EMPLOYMENT TRIBUNALS

Claimant: Julie Miller

Respondent: Tesco Stores Limited

Heard at: London South **On: 27, 28, 29, 30 and 31 March 2023 and in chambers on 24 and 25 April 2023**

Before: Employment Judge Khalil sitting with members
Ms G Mitchell
Mr C Mardner

Appearances

For the claimant: in person
For the respondent: Mr Nicholls, Counsel

RESERVED JUDGMENT

***Unanimous* decision:**

The claimant's claim for Unfair Dismissal under S.94/98 Employment Rights Act 1996 is not well founded and is dismissed.

The claimant's claim for Unfair Dismissal under S.103A Employment Rights Act 1996 is not well founded and is dismissed.

The claimant's claim for Detriment for making Protected Disclosures under S.43B/47B Employment Rights Act 1996 is not well founded and is dismissed.

The claimant's claim for Victimisation under S.27 The Equality Act 2010 is not well founded and is dismissed.

Reasons

Claims, appearances and documents

1. This was a claim for 'ordinary' unfair dismissal under S.98 Employment Rights Act 1996 ('ERA'), 'automatic' unfair dismissal under S.103A ERA, detriment for the making of protected disclosures under S. 47B ERA and victimisation under S.27 of The Equality Act 2010 ('EqA').

2. The claimant appeared in person. The respondent was represented by Mr Nicholls, Counsel.

3. The Tribunal had an E-Bundle running to 1228 pages. The respondent called Ms Alison Taylor, Employee Relations Partner, Ms Janine Purvis, Fresh Lead Manager (Burgess Hill), Mr Michael Germain, Store Manager (Hove), Mr Stuart Finch, Store Manager (Gillingham) and Ms Jessica Ryall, former People Partner (called under a Witness Order).

4. At a previous Preliminary Hearing, the Tribunal had determined the claimant was not a disabled person within the meaning of S.6 EqA at the material time (s).

5. The claimant had prepared 2 witness statements. One of the versions had a number of comments in the margin by what appeared to be the claimant's advisers. Following discussion with the claimant she confirmed she was not placing reliance on that statement. The other statement she did place reliance on had 6 pages but no cross reference to any documents in the Bundle.

6. The parties had agreed a list of issues.

7. The Tribunal informed the parties that the Bundle size was extremely disproportionate. To the extent that the documents might be relevant, the Tribunal would simply not be a position to read the documents which would take at least 3days to read. Thus, following discussion, it was agreed with the parties that the Tribunal would only read what it was directed to read and any document it was taken to in evidence. The respondent invited the Tribunal to read the documents referenced in the respondent's witness statements. The claimant did not ask the Tribunal to read any documents but said she would be referring to documents when cross examining the respondent's witnesses.

8. The Tribunal discussed the Order of evidence. Given there were claims with competing burdens of proof, there was no strict rule to apply. In

addition, as the claimant was a litigant in person, the respondent's counsel indicated that the claimant might prefer to cross examine first as it might be challenging for her to face cross examination over 1 to 1.5 days and then move straight into cross examination by her. Following discussion with the claimant she said he would prefer to cross examine first; she said she prepared her questions. Thus, it was agreed that the respondent would call its evidence first.

9. A Witness Order was also made to secure the attendance of Ms Jessica Ryall, whose evidence was considered at least potentially, if not actually relevant to the protected disclosures claim and who was no longer employed by the respondent. Efforts had been made for her evidence to be given voluntarily.

10. The Tribunal released the parties at 12.00pm on day 1 to undertake its reading. The evidence and submissions were completed at the end of day 5. The Tribunal reserved its Judgment for deliberation which took place over 2 subsequent days.

Relevant Findings of Fact

11. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

12. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and was taken to in the findings below but that does not mean it was not considered if it the Tribunal was taken to the document.

13. The respondent is a large well known retailer with approximately 3400 Stores in the UK and about 300,000 employees. It has various formats of its Stores, including Tesco Superstore, Tesco Extra, Tesco Express and Tesco Metro. It also operates a Distribution Centres.

14. The claimant was employed as a 'dot com' driver working in the Horsham Store immediately before her dismissal with effect from 30 July 2018. Her role involved delivering online ordered food and drink into customers' homes.

15. The claimant began working for the respondent on 1 September 1997. Thus, at the date of her dismissal she had 20 years' service.

16. The claimant had raised a number of grievances during her employment.

17. In March 2017, Ms Childs, the Group People Manager, heard the claimant's stage one grievance about the treatment of the claimant following her return to work following an operation (Carpal Tunnel Syndrome) and in relation to allegations of bullying. The grievance was upheld in relation to providing the claimant with temporary lighter rounds but was not upheld in relation to the bullying allegations. The outcome report was at page 493-497. It was recorded in this outcome that drivers had a choice about whether or not they wished to have their vans loaded, further that this was agreed locally. In addition, Ms Childs stated there was no cost saving in getting drivers to load as loaders were paid less.

18. The claimant appealed the outcome which was heard by Ms Taylor. The stage one grievance decision was upheld. Ms Taylor's outcome was dated 22 May 2017 (539 A to 539 E).

19. On 11 December 2017, a disciplinary hearing took place in relation to the claimant's alleged refusal to sign the corporate consent letter for drugs and alcohol testing. At the disciplinary hearing, the claimant did sign the form (pages 589, 615). Her main objection had been that the document did not have her name and date printed on the top. The document she signed had a box for her signature, her name in print and a date at the bottom. The claimant's name was written in manuscript at the top.

20. The claimant also raised a grievance to Mr Lee Laflain, Store Manager, Horsham Extra, on 4 December 2017, about Mr Addison in relation to being pressurised into signing this document. She said she considered this to be bullying and discrimination (page 585).

21. In or around March 2018, Shaun Collins, People Manager, Horsham Extra, was made redundant.

22. Following a meeting on 19 February 2018, on 9 March 2018, Ms Taylor also concluded a stage one grievance in relation alleged slanderous comments by Shaun Collins. The claimant had raised this grievance on 20 January 2018. The alleged comment was in connection with the claimant having her van loaded which he said her colleagues were not happy about. Mr Collins had said he had said 'sometimes if you are unhappy, it might be you'. Ms Taylor rejected the grievance (pages 651-656). It was also recorded in the outcome the resolution of the grievance against Mr Kevin Addison was meant to be resolved by means of a facilitated resolution.

