the redundancy process

and he decided in favour of another candidate. The Claimant further contended that, as a person who had made a protected disclosure and, in any event, the Respondent should have given her greater support in finding alternative work.

3. The issues in the case were summarised in a Case Management Summary sent to the parties following a case management hearing in front of Employment Judge R. Lewis on 1 November 2021.

4. In addition to the claim for unfair dismissal, the Claimant brought a claim for detriment on the ground of making one or more protected disclosures. The detriment relied on related to delays in ordering and fitting a replacement seat for the ladies toilet at her workplace.

5. The Claimant first notified Mr Doyle that the toilet seat was broken and needed to be replaced in late January 2020. After some protracted correspondence including both Mr Doyle and Mr Smith, on 5 February 2020 Mr Smith told the Claimant that a new toilet seat had been ordered and that Mr Doyle would get one that morning "as cover" until the new seat arrived. This did not happen.

6. The Respondent submitted that this claim for detriment was out of time. The claim was not presented to the Tribunal until 15 March 2021. We dealt with this issue first and before deciding whether the Claimant was unfairly dismissed.

Public Interest Disclosure

7. As the unfair dismissal claim included a claim under section 103A of the Employment Rights Act 1996 (ERA), that the reason or principal reason for the Claimant's dismissal was that she had made one or more protected disclosures, it was necessary for us to determine whether the Claimant made any disclosures qualifying for protection under sections 43A and 43B of the ERA.

8. The Claimant relied on two disclosures: one made on 27 November 2019, which contained information about breaches of GDPR; and one made on 24 January 2020 which concerned the fact that a letter addressed to Mr Doyle from HMRC and to his son, Mr J. White, from the DWP were addressed to them at the Showroom premises. The Claimant alleged during her grievance that they were living at the premises and there was a considerable amount of evidence that they were, including clothes, furniture and large quantities of beer cans left on the Claimant's desk and in bin bags at the premises.

9. The first alleged protected disclosure involved the Claimant disclosing information that Mr Smith was allowing the GDPR to be breached. She provided information that customer data in relation to thousands of customers was being shared, including with foot canvassers, in breach of the GDPR.

10. The Respondent's Counsel conceded that this information tended to show a failure to comply with a legal obligation but he contended that the Claimant did not reasonably believe that this disclosure of information was in the public interest. She only disclosed the data, he submitted, because she wished to exclude Mr Smith from being involved in her November 2019 grievance.

11. The Claimant contended that the disclosure of information about breach of the GDPR was a serious matter. She believed that it was in the public interest to disclose the information. Large amounts of customer data were being shared without their consent with persons, including foot canvassers, who had no legal right to have that data.

12. We accepted the Claimant's submission on this issue. We found that she did have a reasonable belief that the disclosure of information was in the public interest. It is in the public interest that private data should be properly protected and not shared unlawfully.

13. In relation to the alleged protected disclosure of 24 January 2020, there was limited evidence as to what information the Claimant disclosed. She disclosed the letters to the Respondent together with a photo of another letter sent to a former employee, Mr Martin Chojnacki. It is not, however, clear that she was informing the Respondent that there was a breach of any legal obligation or of any other matter falling within section 43B of the ERA. The information appeared to be provided to show that the individuals who were receiving letters at the Showroom were living at the premises (and there was a great deal of evidence that supported this). This may have been unlawful but it did not involve any public interest.

14. The Tribunal therefore did not accept that this second disclosure amounted to a protected disclosure within the meaning of the ERA.

The Time Point

15. Pursuant to section 48(3) of the ERA, a claim for detriment under s47B must be brought before the end of the period of 3 months beginning with the date of the act or failure to act complained of. In this case, the act complained of came to an end at the very latest in March 2020 when the North Harrow showroom (sometimes referred to as the Harrow showroom) closed because of lockdown and the Claimant went on furlough. The claim was not presented until 15 March 2021.

