EMPLOYMENT TRIBUNALS

Claimant: Ms R Hall

Respondents: 1. Lingwood Security Management Limited
2. Mr K Blakemore

Heard at: Manchester **On:** 30 and 31 August 2022 and 1 September 2022

Before: Employment Judge McDonald
Mrs C Bowman
Dr B Tirohl

REPRESENTATION:

Claimant: Mr S Martins (Employment Law Consultant)
Respondents: Ms A Jervis (Advocate)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim against the first respondent that she was dismissed because she made a protected disclosure and that that dismissal was an automatically unfair dismissal in breach of section 103A of the Employment Rights Act 1996 ("the ERA") fails and is dismissed.

2. The claimant's claim against the first respondent that she was dismissed for asserting a statutory right (namely the right in s.44(1)(c) ERA) and that that dismissal was automatically unfair under s.104 of the ERA fails and is dismissed.

3. The claimant's claim against the first and second respondents that in breach of section 47B of the ERA she was subjected to detriments for making a protected disclosure fails and is dismissed.

4. The claimant's claim against the second respondent was brought out of time. It was reasonably practicable for the claim to have been brought in time.

ORDER

The Tribunal makes an order pursuant to rule 50 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that there should be omitted or deleted from any document entered on the Register or which otherwise forms part of the public record any details identifying the residential or work location of the claimant. This order was made to protect the claimant's rights and that of her family under Article 3 and Article 8 of the European Convention on Human Rights.

REASONS

Introduction

1. By a claim form dated 31 October 2020 the claimant brought claims of automatically unfair dismissal against the first respondent. The claimant says that she was dismissed for whistleblowing or for asserting a statutory right, namely being subjected to a detriment for raising health and safety concerns. The claimant also claims that the first and second respondents subjected her to detriments because of whistleblowing. She also says the first respondent failed to provide her with a statement of particulars of employment.

2. The claimant was represented by Mr Martins, an Employment Law Consultant. The respondents were represented by Ms A Jarvis, an Advocate.

3. The parties had prepared a final hearing bundle. The index ran from page 1 to page 147. However, there were additional documents at pages 148-149 (the claimant's grievance/appeal against dismissal). In addition at the start of the hearing the claimant produced further documents. They were two paper timesheets from May and June 2020 (pages 150-151) and documents relevant to remedy (pages 152-157). Those documents included sick notes for the claimant and a letter relating to Universal Credit. The respondent did not object to those documents being added to the bundle.

4. During the evidence, the respondent also adduced a further document, namely a series of screenshots of the respondent's electronic timesheet. The claimant did not object to the admission of the document. That document was added as pages 158-161.

Evidence

5. We heard evidence from four witnesses. There was a written witness statement for each and all four gave oral evidence. On the first day of the hearing, we heard from the claimant and from her witness, Miss Karen Pettifer ("Miss Pettifer").

6. On the afternoon of the first day we heard from Heather Corcoran ("Mrs Corcoran") who was the first respondent's HR and Personnel Manager at the relevant time. We also started hearing the evidence of the second respondent, Kevin Blakemore. He was employed by the first respondent at the relevant time in

the role of NHS Contract Manager. He was also the claimant's line manager. To make this judgment easier to follow we refer to him as “Mr Blakemore” rather than as the “second respondent”. We refer to the first respondent as “the respondent”.

7. There was not enough time to finish Mr Blakemore’s evidence on the afternoon of the first day. We finished hearing his evidence on the afternoon of the second day. We had delayed the start of the hearing to take into account Mr Blakemore having worked a nightshift and having to travel from Morecambe to attend the Tribunal on the second day. We heard the remainder of Mr Blakemore’s evidence on the afternoon of the second day.

8. While it is obviously a matter for a party to decide which witnesses to call, the Tribunal were surprised that the respondent did not call evidence from Ms Smith or any senior managers in relation to the alleged failure to hold an appeal hearing or otherwise respond to the claimant’s appeal against dismissal.

9. After the close of evidence on the second day we heard submissions from Ms Jervis and Mr Martins. Both had provided written submissions which they supplemented with oral submission.

10. We deliberated on the morning of the third day and gave oral judgment in the afternoon of the third day. Mr Martins requested our reasons in writing. As is usual practice, these written reasons reflect the oral reasons given but are not word for word the same.

Anonymity/Privacy

11. There was no application at the outset of the hearing for an anonymity order. However, during the course of the claimant's evidence she made it clear that she had significant concerns about where she and her family were located being a matter of public record. The Tribunal explained that the Tribunal’s Judgment would be a matter of public record.

12. The claimant confirmed that she was not seeking for her name or that of the respondent to be anonymised but did want to ensure that there was no possibility of third parties being able to identify the area in which she was living and working. She gave evidence, which we accept, that she had in the past been subject to violence and stalking and that disclosure of her location gave rise to a significant risk of harm to her and her family. The respondent did not object to an order anonymising the claimant’s work and home location.

13. The starting point when considering any application for anonymity/privacy is that hearings and Judgments should be public. Article 6 and Article 10 of the European Convention on Human Rights are clearly engaged. In addition, rule 50(2) of the Employment Tribunal Rules 2013 requires the Tribunal to give the principle of open justice and the Convention right to freedom of expression, full weight. Those rights, however, have to be balanced against the claimant’s Article 3 and Article 8 rights. In addition, her family have Article 8 rights. Having heard evidence from the claimant we are satisfied that both those Articles are clearly engaged in this case.

14. The claimant confirmed that there was no need to anonymise either her name or the respondent’s name in this case. The respondent is a nationwide organisation

and therefore including its name in the Judgment will not narrow down the location at which the claimant worked.