23. The claimant appealed this outcome (pages 659-661) but then withdrew the grievance appeal at the hearing on 23 April 2018. This was heard my Ms Jenny Holman, Colleague Relations Partner. The claimant said there was no point in pursuing the appeal as Mr Collins was no longer employed (page 676).

24. The claimant wrote to Ms Jessica Ryall on 26 April 2018 (pages 677 – 678) requesting health and safety documents and referring to outstanding grievances dated 4 December 2017 and 10 March 2018 (which was a letter chasing the earlier letter of 4 December 2017). Ms Ryall had been the note taker at the appeal hearing on 23 April 2018. The letter also made reference to the Data Protection Act (regarding her earlier grievances being 'lost') and to drug-taking by a manager.

25. In relation to the claimant's request for health and safety documents in relation to risk assessments, control measures, manual handling and bronze training, Ms Ryall arranged a meeting with Mr Bolton, Regional Dot.Com Driver Trainer. There had been a brief reference to this at the appeal hearing on 23 April 2018, which Ms Holman had said was not part of her remit.

26. Ms Ryall also arranged a grievance hearing before Mr Warren Partridge, Store Manager, Portslade, in relation to the other matters referred to in the claimant's letter of 26 April 2018, which she interpreted as a grievance. An invitation letter dated 10 May 2018 was sent to the

claimant for a grievance Hearing to take place on 21 May 2018 (page 680).

27. A meeting between Mr Bolton and the claimant took place on 21 May 2018. Ms Ryall was in attendance. Following this meeting, a list of next steps was prepared by Ms Ryall (page 716). The summary was as follows:

- Incident involving a dog attack to be followed up – Mark Murrell
- Ensure Drivers are taking the correct break times – Mark Murrell
- Is there a specific risk assessment for Dot Com or just a generic one – Mark Bolton
- Pristine documentation provided to Julie – Mark Bolton
- Van steps to be cleaned weekly by contractor and checked weekly – Mark Murrell
- Any adjustment passports to be reviewed accordingly – Mark Murrell
- Investigate if there is any Dot Com documentation re control measures – Mark Bolton
- Drivers to load vans if they are happy to do so – if they are not, then the van will be loaded for them – Mark Murrell
- Procedures for accidents/incidents on customers property after being reported through the injury helpline - what does it look like? – Mark Bolton
- Meeting with store Manager to discuss other concerns – Helen Knight with Julie Miller

28. These actions were followed up and some marked with a tick (page 717). Ms Ryall's evidence (paragraph 17) that all of these actions were completed was not challenged by the claimant.

29. The claimant also had a grievance meeting with Mr Partridge on 21 May 2018. The claimant was provided with an outcome following this meeting on 11 June 2018. Mr Partridge dismissed the claimant's grievance regarding Mr Addison's alleged behaviour in an investigation meeting regarding the unsigned drug and alcohol consent form and Mr Addison's alleged behaviour in relation to a tray check during which the claimant found 2 oranges without barcodes. The investigation outcome report was at pages 781-782. The grievance was rejected.

30. The claimant wrote to Ms Ryall on 3 June 2018. In summary she complained about a manager having stolen from the company, who she said had also kept/used drugs on the premises, she complained that it was not a driver's job to load a van, she complained about the weight of the loads, she complained about the notes of a double dog attack in the respondent's records and she complained that her Carpal Tunnel Syndrome and injuries of other drivers needed to be reported under 'Riddor' and the Manual Handling Regulations 1992 (pages 762-764).

31. The claimant appealed Mr Partridge's grievance outcome to Mr Brian Message, Store Manager, Shoreham. The appeal hearing took place on 2 July 2018. The appeal was rejected (pages 861-862).

32. On 26 June 2018, Ms Purvis conducted investigation meetings with Mr Tom O'Donnell, Mr Peter Steenhoven and Mr Gary Tester. This followed receipt from these individuals of grievances against the claimant as follows:

- On 9 June Mr O'Donnell had submitted a written complaint that the claimant had said at a training session, in relation to feedback on a video which had been viewed at the session, that a person in the video 'could have spoken English'. The person in the video was of a different ethnicity to the claimant. He considered the comment highly offensive, adding that the English spoken in the video by the individual was perfect. In addition, he alleged that 6 months previously, the claimant had also made a homophobic remark (page 767)

- On 11 June, Peter Steenhoven made a statement similar to that of Mr O'Donnell about the video, saying that the comment ' He could have spoken in English' was made loud enough for him to hear as he was sitting in front of her. He too considered it to be offensive. He did not however make any reference to any previous homophobic comment. He added that the claimant had also been disruptive at the meeting and made it personal with comments to the trainer (page 769)

- Mr Steenhoven lodged a further grievance in relation to the claimant on 12 June. He said on 11 June 2018, the claimant had said to her

that the respondent was 'harassing us all'. He said he was not interested and said to the claimant 5 times that he did not wish to discuss this with her. In response he said the claimant said, twice, she "will have him". He said he felt harassed, bullied and threatened by this. He said his team leader had intervened and another work colleague had witnessed the incident too (pages 783-784)

- On 13 June 2018, Mr Loughlan O'Brien and Mr Ben Weaver made statements about the claimant being disruptive during a training session by ranting/raising repeatedly about an issue personal to her which they felt was not appropriate to raise in the session (pages 785-786),

- On 18 June 2018, Mr Tester submitted a statement in which he said that the claimant had referred to Mr Kevin Addison as having the word 'cunt' on a name badge. He said she did this by gesturing towards Mr Addison (page 794).

33. An anonymous complaint was received too but which was not taken further in the investigation by Ms Purvis. This statement casted doubt on whether the claimant's injury (for which she had lighter loads and the van was loaded) remained genuine and about how the claimant spoke to fellow drivers.

34. On 21 June 2018, Mr Addison arranged for these individuals to be interviewed by Ms Purvis. They were individuals in his team.