16. The Tribunal can extend time for a reasonable period where it is not reasonably practicable to bring the claim in time. The only reason relied on by the Claimant for contending that it was not reasonably practicable to bring the claim in time was that the appeal against the grievance she had brought against Mr Doyle had been suspended and was not concluded while she remained in employment.

17. The Tribunal had to consider whether it was reasonably feasible to bring the claim in time. An outstanding grievance does not mean that it is not reasonably feasible to present a claim. There was a misunderstanding on the Claimant's part about the effect of her grievance on the running of time but that was not enough to satisfy a test of reasonable practicability.

18. We were not satisfied that it was not reasonably practicable tor this claim to be brought in time and this claim is therefore dismissed.

19. Although there was no requirement in the circumstances for us to consider the issue of causation, having heard the evidence, we considered that the causal link between the alleged detriment and the protected disclosure that we have upheld could not, in any event, be made out. The failure to replace the toilet seat reflected poorly on the Claimant's managers and may have been motivated by some personal animosity towards the Claimant but the link between that behaviour and the protected disclosure was not made out. The Claimant herself could not explain why she said that the delay in dealing with the toilet seat was linked to her disclosure of information about the GDPR rather than because matters connected with her grievance against Mr Doyle and his negative treatment of her.

20. The Claimant's claim for detriment based on making a protected disclosure was therefore dismissed as it was made out of time and it was reasonably practicable to bring the claim within the 3 month time limit set out in section 48 of the ERA.

21. We then went on to consider the Claimant's claim for unfair dismissal.

Facts

22. The Claimant was employed by the Respondent as a Showroom Administrator between 1 June 2012 and 30 October 2020. The Respondent is a well-known supplier and installer of home improvement products such as windows, doors, conservatories and similar products.

23. The Claimant worked for 20 hours a week in the North Harrow Showroom, where she supported Mr Doyle, five sales representatives and two foot canvassers with administrative duties and customer service. The Claimant was an employee but the other individuals working out of the Showroom worked on a self-employed basis.

24. In January 2019, the Claimant raised a grievance against a sales representative, who was then removed from the London North West region, where the North Harrow Showroom was situated. In the period after that, Mr Doyle, who did not agree with the outcome of the Claimant's grievance, behaved towards the Claimant in a way that made her working life very difficult.

25. On 20 November 2019, the Claimant raised a grievance against Mr Doyle. She alleged threatening and abusive behaviour by him and victimisation. She linked his behaviour with her January 2019 grievance and another matter concerning a foot canvasser. She said that she was being isolated, ignored and treated less favourably than everyone else and that Mr Doyle was making her working life difficult, with a view to getting her to leave her employment.

26. In her grievance letter, the Claimant asked that Mr Smith not be involved in the process as he would be named in it. The Claimant had reported matters to Mr

Smith and said he had done nothing about them to the point that she now did not know what to do.

27. Following submission of her grievance, the Claimant raised further concerns about Mr Smith. Allegations were made that some late-night phone calls had been made from the Showroom, which Mr Smith investigated.

28. On 8 January 2020, the Claimant's grievance was heard by Mr Philip Goult (Head of Conservatory Development (Sales)) who gave evidence to the Tribunal. He was supported by Sara Ledgard from HR. Mr Goult considered the grievance by reference to two points: first, Mr Doyle's behaviour; and secondly the allegation that the Claimant had reported her complaints about Mr Doyle to Mr Smith and he had not dealt with them, so that matters were gradually getting worse.

29. There was a dispute as to whether the Claimant raised the GDPR matter at that hearing. It was not recorded in the notes. We concluded that towards the conclusion of the hearing it was raised by the Claimant, as she told us in her evidence, but that it was not discussed in any detail.

30. Following the grievance meeting, Mr Goult and Ms Ledgard carried out various enquiries. They interviewed Mr Smith, Mr Doyle and four others.