15. Taking into account the evidence we heard; the lack of any objection from the respondent; and the need to balance the principle of open justice against the need to protect the claimant's rights and those of her family, we decided that the appropriate order to make was an order that there should be omitted or deleted from any documents entered on the Register or which otherwise forms part of the public record any details identifying the residential or work location of the claimant.

The issues in the case

16. The issues in the case had been identified in the Annex to Employment Judge Ross' Case Management Order from the hearing on 19 April 2021. At that point, the claimant had not specified which statutory right she said she had asserted which had led to her dismissal. Having taken instructions Mr Martins confirmed that the relevant statutory right was the right under section 44(1)(c) of the Employment Rights Act 1996 ("the ERA") not to be subjected to any detriment where, being an employee where there were no employee representatives or safety committees, she had brought to her employer's attention by reasonable means circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

17. Mr Martins also confirmed that the claimant was still pursuing a claim that the respondent had failed to provide her with employment particulars as required by section 1 of the ERA.

18. When it came to the claim against Mr Blakemore, the second respondent, there was a time limit issue. That is because early conciliation against him was not started until 14 September 2020. That meant that any detriments which took place before 15 June 2020 were potentially out of time. That included any detriments up to and including the date f dismissal on the 12 June 2020. The Tribunal would need to decide:

(1) Whether the detriments were "part of a series of similar acts or failures" (section 48(3)(a) of the ERA), and if so whether the claim was brought within three months of the last of those acts; or

(2) Whether the claim was brought within such further period as the Tribunal considers reasonable if the Tribunal is satisfied it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

19. We think it also important to say what we are <u>not</u> deciding in this case. The claimant did not have the 2 years' continuous service required to bring a claim of "ordinary" unfair dismissal. Had she done so, we have no hesitation in saying that her dismissal would have been unfair. She was dismissed without any semblance of a fair disciplinary procedure being followed.

20. However, we are not deciding a case of ordinary unfair dismissal. For the claimant's unfair dismissal case to succeed, she must satisfy us that the reason or principal reason for her dismissal was that she blew the whistle or asserted a breach

of a statutory right. If she cannot do so, her unfair dismissal claim must fail regardless of how unfairly her employer acted in dismissing her in the way it did.

Findings of Fact

Credibility

21. We found the claimant to be a sincere witness and her evidence to be reliable. We found Miss Pettifer's evidence to be reliable so far as it went but of limited relevance to the matters we needed to decide. Even allowing for the passage of time since the events with which the case was concerned, we found Mr Blakemore to be a deeply unsatisfactory witness. He began his evidence by making significant alterations to the evidence in his witness statement. In cross examination his evidence was extremely evasive, vague and contradictory. We did not find his evidence reliable and where there is a conflict between his version of events and the claimant's, in general we prefer her evidence. We found Mrs Corcoran's evidence to be vague and generalised.

Background facts and events up to 11 June 2020

22. Turning then to our findings of fact. The claimant was employed by the respondent as a Security Officer. She worked for it from 14 March to 17 October 2019. She then re-joined the first respondent on 19 December 2019. She was dismissed without notice on 12 June 2020. That means that (even if both her periods of employment were continuous) she would not have the two years' continuous service required to claim "ordinary" unfair dismissal.

23. We find that the claimant was given and signed a contract of employment when she first joined the respondent in March 2019 (pp.62-64). However, she was not given a new contract or a statement of terms of employment when she re-joined the respondent in December 2019. Although the claimant's second start date of 19 December 2019 had been written into the version of the contract at p.62 by Mrs Corcoran, we find that version of the contract was never issued to the claimant in that form.

24. The claimant was a remote worker in the sense that she was based at NHS hospitals but managed by a central Control Office. That Control Office allocated shifts to her and was her primary contact point.

25. Mr Blakemore joined the respondent on 1 April 2020. He was therefore the claimant's manager for some 2½ months before he dismissed her. Although Mr Blakemore visited the 6 sites for which the respondent had NHS contracts, he had not met the claimant face to face before the Tribunal hearing. Mr Blakemore suggested that he had spoken to the claimant on more than one occasion, but we prefer the claimant's evidence that he had only done so on one occasion, to shout at her for not ending her shift on the ward she had been allocated to.

26. Mr Blakemore's evidence was that the claimant's performance in terms of her duties were satisfactory. However, he said that there were several issues with her conduct. These included failing to turn up for shifts allocated to her; failing to confirm her shifts with Control; always submitting her timesheets late; and smoking on hospital grounds where that was clearly not allowed. He also said that he had

been told by 3 other staff members that the claimant had been making derogatory remarks about her employer to staff at the hospital at which she was based. It was alleged that she had said the respondent was “shit” and that management were “a fucking joke” and gave no support. Mr Blakemore gave no details of when this had happened and was not willing to name the alleged witnesses.

27. In his cross-examination evidence Mr Blakemore said that each of these incidents in themselves amounted to gross misconduct and a “10” in terms of a 1-10 scale of seriousness. He was not able to convincingly explain, however, how the incidents referred to fitted within the examples of gross misconduct given in section E of the respondent’s disciplinary procedure (p.96), other than suggesting that not turning up for shifts amounted to “breach of health and safety rules endangering the lives of employees or other persons”. He also suggested that bringing the company into disrepute would be an example of gross misconduct. That was not set out in the policy but we accept the list at E is not exhaustive. We find that the conduct described (smoking on non-smoking premises (b), failure to follow rules (h)) would fall at most within the examples of “misconduct” in section C of the respondent’s disciplinary policy.