35. On 21 June 2018, Mr Mark Bolton, who facilitated the training session on 7 June 2018, emailed Ms Knight commenting on the disruptive nature of the claimant at the training session. He said she had arrived late, was rude and unhelpful, concentrating on 2 specific concerns of her own (rather than service issues), such that he had to address her in a forceful tone at the meeting. He said she was uncooperative and having done 4 sessions of this kind, no-one else had presented themselves in this way. He had even thought about ejecting her. Other than the claimant, he said it had been an absolute pleasure to un the sessions for an otherwise engaged, enthusiastic and interactive team (page 803).

36. In Ms Purvis's interview with Mr O'Donnell on 26 June 2018, he repeated the comment he had heard. He said the claimant looked around

for approval. In a break, he had spoken with Mr Steenhoven, who confirmed he had heard the comment. He said she did not shout, but it was loud enough to hear. He said he and Mr Steenhoven were near her. He said he had friends from different ethnicities, and this was too serious not to say anything. He said the claimant was aggressive in the meeting and always bringing it back to the safety situation about herself. He said she was aggressive with Mr Bolton in the meeting and used the opportunity to attack him. In response to a question about whether she could be classed as racist, he said yes as she was bigoted towards people who were different. He also referred at this meeting to the homophobic comment 6 months previously when he said she had referred to someone as a shirt lifter. He said he had asked if other drivers had heard the comment ('He could speak English') but other drivers had not heard it (pages 810-811).

37. In Ms Purvis's interview with Mr Steenhoven, he confirmed he heard the comment, he said it was said in normal tone (not in a loud voice), he definitely considered it racist and he was very offended. He said he put in a statement after speaking to Mr O'Donnelly who said we shouldn't tolerate it and should stand up to racism. He also said the claimant was late coming to the training, was disruptive at the training, that she brought up personal issues and he felt she had spoilt the training (pages 819-820).

38. In a second interview with Ms Purvis, Mr Steenhoven confirmed the altercation with the claimant whilst loading his van. He added she said "I'm going to have you, I'm going to kill you". He added that 'Gary' had intervened and told her to stop. There was reference to what appeared to be a previous incident when he had commented on the claimant having the lightest road which he had apologised for in response to which he said the claimant had said "I had a passport, doing it to wind Tesco's up". Mr Steenhoven added he was contemplating going to the police to make a complaint about the verbal abuse and threats (page 826).

39. In Ms Purvis's interview with Gary Tester, he said the claimant was moaning that people wore name badges apart from one 'cunt' gesturing to Mr Addison. He added that although they couldn't see him, they both knew he was there. He said her tone was aggressive. He said he had decided to make his statement because Mr Addison had asked him to. In relation to the incident with Mr Steenhoven, he said it felt like the

claimant was baiting him. He said he stepped in between them and she was saying "I'm going to get him and have him". He said the claimant had said that Mr Steenhoven had said she didn't know how to do her job. He said she was very aggressive. He added that Mr Steenhoven was shook up and worried by the incident. He had not himself heard anything the claimant had said about the driver in the video but he said the claimant had been disruptive at the meeting.

40. The claimant was invited to an investigation meeting by a letter dated 2 July 2018 (page 848).

41. At the investigation meeting the claimant denied referring using the phrase 'shirt lifter' and denied its relevance as the it related to someone who was no longer employed; she denied referring to Mr Addison as a 'cunt'; she denied she had said the driver in the video 'could have spoken English' – instead she said she had said he could have spoken 'better English'. In response to a question why two employees would say that she had said it in a racist way and would feel that, she said she had no idea why they would say or feel this. The claimant denied she had been disruptive at the training meeting and in relation to the incident/altercation with Mr Steenhoven, she said he had an issue with her because he has to load her vehicle. She also denied threatening Mr Steenhoven, saying it was his word against hers. The claimant queried whether she needed to raise a grievance against Helen Knight. It was explained that the complaints had been raised by other employees (pages 873-878).

42. The claimant was accompanied at the meeting by Mr Bailey, her union representative. Both signed the handwritten notes as being accurate.

43. Ms Purvis considered the claimant had a disciplinary case to answer and the claimant was invited to a disciplinary hearing by a letter dated 11 July 2018. The claimant was provided with the grievance statements and investigation notes in advance and was forewarned that dismissal was a possible outcome (page 905).

44. Mr Germain was appointed to chair the disciplinary hearing. He was the Store Manager at the Hove Store who had never worked at the Horsham Store.

45. The disciplinary hearing took place on 23 July 2018. The claimant was accompanied by Mr Bailey. The typed notes were at pages 950-959. The notes had been signed by the claimant and her representative.

46. At the hearing, the claimant maintained that she had not used the expression shirt lifter and as it was not relevant as it related to an ex-employee. She denied using the word cunt towards Mr Addison and said Mr Tester was lying about what she had said and that he had been prompted to do so by Mr Addison. The claimant said it was untrue that she had threatened Mr Steenhoven. She said he had said to the claimant she could not do her job, that he apologised to her about a previous incident, that he wanted to do her hours, being female had contributed to this and that Mr Addison had coerced Mr Steenhoven too. In relation to the alleged racist comment about the person speaking on the training video, the claimant said Mr O'Donnell and Mr Steenhoven had both been coerced by Mr Addison. In relation to being disruptive at the meeting, the claimant said she had been lied to about the start time (by Mr Addison) and that Mr Addison had also coerced Mr Bolton (the trainer) into submitting his email which complained about the claimant's conduct at the meeting. Mr bailey summarising for the claimant also stated that Mr O'Donnell and Mr Steenhoven's statements were not signed, that the 'shirt lifter' comment was 6 months ago and Mr Bolton had emailed his concerns 2 weeks after the training. The claimant also added that this all stemmed from the claimant putting in a complaint against another manager in 2012, from which time, Mr Addison had wanted her out.

47. At the end of the meeting, Mr Germain reserved his decision, pending further investigation. This further investigation was undertaken by Mr Paul Rayner, Fresh Lead Manager.

48. The following people were spoken to: Gary Tester, Michelle Whelan, Gary (anonymous), Neil Condre, Kevin Addison and Chloe Spriggs.

49. Ms Whelan said that at the training meeting, the claimant was embarrassing, and unprofessional, raised her voice and she had spoken over the trainer. She described the claimant as aggressive and intimidating (pages 1028-1029).

