Case Number: 2207230/2021

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr J Sharp		**Global Support Services (UK) Ltd**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 3 JULY 2023

Introduction

1 The Respondent is a company which provides a range of security services including close protection officers, dog handlers, surveillance, drones and training to a range of clients throughout the UK. It seems that their directly-employed workforce number about 26, but they also operate through contractors.

2 The Claimant, Mr Jordan Sharp, was continuously employed by the Respondent from 26 August 2019 until 17 August 2021, in the role of Dog Handler. The employment ended with summary dismissal on the stated ground of gross misconduct.

3 By a claim form presented on 22 November 2021, the Claimant brought complaints of unfair dismissal, wrongful dismissal, sex discrimination, victimisation and denial of the right to be accompanied at a disciplinary hearing together with a claim for holiday pay. All elements of his case were resisted.

4 The case came before Employment Judge Tinnion in the form of preliminary hearings for case management on 4 May and 5 July 2022, the combined effect of which was that the Claimant was granted permission to amend the claim form to add a complaint of 'automatically' unfair dismissal on 'whistle-blowing' grounds, the dispute was clarified and a list of issues agreed, unremarkable directions were given and a final hearing was listed.

5 Following a postponement, the matter came before us on 26 June 2023 in the form of a final 'in-person' hearing to determine all issues of liability in respect of all claims and any remedy issues which might arise. Five days were allocated. The Claimant was ably represented by Mr Andrew Findlay-Stewart, a lay representative and a former employee of the Respondent. Dr S Chelvan, counsel, appeared for the Respondent.

6 We heard evidence and argument on liability over days one to four. On day five, following private deliberations, we delivered an oral judgment with reasons

dismissing the complaints of sex discrimination, victimisation and automatically unfair dismissal and upholding the remaining claims (one by consent).

7 These reasons are given in written form pursuant to a timely request in writing by the Claimant.

The Legal Framework

The Equality Act 2010 claims

Direct discrimination

8 Chapter 2 of the Act identifies the various forms of prohibited conduct. The first of these is direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

9 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

It is not in question that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.[1]

Victimisation

10 By the 2010 Act, s27, victimisation is defined thus:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
>
> **…**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

[1] See *eg Onu v Akwiwu* [2014] EWCA Civ 279 CA.

11 When considering whether a claimant has been subjected to particular treatment 'because' he or she has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

Protection against discrimination etc

12 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(a) by subjecting B to any other detriment.**

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

13 Employees enjoy parallel protection against victimisation under the 2010 Act, s39(4)(d).

'Whistle-blowing' protection

14 By the Employment Rights Act 1996 ('the 1996 Act'), s43B, it is stipulated that:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is 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 …**

15 Qualifying disclosures are protected if made in accordance with ss43C to 43H (see s43A). By s43C, it is provided that:

> **(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –**
>
> **(a) to his employer …**

16 The requirement for a disclosure of 'information' was considered by Slade J sitting in the EAT in *Cavendish Munro Professional Risk Management Ltd v Geduld* [2010] ICR 325. She equated 'information' with 'facts', observing that mere 'allegations' did not fall within the statutory protection. This analysis was qualified

in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, in which it was pointed out that the legislation posited no rigid dichotomy between facts and allegations and that 'information' may comprise both: a disclosure which makes an allegation will be protected provided that it has sufficient factual content and specificity.

17 The requirement for a reasonable belief that the disclosure is in the public interest was enacted by means of an amendment introduced by the Enterprise and Regulatory Reform Act 2013. Its effect was examined by the Court of Appeal in *Chesterton Global Ltd v Nurmohamed & Anor* [2017] EWCA Civ 979. Giving the leading judgment, Underhill LJ rejected the argument that a disclosure about a breach of an individual worker's contract of employment (or some other matter personal to him or her) could not fall within the statutory protection. In such a case the Tribunal must have regard to all the circumstances including the number of people whose interests the disclosure served, the nature of the interests affected and the extent to which they are affected by the disclosure, the nature of the alleged wrongdoing and the identity of the alleged wrongdoer.

18 Here, the 'whistle-blowing' complaint is based on the dismissal. A dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure (the 1996 Act, s103A)[2]. Reasonableness does not enter the reckoning. If the proscribed reason applies, the dismissal is unfair without more; if it does not, the claim under s103A fails, however unreasonable the employer's action may have been.