31. The outcome of the Claimant's grievance was sent to her by a letter dated 12 March 2020. Her grievance against Mr Doyle was upheld in part and the matter she raised about Mr Smith not dealing with matters was upheld in full. Mr Goult's conclusion was that the Harrow Showroom was a poor working environment due to Mr Doyle's behaviour. Mr Goult concluded that Mr Doyle used unacceptable language and behaviour in the workplace.

32. The Claimant appealed by a detailed letter of 16 March 2020. She said that the investigation had not been dealt with fairly, impartially and was pre-judged. She said that Mr Smith had not respected the confidentiality of her grievance. Her letter included allegations that certain matters she had raised had not been dealt with.

33. Because of the Covid pandemic it was agreed with the Claimant that the appeal would be postponed for the time being pending the lifting of travel restrictions and isolation requirements. The Claimant was offered the option of her appeal being dealt with by phone, video or on paper but she rejected this.

34. In consequence of the impact of the Covid-19 pandemic on their business, the Respondent underwent a redundancy exercise. In order to reduce overheads and protect the interests of the business, the Respondent decided to amalgamate all of the Respondent's 67 showrooms/office locations into new trading centres based in 31 of the Respondent's existing sites.

35. On 24 August 2020, Showroom Administrators (and some other showroom-based employees) were requested to attend a conference call on 26 August 2020. During that call (in which the Claimant participated), they were read an

announcement prepared by the Respondent's Chief Commercial Officer, Mr Martin Rutter (who gave evidence to the Tribunal). They were told that their role would no longer exist. Showrooms/Offices or Garden Centres that remained open would become Trade Centres with a new role of "Trading Centre Co-ordinator" (TCCO) being created (one in each Trading Centre). Showroom Administrators could apply for the TCCO roles and were given a list of the proposed Trading Centres, which included North Harrow.

36. On the same day, Showroom Administrators, including the Claimant, were each sent a letter, advising them that they were at risk of redundancy. The letter enclosed the Respondent's redundancy policy, its guide to consultation, a copy of the current vacancy list showing the TCCO roles (amongst others), an application form for the TCCO role and the job description for the role. In the letter, the Claimant was invited to an individual consultation meeting on 1 September 2022, which she attended.

37. The meeting was chaired by Mr Smith, supported by the Respondent's Senior HR Manager, Mrs Elaine Porter, who gave evidence to the Tribunal. At the meeting, the Claimant confirmed that she understood the announcement made on 26 August. She said that she wished to apply for the TCCO role at Harrow. She was not interested in other locations. Mrs Porter advised her to include all her relevant skills on her application form.

38. The Claimant made the application promptly and it was assessed by Mr Smith on 3 September. Mr Smith marked the Claimant 16/20 and recommended that she move to the interview stage. He noted on the form as follows: "there had been a huge breakdown in relationship with the Harrow office which has been discussed. With some aspects of this I was very unhappy personally and found that some things said were simply untrue which does give me cause for concern going forward, as some of these were aimed at myself directly, I would like to point out that this wasn't taken into account when scoring [the Claimant] for this role".

39. On 8 September 2020, the Claimant and one other candidate were interviewed for the job. Mr Smith conducted the interview supported by Ms Ledgard. The other candidate was successful: she scored 45/60 as against the Claimant's score of 40/60. We did not hear evidence from Mr Smith who may have been able to give us some further assistance on the difference between the scores. We were told that Mr Smith had left the Respondent company.

40. The documents recording the interviews of the two applicants and their scores appeared on their face to reflect answers given by the candidates. Notes were made of the Claimant's answers and scores applied. There was a dispute about whether the word "potter" was used by the Claimant, in describing what she would do. The Claimant denied this and denied knowing what the word "potter" meant. We did not accept this and concluded that it was likely, in this respect, that the note was accurate. It was unlikely that Ms Ledgard would have recorded this word if it was not said.

41. The successful candidate had worked as a Showroom Administrator for some 20 years in a north London showroom and the Claimant, fairly in her evidence, made it clear that she was not positively suggesting that she (the Claimant) was a stronger candidate than the successful candidate.