50. Mr Tester said that Mr Addison had been 'taken back' when he had confirmed what the claimant had referred to him as (cunt). He also said

the claimant was disruptive and asked inappropriate questions at the training session (pages 1022-1023).

51. 'Chris' (anonymous) said the claimant had said to Mr Steenhoven, during an altercation with him, "I will fucking have him, I will kill him". He said the claimant was aggressive and intimidating (page 1033).

52. Mr Condre said the claimant was disruptive at the training meeting, he had heard she might have said unacceptable comments, though he did not hear these himself and the claimant had come across as aggressive and she raised her voice (page 1037).

53. Mr Addison confirmed his conversation with Mr Tester when he had been told that the claimant had referred to him as a cunt. He confirmed he had asked Mr Tester to put in a statement after he had been told what the claimant had said. He said he was shocked someone would call him that. In relation to the training meeting, he said the claimant had been aggressive, intimidating and had raised her voice. He did not refer to any other specific (unacceptable) comments which he had heard the claimant make (pages 1041-1042).

54. Ms Spriggs said the claimant was disruptive and argumentative at the training meeting and had spoken in a tone that would not be used to talk to someone, that she had raised her voice and had also tried to gather support for a petition against Mr Addison about whether he had made any comments. Ms Spriggs said she refused to sign it 3 or 4 times (pages 1048-1049).

55. Following this investigation, a reconvened disciplinary hearing took place on 30 July 2018. The minutes were at pages 1054-1058 of the bundle. Mr Bailey accompanied the claimant. He said he was disappointed that the additional investigations had been of managers present at the training session, further that Mr Raynor had asked closed and leading questions. Following an adjournment, Mr Germain concluded that the claimant's use of the phrase 'shirt lifter' was inconclusive. The Tribunal found this was because of the passage of time since the comment being reported. Mr Germain concluded the claimant had been disruptive at the training session. Mr Germain concluded that the claimant had gestured towards her manager, Mr Addison, referring to him as a cunt. Mr Germain concluded the comment 'He could have

spoken English' was made by the claimant which had been heard by 2 employees who were both sufficiently offended such that they had raised a grievance about the comment being racist. Mr Germain also concluded that the claimant did say to Mr Steenhoven that she was going to 'have him' in her altercation with him. He thus concluded the claimant should be dismissed for gross misconduct.

56. In coming to his decision, Mr Germain said (in his witness statement) he had regard to the respondent's disciplinary policy (page 135) which includes:

- Harmful or offensive contact with another person or threatening to harm someone
- An act of harassment or bullying
- Serious verbal abuse of colleagues or managers
- A serious breach of acceptable behaviour

57. Mr Germain also had regard to the claimant's length of service but which he said did not mitigate against the claimant's behaviour and conduct. He said he also considered alternatives to dismissal but owing to a complete lack of remorse and a lack of self-awareness, he believed that her unacceptable behaviour was likely to be repeated if she remained employed.

58. Mr Germain also factored in that this was not a one-off incident, but multiple incidents with multiple complainants with a real risk of her behaviour continuing as the claimant was not prepared to make any concessions.

59. This evidence was unchallenged and was accepted by the Tribunal.

60. The dismissal outcome letter was at page 1070. The claimant was given a right of appeal. The claimant exercised her right of appeal by a letter dated 6 August 2018 (page 1074). The claimant alleged that Mer Germain had been one-sided and biased, that staff had been prompted to put in false statements. She said she had no choice but to take the matter to a Tribunal.

61. The appeal was heard by Mr Finch, the Gillingham Store Manager. It took place on 25 September 2018, having been rearranged to

accommodate the claimant's accompanying companion and to ensure the claimant had received the appeal pack. The claimant was accompanied by her union representative, Mr Kieron Murphy.

62. At the hearing the claimant confirmed her grounds of appeal (see above) adding that statements against her were unsigned, falsified and that this was a witch hunt by Mr Addison.

63. The hearing was adjourned by Mr Finch for a brief period because of the claimant's behaviour in interrupting Mr Finch. This was recorded in the minutes. These minutes were signed by both the claimant and her representative. In oral testimony, the claimant said she was being told to 'shut up' repeatedly by Mr Finch at this meeting. In fact she said this had happened repeatedly at the dismissal meeting too. Upon being questioned by the Tribunal, the claimant said this happened every 5 minutes. This had not been raised at the time or prior to this being said under cross examination. Nothing had been recorded in both sets of minutes signed by both the claimant and her union representatives. The Tribunal found this testimony remarkable and untrue.

64. Following the adjournment, Mr Finch summarised his understanding of the key assertions at the appeal hearing being that Mr Germain had fumbled through the meeting, that Mr Germain had not interviewed the other individuals himself, fellow drivers had not been interviewed, the colleagues were prompted, no probing questions were asked relating to Mr Addison and that Mr Germain didn't delve enough into the culture. These were agreed.

65. Mr Finch concluded that the use of post it notes was a matter of style, whilst there was confusion over the dates, the incidents did happen, he acknowledged that some statements were unsigned, but he was satisfied they were written by their authors who had also been interviewed. Mr Finch was also satisfied that enough people were interviewed to get a fair representation (about the training meeting). He acknowledged however that the questions could have been more consistent. Mr Finch also confirmed he was focused on the evidence before Mr Germain and whether he had a reasonable belief for the 3 incidents for which the claimant had been dismissed. In relation to the racial comment and the two corroborating statements, Mr Finch rejected that because they had discussed the matter between themselves that this was evidence of lying

(as alleged by the claimant). Mr Finch was also satisfied that the comment was not said loudly such that others might have heard it. Mr Finch also confirmed that the claimant had not been dismissed for a stand-alone allegation of disruptive behaviour. He also explained that he understood that Mr Germain had not upheld the allegation about the shirt lifter comment because of the six-month passage of time. Mr Finch noted that the allegations for which the claimant had been dismissed were all against statements from 2 people. Mr Finch accepted that some of the questioning could have been different.

66. Following an adjournment, Mr Finch upheld the decision to dismiss the claimant. Whilst he accepted there were some procedural issues, there was no evidence presented that the incidents did not happen. He concluded that Mr Germain had shown consideration in rejecting one allegation and not using another allegation, before concluding that 3 incidents did happen.