Denial of the right to be accompanied

19 The Employment Relations Act 1999 ('the 1999 Act') enacts by s10(2A) a general right for a worker to be accompanied at a disciplinary or grievance hearing by a companion of his or her choosing. By s10(1) the right applies where the worker is "invited to attend a disciplinary … hearing" and "reasonably requests" to be accompanied at the hearing.

20 By s13(4) of the 1999 Act, a "disciplinary hearing" is defined as a hearing which "could result" in a "formal warning", "the taking of some other action in respect of a worker by his employer", or the "confirmation of a warning issued or any other action taken".

21 By the 1999 Act, s11, the Tribunal has jurisdiction to consider a complaint by a worker that an employer has failed to comply with (among others) the duty under s10(2A). Where the Tribunal finds the complaint well-founded, it "shall" order the employer to pay to the worker compensation not exceeding two weeks' pay. The usual cap on a 'week's pay' applies.

Compensation for annual leave entitlement outstanding on termination

22 Under the Working Time Regulations 1998, regs 13-16, provision is made for employees and workers to enjoy certain rights relating to annual leave. These

[2] The protection against unfair dismissal sets a higher standard than that under s48(1), where the disclosure need be no more than a material influence behind the detrimental treatment (see above).

include rights to minimum paid annual leave and to compensation for annual leave accrued but unused at the date of termination.

23 It was common ground that the Claimant enjoyed contractual rights in respect of annual leave. It was also common ground that the Tribunal had jurisdiction to consider claims to enforce that right (by virtue of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994).[3]

The Claims and Issues

24 At the start of the hearing before us the Respondent conceded liability in respect of the wrongful dismissal claim.

25 The list of issues agreed in May 2022 is attached as an appendix to these reasons, amended to delete matters which had fallen away by the end of the hearing before us.

Oral Evidence and Documents

26 We heard oral evidence from the Claimant and, on behalf of the Respondent, Mr Daniel Mailly, CEO, Mr Dave Pitt, Specialist Services Director, Mr Kevin Wootton, Business Development Director and Ms Nikki Walker, a contractor at all relevant times engaged by the Respondent to carry out ED dog handling work.

27 We read statements in the names of the Claimant's two supporting witnesses, Mr Findlay-Stewart and Mr Kevin Harrison, a trade union official. Dr Chelvan elected not to cross-examine either.

28 In addition to the testimony of witnesses we read the documents to which we were referred in the bundle of over 560 pages, to which a few additions were made in the course of the hearing.

29 We also read Dr Chelvan's opening skeleton argument and the written closing submissions of both representatives.

The Facts

30 We reminded the parties more than once that the claims fell within a narrow compass. The facts essential to our decisions on the claims, either agreed or proved on a balance of probabilities, are the following.

The main narrative

31 The Claimant's work as a Dog Handler involved two distinct types of duties: general purpose ('GP') and explosives detection ('ED') work. The hourly rate for the latter was about double that of the former.

32 In early 2020 the Claimant started working on the Respondent's Google ED contract in central London. He was assigned a dog, Angel, one of a batch of five

[3] The limitations upon that jurisdiction are not relevant here.

acquired by Google for ED training, and required to keep and look after her.

33 Google's intention throughout was that there should be two ED teams (dog and handler) working alternate weeks at their sites. In the event, however, the Claimant's intended colleague failed his probationary period and left the Respondent. The result was that the Claimant had the contract to himself. Plans to replace the colleague were put on hold when, weeks after the Claimant's deployment, the first Covid-19 national lockdown started. Google also made it known that it did not wish the ED handler to be placed on furlough. Understandably, the Claimant was more than content with these developments, which meant that he was able to earn consistently at the ED rate. It would have been otherwise had a second ED handler been appointed, since he would have had to spend alternate weeks on other work, at least some of which would almost certainly have entailed GP duties.

34 Not surprisingly, these comfortable arrangements could not last for ever. In the first half of 2021 Google decided that it wished for its sites to be covered at all times by two ED teams. This meant that there would need to be four teams, two 'on', two 'off', at any one time. The proposal led to concerns from the Respondent, particularly about the difficulty of recruiting three new teams. Eventually, it was agreed that Google's needs could be met by employing three ED teams rather tan four.

35 On 9 July 2021 Mr Pitt wrote to the Claimant explaining the new plans, which would involve each ED handler working a two weeks on, one week off pattern. The Claimant replied the same day, rejecting the proposal and stating that his personal finances made it necessary for him to work at least 180 ED hours per month.