42. On 17 September 2020, the Claimant was invited to a second consultation meeting. That meeting took place on 21 September 2020.

43. At the meeting, conducted by Mr Smith with Ms Ledgard supporting him, the Claimant was told that she had been unsuccessful in her application. Rather than simply being told that there were two candidates interviewed and the other candidate had achieved a higher score, Mr Smith simply stated that there were "other applicants" and the Claimant had been unsuccessful. He said that she had scored 40/60. Some positive things were said but it was also said that "she had not fully grasped the purpose of the new role". The Claimant felt demoralised by what was said and it put her off applying for other TCCO roles.

44. The Claimant had not applied for any other roles with the Respondent. At the meeting, Mr Smith asked the Claimant if she was interested in positions at Milton Keynes or Luton. The Claimant made it clear that she did not drive and those positions were too far away. They were not realistic alternatives for her.

45. The Claimant received notice of termination of her employment by a letter dated 23 September 2020. The letter was headed "Notice of termination of employment on Grounds of Redundancy". Her last day of employment was stated to be 16 November 2020. It was stated in the letter that there were no suitable vacancies and the Respondent was not in a position to offer any alternative post.

46. On 25 September 2020, the Claimant appealed against the decision to dismiss her. She said that her outstanding grievance, in which Adam Smith was named, was a factor in her not being appointed to the TCCO role.

47. The appeal was heard by Mr Jack Wigley on 6 October 2020, supported by Mrs Porter. The Claimant's November 2019 grievance, documents relevant to its outcome and the conclusion were not made available to Mr Wigley. The appeal hearing was very short: 10 to 15 minutes. At the appeal, the Claimant made it clear that she understood that Mr Smith would conduct the selection process for the TCCO role and had not objected to that. She may not have used the precise words that she had "no problem" with Mr Smith conducting the selection process but the gist was clear.

48. Mr Wigley spoke to Mr Smith after the appeal hearing. Mr Smith said that the Claimant did not get the role because she did not interview as well as the other candidate. He denied that he had taken into account the past grievance but had interviewed on the basis of a clean slate.

49. On 22 October 2020, Mr Wigley informed the Claimant that her appeal was not upheld. He confirmed that the original decision to terminate her employment on

grounds of redundancy was upheld. She was also told in that letter that the TCCO role was no longer going ahead.

50. In October and due to the ongoing drive for business efficiency and costs savings, the decision was taken to withdraw the TCCO role. Only the Trading Centres with Garden Centres would go ahead with TCCOs, save that in the case of two non-Garden Centre premises there were issues with the lease which meant the premises remained open. The Harrow Showroom was one of the showrooms which would not reopen and the successful candidate for that job also had her employment terminated on grounds of redundancy.

51. The Respondent decided to withdraw the TCCO role on 16 October 2020 and the announcement was made on 19 October. The Claimant complained that she was not informed of this. The reason was that she was not one of those who had been successful in applying for a TCCO role.

52. On 27 October 2020, the Claimant was told that her date of leaving was changed to 30 October 2020 and pay in lieu of notice would be paid accordingly for the remainder of her 8 week notice period. Her effective date of termination was therefore 30 October 2020.

53. The Claimant's appeal against the decision of Mr Goult was in due course dealt with in considerable detail in a letter dated 21 December 2020 from Mrs Porter after the Claimant's employment had come to an end. As this was after the end of the employment, we did not consider that this impacted on our decision at all. We note only that it was a very thorough response.

Law

54. Pursuant to section 103A of the ERA: "*an employee who is dismissed shall be regarded…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".*

55. Under section 98 of the ERA it is for the employer to make out a potentially fair reason for dismissal. In this case, the Respondent relied on redundancy as the reason for dismissal, which is a potentially fair reason within section 98(2)(c) of the ERA. If the reason is made out, the Tribunal must consider under section 98(4) whether the dismissal is fair or unfair *"in accordance with equity and the substantial merits of the case",* having regard to the reason for dismissal and whether the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissal.