67. The appeal outcome was confirmed in a letter dated 26 September 2018 (page 1130).

68. The claimant had, on 12 July 2018, put in grievances against Ms Purvis, Ms Knight, Mr O'Donnell, Mr Steenhoven, Mr Gary Tester and Mr Bolton and on 16 July 2018 against Mr Addison (pages 906-912).

69. Ms Mclean, Colleague Relation Partner was appointed to consider these grievances.

70. The grievance against Mr Addison did not proceed as it was decided that the grievance was similar to that which had been previously raised and rejected.

71. The grievances against Mr O'Donnell, Mr Steenhoven, Mr Tester and Mr Bolton also did not proceed as these were considered to be part of the disciplinary investigation officer's process.

72. The grievances against Ms Knight and Ms Purvis - that Ms Knight had allowed her management team to accuse the claimant of things and to influence her colleagues in a witch hunt and that Ms Purvis had been unprofessional, influenced and not impartial - were considered and rejected. Ms Mclean interviewed the claimant on 22 July 2018 and Ms

Knight and Ms Purvis on 24 July 2018. The grievance outcome was at pages 1011 to 1013.

Applicable Law

Unfair Dismissal – S.98 (2) & (4) Employment Rights Act 1996 ('ERA')

73. The respondent relied on S.98 (2) (b) (conduct) in relation to its potentially fair reason for the claimant's dismissal. The burden to show the reason rested with the respondent.

74. Subject to showing a reason, the Tribunal needed to consider whether the dismissal was fair or unfair, having regard to the reason shown by the respondent, whether the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissal which question shall be determined in accordance with equity and the substantial merits of the case – S.98 (4) ERA. This is a neutral burden.

75. The test in a conduct case is as set out in the well-known case of ***BHS v Burchell 1978 IRLR 379***:

- that the respondent genuinely believed in the claimant's misconduct
- that belief was based on reasonable grounds
- that there was as much investigation as was reasonable.

76. Further, the Tribunal needed to be satisfied that the dismissal was within the range of reasonable responses. This does not entitle a Tribunal to substitute its view for that of the employer. The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure ***Sainsburys Supermarkets Ltd v Hitt EWCA Civ 1588.***

Protected Disclosure claims – S,43B/47B & S.103A ERA

77. Under S.103A ERA, an employee 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.

78. By virtue of S.47B ERA, a worker has the right not be subjected to a 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. In NHS Manchester v Fecitt and others 2012 IRLR 64, it was stated that the test is whether the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower".

79. A protected disclosure qualifying for protection is one made in accordance with S.43A (which refers to S.43 C to S.43H about the conveyance of a qualifying disclosure) and S.43B (which defines a qualifying disclosure).

80. S.43B ERA says:

Disclosures qualifying for protection:

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

81. S.43B ERA requires consideration of whether the claimant had a reasonable belief that the information disclosed is made in the public interest and tends to show one of the six matters listed above. The test is twofold: the subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed. The

objective element is that that belief must be reasonable. ***Chestertons Global Ltd v Nurmohammed 2018 ICR 731 CA and Babula v Waltham Forest College 2007 EWCA Civ 174.***

82. Pursuant to S.48 (2) ERA, the burden of proof in relation to the reason for the alleged detrimental treatment rests on the respondent. However, this is once a protected disclosure has been established and that the respondent has subjected the claimant to a detriment.

83. In relation to S.103A ERA, the burden of proof in relation to dismissal was addressed in ***Kuzel v Roche Products Ltd [2008] EWCA Civ 380,*** CA:

"*57…when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

84. There must be a disclosure of information. In ***Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT/ 0195/09***, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation.

It suggested that:

"The ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information." (Paragraph 24.)

85. In ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436***, the Court of Appeal rejected the suggestion that, in Cavendish, the EAT had identified the categories of "information" and "allegation" as mutually exclusive. The Court held that the wording of the legislation should not be glossed to introduce a rigid dichotomy between "information" on the one hand and "allegations" on the other. Sometimes a statement that could be characterised as an allegation would also constitute information and amount to a qualifying disclosure. However, not every statement involving an allegation would do so. It would depend on whether it had sufficient factual content and was sufficiently specific.

86. In ***Norbrook Laboratories (GB) Limited v Shaw [2014] ALL ER (D) 139*** it was said that linked complaints taken together could amount to a qualifying disclosure.

87. In ***Williams v Michelle Brown Am, UKEAT/0044/19/OO***, HHJ Auerbach said:

> "9. *It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paras (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*
>
> *10. Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute."*

Conclusions and analysis

The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and have been determined issue by issue. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

Did the claimant make a Protected Disclosure/do a Protected Act?

Protected Disclosure 1/Protected Act 1

88. The Tribunal rejected that the claimant made a protected disclosure or did a protected act in an oral conversation between the claimant and Mr Laflain in March 2016. The Tribunal concluded that there was no evidence before it at all about the fact or content of any such conversation, specifically or generally. No evidence was offered by the

claimant in her witness statement or in oral testimony or by reference to any written documentation, contemporaneous or otherwise. The Tribunal concluded that, essentially, this assertion had been abandoned.

Protected Disclosure 2/Protected Act 2

89. In the claimant's first claim form she had not ticked the box that her claim included a claim about protected disclosures (10.1). That would not of course be determinative of whether or not a claim form raises such a claim, particularly as the claimant was a litigant in person, but it has some relevance. Moreover however, there was no or inadequate detail/narrative about the nature or particulars of her claim. In Box 9 the claimant had referred to continuing bullying over 6 years and non-compliance of company policies and health and safety issues. That was the entire extent of her claim. There was no information/detail about any disclosure of information about any alleged wrong-doing or when or to whom. It was appropriate to apply ***Cavendish Munro Professional Risk Management Ltd v Geduld 2010 ICR 325*** – merely making an allegation or stating a position will not amount to disclosure of facts. This was not a case whereby a high threshold was being applied to what had been disclosed. The claim form was wholly unspecific. This was a bare allegation devoid of any factual content. In ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436,*** the Court of Appeal said 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 [43] (1)."*

90. There was nothing in the claim form by reference to the Equality Act or any protected characteristic under any section of S.27 Equality Act 2010. The disability discrimination box was not ticked or that the claimant had a disability. The claimant did not do a protected act.