36 Mr Pitt wrote again to the Claimant on 26 July 2021 stating that the Respondent expected to enter into a new contract with the Prince Edward Theatre ('PET'), which was likely to create an opportunity for him to undertake additional ED hours during weeks when he was not working at the Google sites. On this footing, the annualised monthly ED hours would exceed 155. The same day, the Claimant replied, rejecting Mr Pitt's proposal.

37 On 27 July 2021 a conversation took place between Mr Pitt and the Claimant, which the latter secretly recorded. Mr Pitt explained that the multiple-handler model was insisted upon by Google and could not be changed. The Claimant appeared to accept the point but stated that he could not afford to lose one ED week in three. Mr Pitt said that he would look to offer him GP work in the 'off' week but was not currently in a position to offer more ED work.

38 In the same conversation, the Claimant complained, as was the fact, that current or future new or trainee handlers would not be required to take a 'Google dog', as he had been. By this time Ms Walker (already mentioned) had joined the Google contract and the proposed third handler, Ms Gemma Forde, was expected to start her training shortly. (For context, Angel was the only one of the five 'Google dogs' which ended up in long-term ED service. Three failed their training and immediately started new lives as pets. The last, Holborn, was successfully trained

but the absence of a second handler during the lockdown months resulted in her losing her ED skills, and she was retired as a working dog and also became a pet. Google discontinued the dog training scheme and recruited no further dogs.) In the conversation the Claimant described the different treatment applied to him and the two female colleagues as "unfair" and "discriminative". He did not say or suggest that the difference was attributable to his sex or to the sex of the two women. Asked by Mr Pitt whether he would like to relinquish custody of Angel, he was very clear that that was not what he was asking for.

39 On 9 August 2021 Mr Pitt sent an email to the Claimant informing him that the third ED handler (Ms Forde) was due to start her training on 16 August and included details of her training shifts. He also stated that a "start date" for the PET work was still awaited and mentioned some other possible opportunities for ED work.

40 On 10 August 2021 an email was sent to Mr Pitt from the Claimant's email address but purportedly from the Claimant and Ms Walker jointly. It was drafted wholly or very largely by the Claimant and Mr Findlay-Stewart, the Claimant's representative before us, who had been employed by the Respondent in the role of Scheduler for nearly three years ending on 2 July 2021. The draft was shown to Ms Walker and she gave her assent to it being sent in her name, but we doubt whether she read it through (it is largely written in the first person singular and misspells first name) and we are certainly clear that she did not consider its meaning and implications with any care. This finding does not reflect well on her, but we accept her evidence in mitigation that she had in recent times been much badgered by the Claimant to support his "constant rants" against the Respondent about his ED working hours and that she felt a degree of pressure as a result. The email included statements in bold type that the latest work pattern set out in Mr Pitt's email of 9 August, with the PET work not ready to start, was "not acceptable" to the Claimant or Ms Walker. Nor (again in bold type) was it "acceptable" for them to be called upon to train Ms Forde, "the person who will be taking our current hours and pay". On a separate point, the email complained that the Respondent was proposing that the 'off' weeks would be time when Dog Handlers would be "on stand by" but not entitled to pay. (This was something which Mr Pitt had not proposed.) The final paragraph read:

> **We are both willing to further discuss this and reach an amicable compromise with you. However neither of us will accept the current situation of promises not being kept and the uncertainty of what our current work situation is. If this is not resolved with pace, then we will each be forced to withdraw our services and no longer service the contract with immediate effect. We will both enter into meaningful dialogue with you to resolve this.**

41 The email was swiftly circulated by Mr Pitt to other members of the senior management team.

42 Later on 10 August 2021, during the working day, Mr Wootton received a telephone call from Ms Jacqueline Lee, the Respondent's office administrator, reporting that the Claimant had telephoned the office and had threatened to "walk off site" (or words to that effect). (In an addendum to his witness statement, the Claimant strenuously maintained that he had not threatened to walk off site, he had

only said that he was being made to feel unwell as a consequence of the stress associated with the planned changes to working arrangements and "might have to go home at some point". It is not necessary for us to make a finding as to precisely what message he wished to convey. We are satisfied that Ms Lee interpreted his remarks as a threat to walk off site and reported them to Mr Wootton accordingly.)

43 Soon afterwards, Mr Wootton telephoned the Claimant, who secretly recorded the conversation. He asked him if he was intending to attend work the following day and received an affirmative answer. By the end of the call Mr Wootton judged that the Claimant had calmed down to an extent.