28. The tabular summary of the disciplinary procedure at F of the Disciplinary Policy (p.96) says that the sanction for a first gross misconduct offence will be “dismissal”. For a first act of misconduct it will be a written warning; followed by a final written warning; followed by dismissal. paragraph F(2)provides that the respondent “retains the discretion in respect of the disciplinary procedure to take into account your length of service and to vary the procedures accordingly”.

29. Mr Blakemore accepted that he had not taken any action in relation to any of the alleged misconduct by the claimant prior to 12 June 2020. The only exception was an email sent to all staff (rather than the claimant specifically) about smoking on NHS premises. His explanation for his inaction in his evidence was that he thought that matters with the claimant could be “turned around”. We did not find that evidence at all convincing. There was no suggestion by Mr Blakemore that he had taken any steps to even start to address these matters with the claimant or even to take advice from Mrs Corcoran as the personnel manager about how to do so.

30. We prefer the claimant’s case and find these incidents did not happen. As we have said, we found the claimant’s evidence more reliable than Mr Blakemore’s. In relation this specific matter, he gave no specific dates for any of the alleged events. There was no documentary evidence, e.g., Control Room call logs, produced to back up Mr Blakemore’s version of events. We find it implausible that he would not have taken any action in relation to matters which he saw as a series of acts of gross misconduct if they had actually occurred.

31. We find that prior to the 11 June 2020 the position was that it was “not in [Mr Blakemore’s mind” to dismiss the claimant. That was his cross-examination evidence. The incident which triggered the claimant's dismissal was therefore the email exchange on 11 June 2020.

<u>Events on 11-12 June 2020</u>

32. By way of context, we find that Mr Blakemore had introduced an electronic timesheet system. It was something he had created based on a template software

programme and something he had used at his previous employer. He had recorded a video demo of how to use it which was emailed to all staff at some point prior to 11 June 2020. There was no evidence that by 11 June 2020 the respondent had told staff that the use of electronic (rather than paper) timesheets was mandatory. Mr Blakemore could not remember whether he had said so in his email sending the demo video. It is clear that paper systems were still being used in May and on 8 June 2020 because we saw examples of those in the Bundle (pages 150 and 151). On balance, we find that the respondent had not, as at 11 June 2020, mandated the use of electronic timesheets only.

33. The claimant's evidence, which we accept, was that on the 11 June 2020 she had found it difficult to fill in the electronic timesheet on her phone and to get them signed by the client. She therefore emailed Mr Blakemore about this (page 127). She explained that she had sent a paper timesheet in because the app did not work on her phone like the demo in Mr Blakemore's emailed video said it did. She said that she had tried to call on 10 June, but Mr Blakemore was out of the office. Mr Blakemore's evidence was that he was contactable 24/7 and there was no log of a missed call from the claimant. No call logs were included in the Bundle. We prefer the claimant's evidence that she tried to call Mr Blakemore on 10 June 2020. That is consistent with what she says in her email on 11 June 2020.

34. Mr Blakemore's response to the claimant's email was to email her back to tell her to ask a colleague to do it on their phone when she was on shift that night because paper timesheets would not be accepted. The claimant responded (as she accepted in cross examination, sarcastically), "well that's a very professional attitude". Mr Blakemore in turn responded in a manner which he accepted in cross examination evidence was not professional, saying "who do you think you're talking to?" (p.126).

35. We find that the claimant had very particular and personal concerns about disclosure of her personal information. That was because she had been in the past subject to personal violence and stalking. That meant that she was understandably concerned about personal information being leaked or shared with others which might in turn end up in the hands of third parties or in the public domain. She was concerned that as soon as she entered personal data such as her email address on a colleague's phone, that phone would "capture" that data. In evidence she told us that the electronic timesheet required her to enter her National Insurance number. The version produced to us by way of screen shots did not require that. On this point we prefer the respondent's case that the form did not require the claimant to input her national insurance number.

36. There were two further email responses from the claimant on 11 June (both on p.126). The first was an email saying that she would have expected a more helpful response as, "putting my personal details into a colleague's phone is not something I'm comfortable with". She went on to say that she was not the only person having issues with the app and suggested that more needed to be done to get it to work correctly. She repeated that she had contacted the office the previous day hoping to speak to Mr Blakemore but he was not available. She said that if Mr Blakemore thought that her previous email was abrupt, that was because being out on the workplace on a nightshift when management are not available does little to inspire confidence.

37. The claimant then sent a further email to Mr Blakemore (seemingly in response to his "who do you think you're talking to" email). She said that for the record she was talking to him and that "the attitude in your email stinks of disdain and contempt. For a security worker to say put your work info into someone else's phone is the most ridiculous thing I've heard. Recommending security workers disclose personal info onto some Joe Bloggs phone does not endear the company to clients if their own staff can't organise their timesheets". She also referred to a "threat to not pay for shifts already done will be enquired about by my solicitor if needs be". It is not clear to us when that threat was made unless she was referring to Mr Blakemore saying the paper timesheets would not be accepted.

38. The claimant sent that email on 11 June at 7:45pm. At 7:52pm Mr Blakemore responded saying, "Stop emailing please. You have been taken off shift as a result of your bad attitude and you will hear further from me tomorrow".

39. At 8:12am the following morning Mr Blakemore sent the claimant an email telling her that the she had been dismissed with immediate effect. He referred to "our emails dated 12 June 2020" which we find was a mistake and should have referred to the email exchange on 11 June. He said that the reasons given for dismissal were "not following company procedure, rudeness, threats and bringing the company into disrepute". He said that the company retained discretion in respect of a disciplinary to take into account length of service and to vary the procedures accordingly. We accept that the respondent's disciplinary procedure does include that provision. The dismissal letter made no reference to an appeal.

40. The claimant sent an email to Loretta Smith of the respondent's HR on 17 June 2020 setting out her "Dismissal complaint". In that the claimant raised the fact she had not been issued with a contract or company handbook; that she had been dismissed without any due process; that entering her details into a colleague's phone was a breach of Data Protection rules; that there was inadequate supervision on shifts; that she had not received training; that she tried to follow company procedures but the company's technology did not work; that she was not being rude to Mr Blakemore.

41. On 18 June, Ms Smith forwarded the email and attachment to Mr Blakemore and asked to discuss it (p.116). She also sent an acknowledging email to the claimant (p.118).

42. Mr Blakemore did not respond and there is no evidence that Ms Smith chased him up.

43. Having heard nothing further, the claimant chased Ms Smith on 28 August 2020 by email. She told Ms Smith that she had taken the matter to ACAS and the respondent would be "hearing from my lawyer" (p.120). Ms Smith referred the matter to Mrs Corcoran noting the claimant was "not with us for long" (p.119)

44. Mrs Corcoran replied to the claimant the same day to apologise for the lack of response and say she was looking into matters. She agreed to come back to the claimant by close of play on 3 September 2020 (p.117).

45. On 2 September Mr Blakemore emailed Mrs Corcoran a series of bullet points headed "Points about Rebecca Hall". We heard no evidence about what preceded

that email. On balance, it seems likely that there was contact between Mrs Corcoran or Ms Smith and Mr Blakemore to trigger it. The list of bullet points included: always failing to turn up for shifts; dropping shifts at the last moment; smoked on site and had complaints from other staff; being rude over email to her manager; manager never had a call from her; she never answered to confirm shifts; timesheets always late.(p.129).

46. Before Mrs Corcoran replied to the claimant, the claimant emailed on 2 September 2020 to say she had taken the matter to ACAS given the "bogus excuse" given for her dismissal and the respondent's lack of response. (p.122).

47. Mrs Corcoran responded shortly afterwards to deny that the reasons given were bogus and that the respondent had the right to vary its dismissal procedure in accordance with length of service which meant there was no requirement for the claimant to be given a disciplinary hearing prior to her dismissal. She said she would relay the facts to ACAS when they got in touch.

48. In terms of other relevant findings of fact, we find that neither Mr Blakemore nor Mrs Corcoran were familiar with or had received any training on the respondent's whistleblowing policy (p.92).

Time Limits findings

49. Early conciliation in relation to Mr Blakemore was initiated with ACAS on 14 September 2020. That is more than 3 months after the dismissal in this case. Unless there was an act of detriment relating to the failure to hold an appeal post-dismissal which formed part of a continuing act, the claim against him would be out of time. We therefore needed to make findings of fact relevant to whether it was reasonably practicable for the claimant to present her claim against Mr Blakemore in time.

50. We find that early conciliation was initiated against Mr Blakemore on 14 September 2020 by or on the advice of Mr Martins. We find that by 28 August 2020 the claimant had already been in touch with ACAS and that she was able to initiate Early Conciliation in relation to the respondent by 4 September 2020. We find that she was aware of ACAS Early Conciliation by that date. Furthermore, her email of 28 August 2020 to Mrs Corcoran refers to the respondent "hearing from my lawyer" and her email of 2 September refers to her "taking this to ACAS".

51. Mr Martins suggested that the claimant's ill-health prevented her from initiating early conciliation in relation to Mr Blakemore earlier than she did. We do not find the evidence supports that. The fit notes in the Bundle related to 2021 rather than the relevant period. The email correspondence between the claimant and Mrs Corcoran at the end of August/beginning of September 2020 show the claimant able to engage with and progress matters.

Relevant Law

Protected Disclosures ("Whistleblowing")

52. Protected disclosures are governed by Part IVA of the ERA of which the relevant sections are as follows:-

> **"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…[or]**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered..."**

53. The Employment Appeal Tribunal ("EAT") summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17**:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

54. **Cavendish** should not be understood to introduce into s.43B(1) a rigid dichotomy between "information" on the one hand and "allegations" on the other. In The question in each case is whether a particular statement or disclosure is a " disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]" . However, in order for a statement or disclosure to be a qualifying disclosure, it has to have a " sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection 43B(1) ". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the Tribunal in light of all the facts of the case (**Kilraine** quoted by the EAT in **Simpson v Cantor Fitzgerald Europe (UKEAT/0016/18/DA)).**

55. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong or formed for the wrong reasons.

56. In **Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837** the Court of Appeal approved a suggestion from counsel that the following factors would

normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

57. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

> "… **while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

Detriment for making a Public Interest Disclosure

58. If a protected disclosure has been made, the right not to be subjected to a detriment by the worker's employer appears in Section 47B(1) which reads as follows:

> **"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."**

59. Section 47B(1A) provides that:

> **"A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—**
>
> **(a)by another worker of W's employer in the course of that other worker's employment"**

60. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

61. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".

62. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> **(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.**
>
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

63. The time limit provision appears in section 48(3). A complaint presented more than three months after the act or failure to act is out of time unless it formed part of a series of similar acts or failures ending less than three months before presentation, failing which the claimant has to show that it was not reasonably practicable for him to have presented the claim within time and that it was presented within a further reasonable period.

64. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal). The court approved the statement in **Bodha v Hampshire Area Health Authority [1982] ICR 200** that the existence of a pending internal appeal does not of itself justify a finding that it was not reasonably practicable to bring a claim.

65. Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal.

66. The fact an internal appeal process is continuing and even where that internal process is delayed for a reason is not in itself a sufficient reason to justify a finding that it was not reasonably practicable to present a complaint within the statutory time period (**Palmer v Southend on Sea Borough Council [1984] 1 WLR 1129).**

67. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Unfair Dismissal

"Whistleblowing" and unfair dismissal

68. Section 103A of the ERA deals with protected disclosures and reads as follows:-

> **"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".**

69. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

70. That requires the Tribunal to make a finding about who took the decision to dismiss.

71. In **Ross v Eddie Stobart Ltd [UKEAT/0068/13/RN)** the EAT confirmed that the principle in **Smith v Hayle Town Council** remains good law. The burden of proving the 'whistleblowing' reason for dismissal under s.103A Employment Rights Act 1996 lies on the employee where they have insufficient continuous service to bring a claim

Dismissal for asserting a statutory right – s.104

72. Section 104 of the ERA provides that:

> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—**
>
> **(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**
>
> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right**.

73. By s.104(4), so far as is relevant to this case, a "relevant statutory right" means any right conferred by the ERA for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal. S.44(1)(c) is such a statutory right. So far as relevant to this case, that subsection provides that:

> "**44 Health and safety cases.**
>
> **(1) An employee 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—**
>
> **(c)being an employee at a place where—**
>
> **(i)there was no such [health and safety] representative or safety committee, or**

> **(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.**"

74. The questions for the tribunal were whether the employee had in good faith made an allegation of a type covered by s.104 and whether that was the principal reason for dismissal, **Mennell v Newell & Wright (Transport Contractors) Ltd [1997] I.C.R. 1039, [1997] 7 WLUK 257**. In **Spaceman v ISS Mediclean [2019] I.C.R. 687** the EAT confirmed that the starting point had to be the language of s.104. Read naturally, s.104(1)(b) required an allegation by the employee that there had been an infringement of a statutory right. An allegation that there might be a future breach was insufficient.

75. Although Mr Martins submitted that a breach of GDPR was a "relevant statutory right" it does not appear to us that it falls within the definition in s.104(4).

Requirement to provide written statement of particulars of employment

76. Section 1 of the ERA requires an employer to give a worker a written statement of particulars of employment not later than the beginning of the employment. S.1(3) provides that the statement shall include particulars of the name of the employer, and worker, the date when employment began and (in the case of a statement given to an employee) the date when their period of continuous employment began.

77. Where an employer fails to comply with that requirement, s.38 of the Employment Act 2002 states:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5….**
>
> **(3) If in the case of proceedings to which this section applies—**
> **(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and**
> **(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …,**
> **the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.**
>
> **(4) In subsections (2) and (3)—**
> **(a) references to the minimum amount are to an amount equal to two weeks' pay, and**
> **(b) references to the higher amount are to an amount equal to four weeks' pay.**
>
> **(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."**

78. The right to an award under s.38 is not a free-standing right and an award can only be made if the claimant succeeds with a claim of the kind listed in Schedule 5.

79. A tribunal cannot make an award under s.38 if the required particulars are provided before proceedings are begun even if not provided within the timescale required by s.1 of ERA (**Govdata Ltd v Denton 2019 ICR D8, EAT**).

Conclusions

80. Our conclusions are as follows:

Public Interest Disclosure Detriment Claim (Whistleblowing)

Protected Disclosures

1. Did the claimant make a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

(1) What did the claimant say, when and to whom? The claimant says she informed her manager, Mr Blakemore, that she had concerns about entering her personal details onto a colleague's phone because she was a female and because of concerns about GDPR.

81. Mr Martins confirmed that the disclosures relied on were in the emails of 11 June 2020 between the claimant and Mr Blakemore. We find those emails do not refer to the claimant having concerns about entering personal details onto a colleague's phone because she was female, nor does she say in terms that is because of concerns about GDPR. At its highest, what she did say over her 2 emails to Mr Blakemore at 18:28 and 19:45 on 11 June 2020 was that "putting my personal details into a colleague's phone is not something I am comfortable with" (18:28) and "for a security worker to say put your work info into someone else's phone is the most ridiculous thing I've heard. Recommending security workers disclose personal info onto some Joe Bloggs phone does not endear the company to clients if their own staff can't organise their timesheets" (19:45). Those statements were made in the context of the claimant saying other people had problems with the electronic timesheet app and that more work was needed to make it worked correctly.

2. Did the claimant disclose information in that disclosure?

82. We remind ourselves that to be a qualifying disclosure there has to be a "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection 43B(1) ". In this case the claimant's case is that the disclosure tended to show a breach of a legal obligation (i.e. GDPR) and that the health and safety of an individual had been, was or was likely to be endangered.

83. Of the statements made by the claimant in the emails, the first is, we find, an expression of personal opinion, i.e. that the claimant herself was not comfortable with putting personal details into a colleagues' phone. There is no disclosure of information. The claimant did not, for example, explain why she was not comfortable, e.g. that it was because the leaking of her personal information was likely to endanger her health and safety or her family's by making her location known to someone that might want to do them harm. She also makes no specific reference even in general terms to GDPR or data protection issues.

84. The second statement "recommending security workers…" comes closer to disclosing information of the required specificity. It refers to "disclosing personal info" which is terminology one would associate with data protection issues. However, it gives no specific information about why using someone else's phone would tend to show a breach of legal obligation. There is no specific information to make clear why it would be likely to lead to endangering someone's health and safety. There is no information about why it might tend to show a breach of GDPR or data protection rules. The claimant explained to us that the concern was that the colleague's phone would automatically capture the information she inputted onto the timesheet form, including her email address. She did not include that information in her email to Mr Blakemore. In the absence of specificity of information, we find that the claimant's emails did not amount to a disclosure of "information" of the required specificity and was not therefore a protected disclosure.

3. Did she believe the disclosure of information was made in the public interest?

85. We have decided there was no disclosure of information. That means that the claims of unfair dismissal and detriment based on such a disclosure fail. As such it is not strictly necessary for us to deal with the remaining issues. We set out our conclusions on the other issues relatively briefly in case we are wrong about issue 2.

86. We find that the claimant did have a belief that what she said in her emails was in the public interest as it related to GDPR. We do not find that she believed it was in the public interest in relation to the Health and Safety. That issue we find was personal to her. However, her second disclosure email to Mr Blakemore refers to the position of security workers generally not just herself. It also refers to the clients and staff. We remind ourselves that as **Nurmohamed** makes clear, the fact that an employee is motivated to make a disclosure by personal reasons is not inconsistent with their holding a belief that a disclosure was in the public interest. We find that to be the case here. The claimant had her personal concerns, but her email refers to security guards more generally.

4. Was that belief reasonable?

87. We find it was reasonable for the claimant to hold that belief in relation to a potential breach of legal obligations under GDPR. Looking at the factors in **Nurmohamed**, we find the numbers of those affected (the respondent has 200 staff) and the identity of the alleged wrongdoer (a contractor providing significant and sensitive services to the NHS involving vulnerable people) we find it was reasonable for the claimant to hold the belief that disclosure was in the public interest.

5. Did she believe it tended to show that:

(1) a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or

(2) the health or safety of any individual had been, was being or was likely to be endangered?

88. We find that the claimant did subjectively believe both that the disclosure tended to show that the respondent was likely to fail to comply with a legal obligation,

i.e. its obligations to protect personal data under GDPR and that her health and safety was likely to be endangered.

89. As to whether it was reasonable for her to hold that belief, we find that it was not reasonable for her to believe that the disclosure as made tended to show either of those two things. That is because the disclosure as made was not sufficiently specific to tend to show a breach either of GDPR or to show endangerment of Health and Safety.

90. Dealing briefly with a point made by Ms Jervis. She suggested that because it was the claimant, rather than Mr Blakemore or the respondent who was going to insert data on a colleague's phone, it could not be said that the respondent was failing to comply or likely to fail to comply with a legal obligation. We do not accept that. We find that where an employer is instructing an employee to do something which breaches GDPR within the course of their employment, that employee is entitled to reasonably believe that the employer is failing or likely to fail to comply with its legal obligations even if it is the employee who does the physical act which constitutes the breach. We do not find that would have prevented the claimant reasonably believing that the disclosure tended to show a breach of the legal obligation.

6. If the claimant made a qualifying disclosure, was it protected because it was made to her employer?

91. Had we found that the disclosure otherwise satisfied the requirements of the definition we would have found it was a qualifying disclosure because it was made to her employer.

S.103 Unfair Dismissal Claim

7. Was the claimant dismissed because she made a protected disclosure?

92. This claim must fail because we have found that there was no protected disclosure.

93. Had we been required to decide this point we would have found that the claimant was not dismissed for making a protected disclosure. We find that the principal reason why Mr Blakemore dismissed the claimant was that he was impatient with her and resented her challenging him and criticising the electronic timesheet app which he had created and sought to implement. That seems to us consistent with the fact that Mr Blakemore had already lost his temper with the claimant (the "who do you think you are talking to" remark) before she had raised any concerns about putting her personal information on a colleague's phone. We find that it was not the content of the subsequent emails relating to her personal information which influenced Mr Blakemore's actions. It was the claimant's continuing to contact him and her personal criticism of Mr Blakemore's email tone. We find that is consistent with his last email suspending the claimant saying, "stop emailing me". It is also consistent with the reasons given the following morning for her dismissal, which refer to her rudeness.

94. In reaching that decision we bear in mind the advice in the case of **Kong v Gulf International Bank (UK) Ltd 2022 EWCA Civ 941, CA,** that whether conduct is properly separable from a protected disclosure is not subject to a threshold question of whether it amounts to 'wholly unreasonable behaviour or serious misconduct'. The issue which a Tribunal must decide is the reason for dismissal. The fact that conduct is in the context of a disclosure does not prevent it being a potentially fair (or non automatically unfair) reason for dismissal. Had we found there was a protected disclosure, we would have found that the claimant had not satisfied us that it was the reason or principal reason for dismissal

Public Interest Disclosure Detriment Claim

The claimant relies on the same disclosure of information (see above).

8. What are the facts in relation to the detriments relied upon by the claimant? The claimant relies on:

(1) The respondent's failure to follow a fair and full disciplinary procedure;

(2) The respondent's failure to hold a disciplinary hearing;

(3) The respondent's failure to hold an appeal hearing;

(4) The respondent denying her shifts prior to her dismissal.

9. Did those facts at 8.1-8.4 occur?

95. We do find that the facts occurred.

10. If yes do they amount to a detriment(s)?

96. We do find they all amount to detriments. We do not accept the submission made by Ms Jervis that they amounted to an unjustified sense of grievance. It seems to us that being dismissed in the absence of a disciplinary hearing and procedure and then being denied an appeal is clearly a detriment. Equally being denied a shift on 11 June is a detriment, and a very tangible one involving loss of pay

11. If yes, were the detriment(s) done on the ground that the claimant made a protected disclosure, having regard to the burden of proof?

97. We have said that there was no protected disclosure. Had there been one, we find that the disclosure did not play a material part in the decisions taken by Mr Blakemore, i.e. 8.1, 8.2 and 8.4. We have borne in mind the different test which applies when it comes to unfair dismissal. We are not asking what the principal reason was for his actions but whether any disclosure had a material, i.e. more than minor or trivial, influence on his decisions. We find it did not. We find that it was his impatience and anger at the claimant challenging him in a sarcastic way and then continuing to email him, together with her personal criticisms of him and the failings in his app, which led to his decisions.

98. When it comes to the appeal, Mr Martins confirmed that this was alleged to be an action on the part of Mr Blakemore (in delaying responding to Ms Smith) and of Ms Smith and Mrs Corcoran. In relation to Mr Blakemore, we find that the disclosure did not play a part in his delaying responding. We find he ignored the email because he did not think her had to deal with it and because he was not chased by Mrs Corcoran or Ms Smith. We find the disclosure was not a material influence on his action.

99. When it comes to Ms Smith and Mrs Corcoran we find the position is different. We remind ourselves that under s.48(2) of ERA it is for the employer to show the ground on which any act, or failure to act, was done. In this case, had the claimant satisfied us that she had made a disclosure and given we are satisfied there was a detriment in failing to allow the claimant an appeal, the onus would be on the respondent to show the ground on which it failed to grant the appeal. It was suggested this was due to pure oversight on Ms Smith's part. However, we heard no evidence from her. Mrs Corcoran was not able to comment because she was not involved until the end of August. Had we been required to decide the point we would have decided that the respondent had failed to discharge its burden of showing the reason for the failing to provide an appeal and the claim in relation to the appeal would have succeeded.

S.104 Automatically Unfair Dismissal

12. In the alternative, the claimant brings a claim that she was automatically unfairly dismissed for asserting a statutory right pursuant to section 104 Employment Rights Act 1996:

a. Was the claimant dismissed because she alleged that the employer had infringed a right of hers which was a relevant statutory right? The claimant relies on a conversation with Mr Blakemore, her manager, when she informed him that she had concerns about entering her personal details onto a colleague's phone because she was a female and because of concerns about GDPR. That is said to be an assertion of her statutory rights under s.44(1)(c), i.e. not to be subjected to a detriment for bringing to R's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety for the purposes of s.44(1)(c) ERA 1996? C asserts this was done to R2 in an email dated 11 June 2020.

(1) Did that conversation take place as alleged above?

(2) .If yes, did the claimant allege breach of a statutory right in that conversation?

100. We find there was no assertion of the statutory right in s.44(1)(c) ERA. The claimant did not say anywhere in her email of 11 June 2020 she had been subjected to a detriment for raising a health and safety concern. We have found that alleging a breach of GDPR was not a "relevant statutory rights" within s.104(4).This claim therefore fails.

(3) What is the relevant statutory right the claimant relies upon? The claimant's representative was unable to clearly articulate this other than to say it was "health and safety". The relevant statutory rights are set out at section 104(4) Employment Rights Act 1996.

(4) If the claimant has alleged that the employer has infringed a right of hers which was a relevant statutory right, was that the reason for dismissal?

101. The claimant did not assert a statutory right. By definition, the assertion of such a right was not the reason or principal reason for dismissal and her claim under s.104 ERA fails.

102. Turning then to the additional issues we identified at the start of this hearing.

Jurisdiction

1. **What is the relevant date for determining limitation?**

    a. **Does the failure to answer the claimant's appeal constitute a continuing act?**

2. **If the claim was submitted out of time against R2, was it reasonably practicable for it to have been submitted on time?**

3. **If not, was it submitted in such further period as is reasonable?**

103. Dealing with the time limit point, we find the last detriment to which Mr Blakemore subjected the claimant was her dismissal on 12 June 2020. We find that he did not submit the claimant to a detriment post dismissal. It was not his decision not to hold an appeal. What that means is that the claim against Mr Blakemore was out of time. The time limit expired on 11 September 2020. Early conciliation was not started until 14 September 2020, more than 3 months after the date of dismissal. That means that the claimant did not benefit from any extension of time under the early conciliation rules. Her claim was filed on 31 October 2020 and was therefore out of time. The onus is on the claimant to show that it was not reasonably practicable for the claim to have been brought in time. On the evidence we are not satisfied that that burden has been discharged.

104. We do not accept that the claimant was prevented by illness from progressing her case: the evidence in terms of the emails of 28 August and 2 September 2020 go against that. The only evidence relating to illness (the fit notes produced by the claimant at the start of the hearing) significantly postdate the relevant period. The claimant was also able to instigate early conciliation in relation to the respondent in time. Had we been required to do so we would have found that the claim against Mr Blakemore was out of time, in that it was reasonably practicable for it to have been brought within the usual time limit and it was not.

S.38 ERA 2002

4. **Has the Tribunal found in favour of the claimant but made no award to her in respect of the claim?**

5. **When the proceedings commenced was the Respondent in breach of his duty under section 1(1) ERA 1996 (to provide written statement of initial employment particulars or particulars of change?)**

6. **How much should be awarded?**

105. The issues here are whether or not the claimant was provided with a statement of particulars of employment as required by section 1(1) of the Employment Rights Act 1996. The first respondent did not suggest that the claimant was issued with fresh terms and conditions when she restarted employment on 19 December 2019. Instead, it was submitted that because her terms and conditions remained the same as they were during her first period of employment with the first respondent, s.1 was complied with by the provision of a contract of employment relating to that first period (signed by the claimant on 14 March 2019).

106. We reject that argument. We note that s.1(3) requires that the statement of particulars include the date on which employment began and on which continuous employment began. That requirement could not be complied with without the claimant being issued with a statement of particulars capturing her new start date on 19 December 2019. Mrs Corcoran adding the new start date to a copy of the first contract but not issuing it to the claimant was not sufficient. Had we found in favour of the claimant, therefore, we would have made an award under s.38 of the Employment Act 2002 on the basis that there had been a failure to comply withs.1 ERA. An award under s.38 can only be made if one of the claimant's other claims succeeded. They all failed so we do not make an award under s.38.

Summary

107. In Summary, all the claimant's claims fail and are dismissed.

108. The Tribunal wish to reiterate that this should not be seen in any way as the Tribunal endorsing the respondents' behaviour. The claimant was not treated fairly. The respondents acted throughout as though they were not bound by and could disregard any notion of fairness or good employment practice. We accept that the first respondent's disciplinary policy enabled it to vary its procedures to take into account matters such as length of service. We note that the respondent is a large organisation with 200 employees. It holds contracts with public bodies and its work involves dealing with vulnerable people and dealing with sensitive matters. The Tribunal is both surprised and disappointed that in this case that the first respondent, through its employee Mr Blakemore, decided to act in the way it did.

109. We are not in a position to find the claimant was unfairly dismissed because the legislation provides that that right only becomes available to employees after two years in ordinary circumstances. We would not wish the respondent to think, however, that the Tribunal takes anything other than a very dim view of its conduct in this matter. We are disappointed that the respondent's senior management have not taken the opportunity to attend or participate in the hearing, at the very least so that lessons could be learned from what happened in this case with a view (we would hope) to improving employment practices in future.

110. We note that the respondent engages Peninsula to provide support in relation to employment matters. There was an element, it seemed to us, of the managers in

this case simply deciding that they could abdicate responsibility for decisions because they had Peninsula to support them. It seems to us clear that there is a need for the respondent to review how managers take decisions about employee relation matters, and perhaps also a need to review what training such managers are provided with, both in relation to whistleblowing matters and in relation to dealing with disciplinary and conduct matters more generally.

111. As this is a case which is not brought under the Equality Act 2010 and one which in any event has failed, we cannot make a recommendation. The Tribunal would however hope that the observations we have made will be fed back to the first respondent and taken account of by its management.

Employment Judge McDonald
Date: 26 September 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
27 September 2022

FOR THE TRIBUNAL OFFICE

ANNEX
List of Issues

Public Interest Disclosure Detriment Claim (Whistleblowing)

Protected Disclosures

1. Did the claimant make a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

    (1) What did the claimant say, when and to whom? The claimant says she informed her manager, Mr Blakemore, that she had concerns about entering her personal details onto a colleague's phone because she was a female and because of concerns about GDPR.

2. Did the claimant disclose information in that disclosure?

3. Did she believe the disclosure of information was made in the public interest?

4. Was that belief reasonable?

5. Did she believe it tended to show that:

    (1) a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or

    (2) the health or safety of any individual had been, was being or was likely to be endangered?

6. If the claimant made a qualifying disclosure, was it protected because it was made to her employer?

Dismissal Claim

7. Was the claimant dismissed because she made a protected disclosure?

Public Interest Disclosure Detriment Claim

The claimant relies on the same disclosure of information (see above).

8. What are the facts in relation to the detriments relied upon by the claimant? The claimant relies on:

    (1) The respondent's failure to follow a fair and full disciplinary procedure;

    (2) The respondent's failure to hold a disciplinary hearing;

    (3) The respondent's failure to hold an appeal hearing;

    (4) The respondent denying her shifts prior to her dismissal.

9. Did those facts at 8.1-8.4 occur?

10. If yes do they amount to a detriment(s)?

11. If yes, were the detriment(s) done on the ground that the claimant made a protected disclosure, having regard to the burden of proof?

Automatically Unfair Dismissal

12. In the alternative, the claimant brings a claim that she was automatically unfairly dismissed for asserting a statutory right pursuant to section 104 Employment Rights Act 1996:

(1) Was the claimant dismissed because she alleged that the employer had infringed a right of hers which was a relevant statutory right? The claimant relies on a conversation with Mr Blakemore, her manager, when she informed him that she had concerns about entering her personal details onto a colleague's phone because she was a female and because of concerns about GDPR.

(2) Did that conversation take place as alleged above?

(3) If yes, did the claimant allege breach of a statutory right in that conversation?

(4) What is the relevant statutory right the claimant relies upon? The claimant's representative was unable to clearly articulate this other than to say it was "health and safety". The relevant statutory rights are set out at section 104(4) Employment Rights Act 1996.

(5) If the claimant has alleged that the employer has infringed a right of hers which was a relevant statutory right, was that the reason for dismissal?

Additional issues added at the start of the hearing:

JURISDICTION

1. What is the relevant date for determining limitation?
    a. Does the failure to answer the Claimant's appeal constitute a continuing act?
2. If the claim was submitted out of time against R2, was it reasonably practicable for it to have been submitted on time?
3. If not, was it submitted in such further period as is reasonable?

S.38 EA 2002

4. Has the tribunal found in favour of the Claimant but made no award to her in respect of the claim?

5. When the proceedings commenced was the Respondent in breach of his duty under section 1(1) ERA 1996 (to provide written statement of initial employment particulars or particulars of change?)

6. How much should be awarded?