Protected Disclosure 3/Protected Act 3

91. In relation to the claimant's appeal against the decision not to uphold her grievance against Mr Collins on 14 March 2018, the claimant did assert in point numbered 9, that rules are being broken with the health and safety of dot com staff. The claimant also referenced having her van

loaded (which she had said Mr Collins had referred to) 'as all vans should be loaded to health and safety rules'. This was in point 4 of her letter. Read together this was sufficient to amount to a disclosure of information. In analysing whether the claimant had a reasonable belief that this tended to show a breach of a legal obligation, the Tribunal rejected that the claimant's belief was a genuinely held belief and/or alternatively, was objectively reasonable. This was because in March 2017, one year earlier, in a first stage grievance outcome, the claimant had already been informed:

"*There is evidence that drivers have been spoken to ask their preference or if they would like to load their own vans. This is something agreed locally and appears to work for most of them. There is no cost saving to the store by not having them load vans, as driver hours are more expensive and the total number of hours required would be the same. Anyone who wants their van loaded can have this and this should be arranged so this is always met." (the Tribunal's emphasis)*

92. This outcome followed an investigation at the time. This outcome, was upheld on appeal and there was no interference with the above finding. In fact, a letter was referred to at appeal which was about/for drivers confirming they were happy to load their own vehicles – confirming the option/choice available.

93. In addition, the claimant's reasonable belief in this asserted and pleaded breach of a legal obligation was fundamentally undermined by the claimant's oral testimony during which she said her whistle blowing concerns were "100%" about alleged drug taking. She reaffirmed this when asked the question again and said categorically her case was absolutely about alleged drug taking (indeed both of her letters to Ms Ryall referred to drug-taking). However, this was *not* her pleaded case and neither had the claimant applied to amend her claim.

94. There was nothing in this letter by reference to the Equality Act or any protected characteristic under any section of S.27 Equality Act 2010. The claimant did not do a protected act.

Protected Disclosure 4/Protected Act 4

95. In relation to the claimant's letter to Ms Ryall dated 26 April 2018, this was a request for health and safety documents on risk assessments, control measures, manual handling and bronze training. There was also a reference to data protection and the use of drugs in the workplace – neither of these matters were part of the claimant's pleaded case. In paragraph 33 of the claimant's amended particulars of claim (page 60), the claimant referred to writing to Ms Ryall to see if the driver's role had changed to stipulate that drivers were supposed to load their vans.

96. A request for these documents was not a disclosure of information. It was a request for documents. If the Tribunal was wrong about that, for reasons given in paragraphs 91 to 93 above, the Tribunal concluded that the claimant's pleaded case was not a qualifying disclosure.

97. There was nothing in this letter by reference to the Equality Act or any protected characteristic under any section of S.27 Equality Act 2010. The claimant did not do a protected act.

Protected Disclosure 5/Protected Act 5

98. In relation to the claimant's letter to Ms Ryall of 3 June 2018, in paragraph 36 of the claimant's further and better particulars (page 60), the claimant had set out her pleaded protected disclosure/protected act. She said the workplace injuries suffered by herself and others should have been reported to the local authorities but had not. Further, she said she had reiterated the scope of drivers' roles and the lack of training of managers.

99. The claimant provided no information about which injuries of others had not been reported, which individuals these related to or any applicable dates, why/how these had been caused by their work or the reason why the claimant was saying these had not been reported. There was no evidence before the Tribunal about an accident report book or any evidence that this had been requested or that any such book was unreliable. The only reference was to the claimant's carpal tunnel syndrome, but no reference to when this had not been reported, by whom or why/how this had been caused by work.

100. The Tribunal concluded there was insufficient specificity and insufficient factual content for this to amount to a disclosure of information.

101. Similarly, there was insufficient specificity and insufficient factual content in relation to any alleged lack of training – which training, when and who was responsible.

102. Additionally, or alternatively, for reasons given in paragraph 93, the Tribunal concluded the claimant's pleaded case in relation to the foregoing, was not a qualifying disclosure.

103. In relation to the scope of drivers' roles, for reasons given in paragraphs 91 -93 above, the Tribunal concluded the claimant's pleaded case was not a qualifying disclosure.

104. There was nothing in this letter by reference to the Equality Act or any protected characteristic under any section of S.27 Equality Act 2010. Whilst there was reference to carpal tunnel syndrome, this was in the context of a alleged (albeit unparticularised) failure to report this (and alleged unspecified injuries of other drivers) to the Local authority, not as an allegation of less favourable or unfavourable treatment. The claimant did not do a protected act.

Protected Disclosure 6/Protected Act 6

105. In relation to the presentation of the claimant's second clam form on 3 August 2018, the Tribunal noted that the claimant had ticked a claim for Unfair Dismissal (she had by then been dismissed). In the narrative in box beneath 8.1 she had referred to defamation, slander, false statements, causing harm, being insulting and offensive, biased and bullying, harassment and intimidation. She had referred to harassment and intimidation in box 8.2 too as well as not following procedures. She added work caused injury before adding that management had been moved to hide this issue. There followed a date reference period from December 2012 and a list of 13 names.

106. The disability discrimination box was not ticked or that the claimant had a disability. Box 10.1 was ticked, that her claim included a claim about protected disclosures.

107. There were no details about which procedures had not been followed or in what way, when or by whom. There were no details about how, why or when work had caused her injury.

108. As such, The Tribunal concluded there was insufficient specificity and insufficient factual content for this to amount to a disclosure of information.

109. There was nothing in the claim form by reference to the Equality Act or any protected characteristic under any section of S.27 Equality Act 2010. The claimant did not do a protected act.

110. The Tribunal considered, although it was not argued or asserted, whether any of the alleged protected disclosures, if taken together in any combination, could amount to a protected disclosure in a 'composite' way. However, the Tribunal concluded that this was not made out. Alleged protected disclosure 1 failed because, evidentially, there was no assertion before the Tribunal. Taking protected disclosures 2 to 6 together (in any combination) did not make good a protected disclosure for reasons given in paragraphs 91-93 and paragraphs 99 to 101.

111. In the light of the foregoing conclusions, it was not necessary for the Tribunal to consider whether or not the claimant had a reasonable belief in the public interest of the disclosures.

Detriments

112. *Being moved to the clothing department in **July 2016*** – The claimant asserted this done on the ground that the claimant had done protected disclosure 1/protected act 1. The Tribunal has concluded there was no such protected disclosure/protected act – no conversation which formed the basis of protected disclosure 1/protected act 1 was found to have taken place. This claim for detriment thus fails.

113. In any event/in the alternative, the Tribunal felt bound to comment that the move to the clothing department was not, objectively, a detriment. In a meeting on 23 May 2016, the claimant herself said that moving to clothing was something she could do (page 223). In evidence, she said she was happy working in clothing saying it was "lovely" further that the respondent was "trying to look after me". Further that she should have "gone straight into clothing". This went completely against the grain of feeling unhappy or dissatisfied about being moved to work in clothing.

114. *Failure to review of the claimant's adjustment passport **3 months after 11 September 2017*** – the claimant asserted that she did not have a 3-month review of her passport (after the first one) which she says was on the ground of protected disclosure 1/protected act 1 and/or protected disclosure 2/protected act 2. For reasons already referred to above, any claim for detriment on the ground that the claimant had done protected disclosure 1/protected act 1, fails. Similarly, the Tribunal has concluded the claimant did not make/do protected disclosure 2/protected act 2 in the claim form presented on 12 April 2018.

115. Moreover/alternatively, the claim form was not served on the respondent until 2 August 2018 (page 3). The claimant's adjustment passport was dated 11 September 2017 (page 549) and reviewed on 24 June 2018. Any alleged failure to review sooner could not, obviously, be on the ground of a claim form which was not received until August 2018.

116. The claim for detriment thus fails.

117. *Being asked to sign a document on **3 December 2017** regarding drug testing for drivers* – the claimant said the document had no background information and was not addressed to the claimant. The claimant also complained about the manner in which it was presented to her. The claimant said this was on the ground of protected disclosure 2/protected act 2 and/or protected disclosure 3/protected act 3. For reasons already referred to above, any claim for detriment on the ground that the claimant had done protected disclosure 2/protected act 2, fails. Similarly, the Tribunal has concluded the claimant did not make/do protected disclosure 3/protected act 3.

118. Moreover/alternatively, this alleged detriment pre-dated both protected disclosures 2 and/or 3/protected acts 2 and/or 3. Thus, obviously, the alleged detriment could not be on the ground of matters arising later.

119. This claim for detriment thus fails.

120. *On **20 January 2018**, Mr Collins told the claimant that the dot com drivers were not happy with the claimant having her van loaded* – the claimant said this was done on the ground of protected disclosure 3/protected act 3 and/or protected disclosure 4/protected act 4. For reasons already referred to above, any claim for detriment on the ground that the claimant had done protected disclosure 3/protected act 3, fails. Similarly, the Tribunal has concluded the claimant did not make/do protected disclosure 4/protected act 4.

121. Moreover/alternatively, this alleged detriment pre-dated both protected disclosures 3 and/or 4/protected acts 3 and/or 4. Thus, obviously, the alleged detriment could not be on the ground of matters arising later.

122. This claim for detriment thus fails.

123. *On **11 June 2018**, the claimant's grievance against Mr Addison was not upheld and on **5 July 2018**, her grievance appeal was not upheld* – the claimant said this was done on the ground of protected disclosure 4 and/ or 5/protected act 4 and/or 5 (grievance outcome) and protected disclosure 5 and/or 6/protected act 5 and/or 6 (grievance appeal outcome). For reasons already referred to above, any claim for detriment on the ground that the claimant had done protected disclosure 4/protected act 4, fails. Similarly, the Tribunal has concluded the claimant did not make/do protected disclosure 5/protected act 5, or protected disclosure 6/protected act 6.

124. Additionally, or alternatively, for reasons given in paragraph 89, the Tribunal concluded that whilst these could amount to detriments, they could have nothing to do with the claimant's alleged pleaded protected disclosures/protected acts – the claimant said the concerns she had raised were 100% about drug-taking (indeed both of her letters to Ms Ryall referred to drug-taking). However, this was not her pleaded case.

125. Furthermore, the Tribunal had no evidence before it to suggest that either Mr Partridge or Mr Message were aware of the letters to Ms Ryall. Ms Ryall had said she had not made them aware and the claimant accepted in evidence at least in relation to Mr Partridge that he did not know about her letters to Ms Ryall. Those letters could not thus have influenced these decision makers in any respect at all.

126. In relation to the grievance appeal outcome (5 July 2018), this could not be on the ground of presentation of the second claim form dated 3 August 2018, sent to the respondent on 6 September 2018 (page 27), as both of these dates post-dated the asserted detriment.

127. These two claims for detriment thus fail.

128. *On **11 July 2018**, the claimant was invited to a disciplinary hearing to answer allegations of gross misconduct* – the claimant said this was done on the ground of protected disclosure 1 and/ or 3 and/or 4/protected act 1 and/or 3 and/or 4. For reasons already referred to above, any claim for detriment on the ground that the claimant had made/done any of these protected disclosures/protected acts fails as the Tribunal has concluded that the claimant did not make/do any of those protected disclosures/protected acts.

129. Additionally, or alternatively, for reasons given in paragraph 89, the Tribunal concluded that whilst this could amount to a detriment, it could have nothing to do with the claimant's alleged pleaded protected disclosures/protected acts – the claimant said the concerns she had raised were 100% about drug-taking. However, this was not her pleaded case.

130. Ms Purvis's evidence was also that she did know of any of these alleged protected disclosures/protected acts (paragraph 36.3 of her witness statement). This evidence was not challenged and there was no competing evidence before the Tribunal. Ms Purvis's investigation was a response to the serious written complaints/grievances which had been received which she was bound to investigate (and make a decision on). The claimant said under cross examination "I would do the same". That was a complete answer to the reason why the allegations against the claimant were investigated and subsequently invited to a disciplinary hearing.

131. This claim for detriment thus fails.

132. *On or around **2 August 2018**, the claimant received the outcome of her grievance dated 30 July 2018 which was not upheld* – the claimant says this was on the ground of all or any of her protected disclosures. All of the protected disclosures/protected acts have been found not to be protected disclosures/protected acts, so any claim for detriment on the ground of those must fail.

133. Additionally, or alternatively, it was not clear what (if any) grievance outcome was conveyed to the claimant on 2 August 2018 and what, if any, grievance dated 30 July 2018 this related to. Under cross examination, the claimant confirmed that this was about there being *no* outcome to her grievances against Ms Knight, Ms Purvis and Mr Addison. That was not factually correct as there were outcomes in relation to Ms Knight and Ms Purvis (pages 1011-1013) and in relation to Mr Addison, there was a decision on 19 July 2018 not to investigate/hear this grievance as it was similar to earlier grievances which had been investigated and found to be unfounded after investigation (page 920).

134. Additionally, or alternatively, for reasons given in paragraph 89, the Tribunal concluded that, whilst this could amount to a detriment, it could have nothing to do with the claimant's alleged pleaded protected disclosures/protected acts – the claimant said the concerns she had raised were 100% about drug-taking. However, this was not her pleaded case.

135. In addition, there was no evidence that Ms Maclean was aware of any of the earlier protected disclosures/protected acts or on what basis such that she could have been influenced by any of those at all.

136. Furthermore, protected disclosures/protected acts 2 and 6 post-dated the asserted detriment.

137. This claim for detriment, thus fails.

Unfair Dismissal – S.98 (2) & (4) ERA 1996

138. In assessing whether the respondent had a genuinely held belief in the claimant's misconduct, the Tribunal concluded that the respondent did hold such a belief. The case against the claimant had come to the respondent's attention by the raising of written complaints by 3 employees. The key decision makers at the dismissal and appeal stages had no prior involvement with the claimant and had nothing to do with any earlier incidents or matters. The claimant's conspiracy theory was as far-fetched as it could have been. The claimant had said all complainant had been propped up to make their statements which were false. The claimant had also asserted that because a manager had previously worked with another manager about whom the claimant had complained, that alone would be a disqualifying reason for that manager to be involved in any process relating to the claimant and would make that manager partial. The respondent was entitled to reject these assertions which had no evidential basis. Bizarrely, the claimant said during the Hearing that she believed both of her union representatives were also part of the conspiracy case (against her). She had not alleged this before but said she had believed this to be the case. The credibility and plausibility of these assertions were flatly rejected by the Tribunal. The Tribunal reminded itself that at both the dismissal and appeal hearings, the claimant had alleged she had been told to shut up frequently, throughout the meetings (every 5 minutes) at which meetings both her representatives had been present and which meeting notes both the claimant and the representatives had signed. This had also not previously been raised at all. The claimant's reliance at the Hearing on her complaints about alleged drug taking in the workplace as being the sole reason why the claimant was adversely treated had no pleaded foundation. The other significant problem with this underlying theme of the claimant, which dated back over 10 years, was that the manager who the claimant said was 'guilty' of such behaviour in the workplace was never charged or prosecuted – somebody else was prosecuted. Upon further probing, the claimant had no explanation why she maintained her view of the manager or why this manager moved store or that it had anything to do with drugs.

139. In assessing if the respondent had reasonable grounds to hold its belief in the claimant's misconduct, the Tribunal concluded that it did so. The Tribunal reached this conclusion with some ease. The case against the claimant involved multiple incidents which were all corroborated – there were 2 consistent accounts of the racial comments, there were 2 accounts of the incident relating to the claimant's reference to her

manager as a cunt and there 2 accounts of the altercation between the claimant and Mr Steenhoven. Other than an assertion of conspiracy, there was no evidence before the respondent that the individual complainants had been put up to making false statements regarding the claimant. The respondent was entitled to conclude that the complainants had given honest accounts. That the incidents happened/were reported in close date proximity or that Mr Addison had asked Mr Tester to make a statement of what he said the claimant had said about him, or that Mr Steenhoven and Mr O'Donnell had discussed the racial comment (first), was no basis to disqualify or dilute the respondent's reliance on those statements.

140. The Tribunal also concluded that the respondent carried out as much investigation into the matter as was reasonable. Each of the complainants were interviewed by Ms Purvis. At the dismissal stage, Mr Germain requested further investigation. The claimant raised multiple grievances around the time of his dismissal. The grievances against Ms Knight and Ms Purvis were independently investigated and rejected. The contextual background had some relevance, notably that an earlier grievance raised against Mr Addison had been heard and rejected arising from the claimant's objection to sign a drugs consent form because, whilst it had a signature and print your name sections, it was not addressed/personal to her. Mr Germain had not upheld 2 of the initial 5 allegations against the claimant and had properly been entitled to conclude the other allegations were made out.

141. Procedurally, the claimant knew the full extent of the case against her and had a full right of reply. She was accompanied at her meetings and was supported and advised by her union. The assertion about her union representatives being part of the conspiracy was only raised at the Hearing and which the Tribunal concluded was baseless.

142. The decision to dismiss the claimant was procedurally and substantively entirely within the range of reasonable responses and not one with which the Tribunal could interfere by some distance. It was open to the respondent to characterise the cumulative effect of the conduct as gross misconduct (the Tribunal was not satisfied that the respondent had concluded each incident to be stand alone incident of gross misconduct) - the claimant had referred to her manager as a cunt, she had threatened another employee and had made a racially offensive remark. The respondent had regard to the absence of any remorse and

self-awareness whatsoever and that there were multiple incidents. These were permissible reasons to take into account before reaching its decision.

Unfair Dismissal – S.103A ERA 1996

143. Having regard to the reasons for the conclusions reached above, the reason for the claimant's dismissal or principal reason, had nothing to do with the making of any protected disclosures.

144. The claimant did not make any protected disclosures.

145. Additionally, or alternatively, for reasons given in paragraph 89, the Tribunal concluded that the claimant's dismissal could have nothing to do with the claimant's alleged pleaded protected disclosures– the claimant said the concerns she had raised were 100% about drug-taking. However, this was not her pleaded case.

146. Additionally, or alternatively, the Tribunal has concluded that the respondent had a genuine belief, based on reasonable grounds having carried out a reasonable investigation, in the conduct (misconduct) of the claimant. It has discharged its burden as to the reason why it dismissed the claimant. There was no causal connection at all to any other reason.

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Employment Judge Khalil
26 May 2023

Sent to the parties on:

26 May 2023

For the Tribunal:

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