44 Mr Wootton did not telephone Ms Walker.

45 Mr Pitt was very concerned to read the email of 10 August. He had doubts about whether it truly reflected what Ms Walker thought and intended. He had spoken with her over recent weeks and she had told him of receiving repeated telephone calls from the Claimant which, she said, had been "wearing [her] down." On 11 July he spoke to her by telephone. She claimed to have "skimmed" the draft. He read out to her the passages about declining to train the new recruit and "withdrawing services". Here Ms Walker said emphatically that she would not endorse such action and the email did not reflect her intentions.

46 On 11 August 2021 Mr Pitt and the Claimant spoke by telephone. Again, the Claimant made a secret recording. Mr Pitt stressed his view that the email of the day before had been unacceptable – particularly the threats to refuse to train Ms Forde and to withdraw services. The Claimant was unapologetic. He made no attempt to withdraw or disavow either threat. There was some discussion about a proposal which he made for him to draw on his outstanding leave entitlement during the 'off' weeks in the planned new working cycle. Mr Pitt said that he would consult with other members of the senior management team on that aspect.

47 Following a number of exchanges within the Respondent's senior management team, Mr Pitt approached Google's security consultants to ask if they would approve the dismissal of the Claimant, explaining that he had threatened to refuse to train a new recruit and to walk off site. The answer, received on 11 August 2021, was that they were content for him to be dismissed and that if had been employed by them he would have been dismissed already.

48 We find as a fact that the senior management team collectively took the decision no later than 11 August 2021 to dismiss the Claimant. The decision was informed in part by the awareness that he could lawfully be dismissed without cause, having accumulated less than two years' continuous service.

49 The Claimant was summarily dismissed by Mr Pitt at a meeting at a motorway service station, at which Mr Wootton was also present. The meeting had been set up by Mr Pitt for the sole purpose of dismissing the Claimant. The appointment was styled a "one to one". The stated ground for dismissal was expressed as gross insubordination (or words to that effect). The Claimant protested that he had had no prior notice of the purpose of the meeting and had not been given the chance to be accompanied. This objection was not entertained

and attention turned to consequential matters – in particular the return of company property and a discussion about whether the Claimant could keep Angel (in the event, she was returned by agreement some weeks later).

50 On 18 August 2021 Mr Pitt sent a letter confirming the Claimant's dismissal. It seems to have been based on a template. It gave the reason for dismissal as gross misconduct, namely sending communications on 10 August which were "deemed to be grossly immoral and constitute gross insubordination."

51 The Claimant exercised his right of appeal. The appeal was heard on 24 September 2021 by Mr Mailly. He falsely represented at the time that he had not been involved in the original decision to dismiss. The appeal failed.

52 The Claimant complains that Mr Mailly prevented him from arguing at the appeal hearing that he had been treated less favourably than Ms Walker. That did not happen. Mr Mailly did intervene, but only to say that Ms Walker's name should not be used.

53 No disciplinary action was taken against Ms Walker, who was (as already mentioned) a contractor.

54 It was not in question before us that the Claimant was a capable Dog Handler and an asset to the Respondent. That said, his interactions with those around him were not always comfortable and he was at times seen as rude or argumentative.

Facts relevant to the holiday pay claim

55 Under his contract the Claimant was entitled to 5.6 weeks' paid annual leave (28 days), including eight public holidays. By cl 6.3 he had the right to be compensated on termination for accrued but untaken annual leave outstanding in the current leave year. The annual leave year ran from 1 April to 31 March.

56 For reasons not entirely clear to us, the Respondent placed strong reliance on an email of 9 April 2020 from Mr Matt Crofts, the Respondent's National Operations Director, to operational staff. In it, Mr Crofts stated that the Respondent would not, at least for the next three months, cancel leave already booked or adopt a blanket approach of refusing leave requests. Rather, it would consider requests on a case by case basis. He also drew attention to a recent government announcement on the relaxation of rules about carrying over leave, which he interpreted as "meaning that leave not taken as a result of Covid-19 can actually be carried over [into] the next two annual leave years."

57 The Claimant gave unchallenged evidence that he was assured in the annual leave year 2020/2021 that he would be able to carry over unused annual leave from that year into year 2021/2022. Mr Findlay-Stewart gave evidence to the same effect, which was also not challenged. He told us (witness statement, para 19) that he had quietly ignored an instruction from Mr Crofts to the contrary effect, judging it to be based on a misunderstanding of the law. We are not sure if that 'instruction' was shown to us. (Given the way in which we have decided this part of

the case, it does not matter if it was or not.)

58 A company document produced in the course of the hearing was consistent with the evidence of the Claimant and Mr Findlay-Stewart, showing the Claimant's official annual leave entitlement for the year 2021/2022 as 48 days (*ie* including 20 days carried forward from the previous year).

59 We accept the evidence of the Claimant and Mr Findlay-Stewart on these matters.

60 No evidence was put before us to call into question the status of Mr Findlay-Stewart as an employee of the Respondent with actual and ostensible authority to bind the company in respect of matters pertaining to (*inter alia*) annual leave entitlements of staff members.

Secondary Findings and Conclusions

Rationale for the primary findings

61 We have treated the evidence of all witnesses before us with a degree of caution, not to say scepticism. The Claimant struck us as consumed by a sense of victimhood to the point of being quite unable to maintain a reasonable or balanced perspective upon events. We were also troubled by his routine practice of secretly recording conversations. This underhand device suggests a willingness to manipulate evidence for tactical advantage and inevitably reflects poorly on the person who resorts to it. On the Respondent's side, we found Mr Mailly a particularly unimpressive witness. In the course of the litigation he seems to have offered three wholly inconsistent answers to a simple and fundamental question: who took the decision to dismiss the Claimant?

62 In the end, however, our decisions on each of the claims rested not on the credibility of witnesses but on the inherent plausibility of the competing cases and, on some points, the corroborative effect of contemporary documents and/or straightforward legal reasoning.

Wrongful dismissal

63 As we have noted, this claim was conceded in the course of the hearing and damages were agreed in the sum of £3,250. It appears that that was awarded by consent as a net sum. It now seems to the judge (who drafts these reasons) that the better view is that the award should be grossed up on the footing that, since a reform of the law in 2018, it will be taxable in the Claimant's hands. Grossing up would leave him, after tax is deducted, with the correct, net sum. Reference may be made to the Income Tax (Earnings & Pensions) Act 2003 and the applicable HMRC Guidance, particularly the Employment Income Manual. An alternative to grossing up (which may be a somewhat elaborate process), is to simply base the award on gross pay. The numbers should come out about the same.

64 The award in the judgment stands – at least for now. If the parties that the judgment reflects an error, they may think that the practical thing to do is simply

adjust the payment accordingly and ensure that HMRC is duly notified. The sum involved is likely to be a few hundred pounds. If they cannot agree, the Claimant may wish to consider an application (out of time) for reconsideration of the Judgment, para (1). The longer the delay, the less likely it will be that the Tribunal will extend time for applying for reconsideration.

The Equality Act claims

Direct sex discrimination

65 Are the alleged detriments established in fact? The first, the dismissal, certainly is.

66 The second alleged detriment, Mr Wootton telephoning the Claimant on 10 August 2021, is not. On the contrary, given the tone and the content of the email of the same day, it would surely have been a detriment for Mr Wootton *not* to contact the Claimant at once to explore his concerns and attempt to reassure him. Nothing said by Mr Wootton in the telephone call was relied upon as hostile or offensive. Rather, it is undisputed that his intervention served to calm the Claimant down to an extent and take some heat out of the situation. His action was beneficial, not detrimental.

67 The fact that Mr Wootton did not contact Ms Walker on 10 August 2021 *might* be relied upon as evidential support for the general case that sex was somehow a factor behind the dismissal, but it obviously cannot stand as detrimental treatment *of the Claimant.* That requires him to show that something done in the workplace occasioned *him* what he can properly judge disadvantageous treatment.

68 The third alleged detriment, Mr Mailly not allowing the Claimant to raise the issue of sex discrimination in the appeal, is not made out in fact. As we have noted in our primary findings, this complaint against Mr Mailly is unfounded. The Claimant is simply wrong (we are prepared to assume, innocently) about what he said and meant. There was here no possible detriment.

69 In respect of the only surviving detriment, was sex a material factor? To put it another way, was sex a significant influence upon the decision to dismiss? In his closing submissions Mr Findlay-Stewart realistically accepted that the 'actual' comparator relied upon, Ms Walker, was not a 'like-for-like' comparator and his case must rest on a comparison with a hypothetical comparator whose circumstances were the same, or not materially different, to his. Here, as the many well-known authorities explain, it is usually helpful to focus attention not on the (imaginary) comparator but on the 'reason-why' question. *Why* did the senior management team decide to dismiss the Claimant? It seems to us that the decision rested on a series of inter-connected reasons. These include the knowledge and/or belief that:

(1) The threats in the email of 10 August 2021 to refuse to train the new recruit and to "withdraw services" appeared to be sincere and not mere posturing.
(2) The Claimant was the prime mover behind the email of 10 August 2021.

(3) The Claimant had repeated the threat to walk off site in his telephone conversation with Ms Lee of 11 August.
(4) The Claimant had stood by the threats in the email and in the call to Mrs Lee in his conversation on 11 August with Mr Pitt.
(5) The Claimant had shown no sign of a change of heart after speaking with Mr Pitt on 11 August.
(6) The Claimant's behaviour on 10 and 11 August 2021 was consistent with prior conduct on his part, which had been seen as difficult, antagonistic and liable to be repeated.
(7) The consequences of the Claimant carrying out his threats (or taking any similar action) could be very serious for the Respondent and its clients.
(8) There was no prospect of an early resolution of the dispute about work rotation, especially as there was no certainty about when the PET work would start.
(9) The Respondent was in a position lawfully to dismiss the Claimant without cause, but would lose that freedom if the opportunity were not taken promptly.

70 The different treatment of Ms Walker is, in our judgment, fully explained by the knowledge and/or belief of the decision-makers that:

(1) The email of 10 August was not her work.
(2) There was no real prospect of her carrying out any of the threats in the email of 10 August.
(3) In the circumstances, she did not represent a material threat to the Respondent's business or its clients.
(4) She was a contractor and there was no imminent prospect of her acquiring statutory employment protection rights.

71 We find that the dismissal of the Claimant is fully explained by these reasons and that there is no evidential basis for the theory that it had anything to do with the Claimant's sex. There is, in our view, simply no rational ground for supposing that sex had anything to do with it.

72 For completeness, we should add that, had we found any detriment other than dismissal, we would have held in any event that it was not motivated to any extent by the fact of the Claimant being male. Again, there is in our view no sensible basis for thinking otherwise. Mr Wootton did not call Ms Walker on 10 August 2021 because he rightly saw the Claimant as the originator of the email and the person who needed to be spoken to and, if possible, calmed down. And, as we have noted, Ms Walker was not ignored. Mr Pitt spoke with her on 11 August. Nor is there any reason for suspecting a sex-related motivation behind Mr Mailly's intervention at the appeal hearing. His concern (justified or not) was obviously to protect a third party's privacy. There is no basis for the notion that he would have acted otherwise if the third party had been male.

73 Finally, we have given consideration to the Claimant's new case, which emerged for the first time in the hearing before us, that the alleged detrimental treatment is explained by some form of sex-based stereotyping. This was an interesting theory but we see no foundation for it. We have two reasons. First, we

find that that the Respondent's different treatment of the Claimant and Ms Walker (already acknowledged not to be a 'true' comparator) are amply explained by the stark differences in their two cases. In short, Ms Walker cannot stand even as an 'evidential' or 'informal' comparator to lend support to the complaint of discrimination. Second, we find nothing in the contextual or 'background' material tending to point to sex-based bias on the part of the (100% male) senior management team. The fact that one or two witnesses judged the Claimant 'rude' or 'abrupt' on occasions is consistent with their having *perceived* his behaviour so. We see no reason to suspect an impermissible (conscious or subconscious) bias behind such a perception. Stereotyping allegations may be more promising where the evidence points to a sex-based *assumption* underlying the act or omission complained of. But there is no sign of that here.

74 For all these reasons, we find no substance in the complaint of sex discrimination.

Victimisation

75 Was there a 'protected act'? The act relied upon was making an allegation of unlawful discrimination in the conversation with Mr Pitt of 27 July 2021 (not 11 August 2021 as stated in the list of issues). In our judgment, the Claimant did not make an allegation in that conversation that any person had committed any contravention of the 2010 Act. He did use the word "discriminative" but in context that word cannot be read as conveying anything more than that he was referring to a difference of treatment (in relation to the matter of taking on a 'Google dog') and his belief that the difference was unfair. He made no reference to sex or gender (or any other protected characteristic) and we see no reason to interpret what he said as implying any form of unlawful discrimination.

76 Even if we are wrong about the protected act, we are satisfied that the claim must fail because we see no basis for supposing that the only detriment relied on (dismissal) was applied to the Claimant 'because of' the (alleged) protected act. The remarks which he made on 27 July 2021 were not *the* reason, or *a material reason*, for the dismissal. On the contrary, we are satisfied that even if (contrary to our view) he truly meant to complain of sex discrimination in that conversation, and even if (even more improbably) Mr Pitt understood him to mean that, his remarks were long forgotten by 11 August, when the swift and drastic decision was taken to dismiss, and had no bearing whatsoever upon it.

'Whistle-blowing'

77 Was there a protected disclosure? The Claimant's case rests on three alleged disclosures of information in the email of 10 August 2021, as follows:

(1) That the planned work rotation cycle was 'unacceptable'.
(2) That the proposed 'stand by' time would be unpaid despite being working time.
(3) That, if the proposition in (2) was correct, the signatories of the email would hold themselves ready to undertake overtime elsewhere.

We are prepared to proceed on the footing that all three constituted disclosures of information in the sense that they conveyed information about the Claimant's state of mind.

78 Did any of the disclosures amount to information which in the belief of the Claimant tended to show a breach of a legal obligation? In the cases of disclosures (1) and (3), the only possible answer is no. Disclosure (1) is about how the Claimant felt. Disclosure (3) is about what the Claimant might do if he was right in his understanding of the law (disclosure (2)). Neither can possibly be seen as tending to support a view that anyone has broken any legal obligation. By contrast, disclosure (2), generously read, may be seen as conveying information which, according to the Claimant's perception, tended to show a breach of a legal obligation in the form of a requirement to work unpaid.

79 Was that a reasonable belief? In our view it was certainly a confused and mistaken belief, but the Claimant is not to be judged as if he was a legal professional. The bar must not be set too high, otherwise the 'whistle-blowing' legislation will exclude all but the specialists. It exists for a much higher purpose. We cannot say that his belief was unreasonable and accordingly we admit is as reasonable.

80 Did the Claimant believe that disclosure (2) was made in the public interest? We are quite satisfied that he did not. There is no sign of the thought having ever occurred to him. He was involved in a narrow dispute about the distribution of work within a fairly small private organisation. The fact that the controversy was important to him did not make it a matter of the slightest public interest and he did not perceive disclosure (2), or any other aspect of the case, as serving or engaging the public interest.

81 For completeness, we further hold in any event that if the Claimant had believed that disclosure (2) was made in the public interest, that belief would have been anything but reasonable. The reasons given in the last paragraph are equally applicable here.

82 For the reasons stated, there was no protected disclosure and the 'whistle-blowing' claim fails. But it would have failed even if we had found any alleged protected disclosure made out. The reason or principal reason for the Claimant's dismissal was the composite ground set out above in relation to sex discrimination. It was, in a sentence, that he was judged a threat to the Respondent and its clients, not that he had voiced unhappiness about the planned work rotations.

Denial of the right to be accompanied

83 The 1999 Act, s10(1), (2A), (3) and s11(1), read together, pose four questions.

(1) Was the Claimant invited to a disciplinary hearing?
(2) Did he reasonably request to be accompanied?
(3) Was his request refused?
(4) If the complaint succeeds, what is the proper award of compensation?

84 We start with question (1). On grounds we had difficulty in understanding, Dr Chelvan sought to persuade us that the meeting on 17 August 2021 was not a 'disciplinary hearing', within the language of the 1999 Act, s13(4). It was the Respondent's position that the purpose of the meeting was to convey to the Claimant that he was being dismissed. The Claimant agreed before us that that was indeed the Respondent's purpose, although he learned that only when the encounter began. How, we wondered, was a meeting set up for the purpose of communicating a summary dismissal not a meeting at which "the taking of some … action in respect of a worker by his employer" "could happen"? Dr Chelvan's point appeared to be that an employer determined to brook no argument or debate was somehow excused from the minimal obligations to respect fair process which the 1999 Act imposes. He showed us no authority. We reject his submission. The meeting on 17 August 2021 was a 'disciplinary hearing' within the meaning of the 1999 Act.

85 As to question (2), we are satisfied in the first place that there was a request to be accompanied. The Claimant did not say in terms: "I wish to be accompanied" but, taken by surprise as he was, he did enough to convey that request by implication. The request was instantly rejected and he was given no chance to renew or develop it. Was the request reasonable? Plainly. The Claimant's livelihood was at stake. Of course it was reasonable to request the legal protection to which the law entitled him.

86 We turn to question (3). Was the request refused? We have answered that question. The request was summarily rejected. That amounted to a refusal.

87 The complaint therefore succeeds, which brings us to question (4). The Respondent's treatment of the Claimant was quite unreasonable. No mitigation was put forward. The maximum award of two weeks' pay was the proper award.

Compensation for annual leave entitlement outstanding on termination

88 As we have noted, the holiday pay claim was treated as arising under the 1998 Regulations and under the Tribunal's contractual jurisdiction.

89 We were not greatly assisted by counsel in relation to the law bearing upon the statutory claim (despite drawing attention in particular to the 1998 Regulations, reg13(10)-(13)). But in the end it seemed to us that the better approach was to focus on the contractual claim. The purpose of the statutory scheme is to provide a set of basic rights, but these must yield to any superior entitlement agreed between the parties as a matter of contract. Here, the Claimant's case was that the parties (the Respondent acting through Mr Findlay-Stewart) had agreed that his 2020/2021 leave allocation, excluding bank and public holidays, could be carried forward to the 2021/2022 leave year, and that he had relied on that agreement. On our primary findings, the agreement relied on is established, as is Mr Findlay-Stewart's authority to bind the company. (Whether his understanding of the legal effect of the legislative changes arising out of the pandemic was right or not is of course irrelevant.)

90 The agreement may be seen as effecting an amendment to the contract of employment or standing independently as a collateral contract. The distinction does not matter. Dr Chelvan rightly did not attempt to argue that any promise by Mr Findlay-Stewart was unsupported by consideration. If consideration was required, the Claimant gave it by continuing to work under the contract of employment.

91 It was not in dispute that, under his contract, the Claimant was entitled on termination to compensation for all annual leave accrued but not taken on termination. The effect of our primary and secondary findings is that his accrued entitlement included the 20 days carried over from the 2020/2021 annual leave year. He was denied compensation for those 20 days.

92 As is recorded in our Judgment, the parties agreed compensation on this head of claim in the sum of £3,519. That is a 'gross' figure and will be subject to deduction of income tax and national insurance contributions in the usual way.

Outcome and Postscript

93 For the reasons stated, the claims succeed to the extent stated in our Judgment, paras (1), (5) and (6), but otherwise fail.

94 This litigation is likely to have left both sides with feelings of regret and disappointment. Valuable lessons about judgement, straightforwardness, respect for truth and adherence to sound workplace rules and practices are there to be learned.

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EMPLOYMENT JUDGE – Snelson

09/08/2023

Reasons entered in the Register and copies sent to the parties on: 10/08/2023

..... for Office of the Tribunal

APPENDIX

LIST OF ISSUES (LIABILITY), DATED 5 MAY 2022

Breach of contract – wrongful dismissal/notice pay

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Direct sex discrimination – ss.13 and 39(2) Equality Act 2010

1. Did the following events occur:

a. on 17 August 2021, Mr. Pitt dismissed the Claimant but not Ms. Nikki Walker (the Respondent accepts this occurred);

b. on 10 August 2021, Mr. Wootton called the Claimant but not Ms. Nikki Walker;

c. on 24 September 2021, Mr. Mailly refused to allow the Claimant to state/advance his case that he had been discriminated against by the Respondent in comparison to Nikki Walker.

2. If and to the extent these events occurred, did those individuals thereby treat the Claimant less favourably than they did or would have treated:

a. allegations (a)-(b) - Ms. Nikki Walker

b. allegation (c) - hypothetical female comparator in Claimant's position

3. If the Claimant was treated less favourably, was that because of sex?

Victimisation – ss.27 and 39(2) Equality Act 2010

1. On about 11 August 2021, did the Claimant state to Mr. Pitt that he believed he was being discriminated against because the two new female employees coming into the handling positions did not have to take on a company dog (whereas he had been required to)?

2. If he did, was that a protected act? In particular, did the Claimant thereby:

a. do a thing for the purpose of or in connection with the Equality Act 2010; or

b. make an allegation that the Respondent had contravened the Equality Act 2010?

3. If yes, did the Respondent dismiss the Claimant because

he did that protected act?

Breach of right to be accompanied at disciplinary

hearing – s.10(2A) Employment Relations Act 1999

1. Did the Respondent require or invite the Claimant to attend a disciplinary hearing on 17 August 2021 at Beaconsfield Services?

2. If yes, did the Claimant reasonably request to be accompanied at this disciplinary hearing (or would he have requested to be accompanied at this hearing had the Respondent informed him that it was to be a disciplinary hearing)?

3. If yes, did the Respondent permit the Claimant to be accompanied at the 17 August 2021 disciplinary hearing by a trade union or work colleague companion?

Holiday pay – breach of contract / Working Time Regs 1998 / s.13 Employment Rights Act 1996

1. During his period of employment, how many days annual leave entitlement did the Claimant (a) accrue (b) take?

2. Given the foregoing, how many days unused annual leave entitlement (if any) did the Claimant have left on 17 August 2021?

3. Has the Respondent paid the Claimant for that unused annual leave entitlement?

4. If not, has the Respondent established that the Claimant has no legal right to be paid for that unused annual leave entitlement?