56. The definition of redundancy is found in section 139 of the ERA. Nothing turned on that definition as the Claimant accepted that there was a genuine redundancy situation at the time of her dismissal.

57. We reminded ourselves that we must not substitute our view for that of the employer and that we must approach all matters of substance and procedure on a range of reasonable responses basis.

Conclusion

58. The effective date of termination of the Claimant's employment was initially 16 November 2020 but that was then varied to 30 October 2020 with payment in lieu of any outstanding notice pay. We considered the reason for dismissal as at the effective date of termination of the Claimant's employment. It is for the Respondent to make out that reason and that it is a potentially fair reason within s98 of the ERA.

59. In examining the reason for the Claimant's dismissal, we considered whether the decision to terminate the Claimant's employment was for the reason stated by the Respondent (redundancy) or whether it was because the Claimant had made a protected disclosure or for some other reason connected with the Claimant's November 2019 grievance.

60. That exercise involved some examination of Mr Smith's conduct of the interview process.

61. Mr Goult had upheld the Claimant's complaint against Mr Smith not dealing with the matters the Claimant had raised about Mr Doyle. It was also clear from the note on the application assessment form that Mr Smith felt unhappy personally about the matters raised against him, some of which he thought were untrue. Mr Smith could have allowed some bad feeling towards the Claimant to influence his decision-making.

62. While this was possible, Mr Smith did address this possibility expressly. He volunteered on the assessment form and then made it clear when questioned that he was not influenced by his personal feelings in relation to the Claimant and her grievance. He did allow the Claimant's application for the TCCO position to progress through to the interview stage. The notes of the interview are not dissimilar to those of the other candidate and the scores awarded are not dissimilar to those of the other candidate. They do not on their face suggest an unfair process.

63. Any link with the protected disclosure is extremely tenuous and not supported by any evidence. In the context of a clear and undisputed redundancy process, we did not find that the protected disclosure was the reason or principal reason for dismissal.

64. The reason for dismissal, we found, was redundancy. That was the reason stated in the letter of 23 September 2020 and nothing that happened subsequently affected that position.

65. We did not conclude that the selection of the other candidate for the TCCO position in preference to the Claimant was tainted by any impartiality. The Respondent's conclusion that the other candidate genuinely performed better at interview was a conclusion it could reasonably draw.

66. In terms of process more generally, we considered whether a fair process was followed. The area where there could be criticism of the Respondent was the

failure to provide any details of the grievance to the appeal manager, Mr Wigley when the issue of Mr Smith's impartiality was live. The provision of details of the grievance to Mr Wigley would have provided him with some better material to examine whether there was any substance in what was said about Mr Smith. However, we weighed this against the fact that the Claimant acknowledged that Mr Smith was the manager who would interview her for the TCCO post and made no complaint at the time and that Mr Smith was spoken to by Mr Wigly in investigating whether Mr Smith approached the selection process impartially. Applying a range of reasonable responses test and looking at the procedure as a whole, we did not consider that the procedure followed was outside the range of how a reasonable employer might act.

67. In relation to alternative employment, the Claimant was sent the vacancy list on a regular basis. She had limitations on how far she could travel because she did not have a car. She did not apply for any job other than the TCCO job at Harrow. Before her employment terminated and in the week commencing 26 October 2020, a TCCO vacancy at Twickenham was advertised on the vacancy list that was sent to the Claimant. She did not apply for the job and the Respondent did not take any positive steps beyond sending her the vacancy list. The Claimant says that the Respondent should have done more but we considered that what the Respondent did was reasonable. The fact that she had made a protected disclosure did not mean that she should be afforded any sort of preferential treatment in the search for alternative work as she suggested but, in any event, there was no suitable job for her save possibly for the Twickenham job of which she was aware but for which she did not apply.

68. The Claimant's claim for unfair dismissal is therefore dismissed.

Employment Judge McNeill QC

Dated: 3 October 2022

Sent to the parties on:

13/10/2022

For the Tribunal: