



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L Edwards

**Respondent:** Miss Gemma Boardman trading as House of GB

**Heard at:** Manchester

**On:** 12-13 September 2023  
and 22 September 2023  
(in chambers)

**Before:** Employment Judge Slater

## REPRESENTATION:

**Claimant:** Ms E Aldred, claimant's mother

**Respondent:** In person

# RESERVED JUDGMENT

1. The complaints of unfair dismissal relying on sections 103A and 104 Employment Rights Act 1996 are not well founded.
2. The remedy hearing provisionally arranged for 19 January 2024 is cancelled.

# REASONS

## Claims and issues

1. At a private preliminary hearing on 27 January 2023, a judge discussed the claims and issues with the parties and recorded, in an annex to the record of that hearing, what the judge understood to be the claims and issues. Paragraph (19) of the case management summary stressed the importance of the list being accurate and complete and required the parties to consider it carefully and write in within 14 days if it did not accurately record the complaints and issues. I understand that neither party

wrote in to say the list was not correct and they confirmed to me at the start of the hearing that this was the list of complaints and issues I was to consider.

2. I record here that, although both parties were not legally represented, both the claimant's mother and the respondent had studied law at university, although not going on to qualify as lawyers, and so could be expected to have a better understanding of legal matters than most litigants in person.

3. The complaints were identified as being about dismissal only. The claimant did not have two years' service so was not able to bring a complaint about "ordinary" unfair dismissal.

4. The list identified a complaint of s.103A Employment Rights Act 1996 (ERA) unfair dismissal only (protected disclosure or "whistleblowing" unfair dismissal).

5. After the first day of hearing, I considered that the complaint should have been identified as one of s.104 ERA unfair dismissal (dismissal for asserting a statutory right) as an alternative to s.103A unfair dismissal. I raised this with the parties at the start of the second day of hearing, before Ms Boardman resumed giving evidence. Ms Aldred said that she wished to make an application to amend the claim to include this complaint. Ms Boardman, after an adjournment to consider the position, objected to the application. I heard submissions from both parties on the matter and made the decision to allow the amendment. My decision and reasons for this decision, which I gave orally, are set out below.

6. I, therefore, updated the list of complaints and issues relating to liability to include the s.104 complaint in addition to the s.103A complaint. I also amended the issues which had been included in the list for s.103A unfair dismissal since, as I explained to the parties, these incorrectly referred to issues which would be relevant to "ordinary" unfair dismissal, but were not relevant to s.103A unfair dismissal. I went through the amended list of complaints and issues orally with the parties before we resumed hearing evidence. I set out in the Annex to this judgment and reasons the amended list which is what I considered when reaching my conclusions.

7. Ms Aldred identified for me the documents relied on as what is described in the list as PD1 and PD2, so I have amended the list to include the page references and to identify PD1 as having been made on 3 September 2021.

8. I informed the parties at the start of the hearing that I was not available on the afternoon of the second day because of a long standing training commitment but no other judge was available for the full two day listing. However, I was hopeful that we would be able to hear the evidence and submissions on liability and I would reserve my decision if necessary and deal with remedy on another day, if the claimant won her claim. We did complete the evidence and submissions and I reserved my decision.

### **Decision on application to amend**

9. I agreed to amend the list of issues to include consideration of the complaint as one under Section 104 of the Employment Rights Act 1996 for the assertion of a statutory right as well as under Section 103A of the Employment Rights Act protected disclosure unfair dismissal. The reasons I gave orally for this decision were as follows.

10. The claimant wrote in box 8.2 on the claim form “This claim is due to me being sacked for requesting my statutory break as an apprentice during the working day”. This clearly identifies the claim as one which fits fairly and squarely into Section 104 of the Employment Rights Act 1996. It appears to me that the Employment Judge at the Preliminary Hearing made an error in identifying the claim as one brought only under Section 103A of the Employment Rights Act. Although the parties were invited to write in if they did not think that the list of claims and issues was completely correct, they did not write in to object. I note that although the claimant’s representative, her mother, studied law at university, she did not qualify as a lawyer and acts here as a lay representative.

11. The respondent is not prejudiced in that one of her defences to the Section 103A claim, that dismissal was not because of the claimant complaining about not having breaks, would also be her defence to the Section 104 claim and she has prepared to meet that claim. She would not have needed to bring any further evidence to the hearing for a Section 104 claim than she needed for the Section 103A claim. Ms Boardman has said that she might have done more disclosure if she had known that there was a Section 104 claim but her description of the further disclosure that she would have made would have been equally relevant to Section 103A. Any disclosure relevant to the reason for dismissal would be as relevant to a Section 104 claim as to a Section 103A claim so I do not agree that the addition of the Section 104 claim puts Ms Boardman at a disadvantage.

12. The only prejudice to the respondent in allowing the change to the list of issues would be that one of the defences to the Section 103A claim, that no protected disclosure was made, would not defeat a Section 104 claim. The claimant would be prejudiced if I did not allow the change in that she could potentially lose her claim if she pursued this under Section 103A only and does not satisfy all the requirements of a protected disclosure, even if I concluded that the reason or principal reason for dismissal was that she had made a complaint about not getting breaks she was entitled to under the Working Time Regulations.

13. In making my decision, I must act in accordance with the overriding objective in the Employment Tribunal (Rules of Procedure) which is to deal with cases fairly and justly. I consider that acting fairly and justly requires me to allow the claimant to pursue the complaint under Section 104 as well as under Section 103A of the Employment Rights Act. I, therefore, allow this amendment and add the section 104 claim to the list of issues.

### **Evidence**

14. I heard evidence from the claimant and her mother, Ms Aldred, and from Ms Boardman, Danielle Horrocks, the respondent’s assistant manager, and Ellie Gallagher, who was the other apprentice taken on at the same time as the claimant and who remains employed by the respondent as a beautician. There were written witness statements for all these witnesses. I also was given witness statements for Tina Ockery of Kleek Apprenticeships (formerly Saks Apprenticeships) and Nicola France, a customer of the respondent, but these witnesses did not give oral evidence. Ms Aldred agreed I could give these statements such weight as I considered appropriate.

15. I had a bundle of documents in various sections designated by letters A to G and numbered within these sections. References in these reasons to a letter followed by a number are to pages in this bundle.

## Facts

16. The respondent is a sole trader operating a beauty salon. The respondent and the claimant's mother were friends, having met studying law at university. The respondent agreed to take on two apprentices to train to be beauty therapists. One of these was the claimant, suggested by the claimant's mother, and the other was Ellie.

17. Both new apprentices did two induction days before starting work. The claimant's employment began on 1 July 2021. Both apprentices were taken on for a three month trial period. These were the first beauty therapist apprentices the respondent had taken on.

18. The respondent entered into an arrangement with a training provider, Saks Apprenticeships (now called Kleek Apprenticeships), to provide a Saks Educator responsible for the apprentices' training and assessment. The Saks Educator attended the salon on occasions to spend time with the apprentices. Saks Apprenticeships provided work books for the apprentices which they were to complete as part of their training.

19. The claimant was 17 when she started work for the respondent.

20. Both apprentices were expected to build their client base by posting on social media. Ms Boardman told them that they should be posting three times a day. They were given advice about this, including access to images and text they could post, from Ms Boardman and her assistant manager, Danielle Horrocks. Neither the claimant nor Ellie consistently posted three times a day. They were both given reminders about this. For example, on 9 August 2021 (E8), Ms Boardman messaged them saying they were not advertising enough and giving some advice on finding things to post. She wrote:

"I will be checking this week and next and if it's not routine after the next two weeks then this job isn't for you. I have told you loads of times but I'm not gonna let it slide anymore that is the most important part of the job. Sorry for the rant but people are not just going to come to you, you need to go out and get it and it will come quicker. If you need help just ask, you can even share our products if your [sic] that stuck on what to post xx."

She wrote that 5 hours of their 30 could be dedicated to this.

21. On 25 August 2021, Ms Boardman again messaged both apprentices about the need to build up business, writing:

"If you haven't posted all week every day on your news feed when I come in next week, I will be reviewing your apprenticeship and job at pay day. I've asked each of you to post three times a day and some days your [sic] not even managing one. It's not hard. Sorry to keep going on but this is what builds your client base up and I said from the very beginning it's the most important thing to do. I can't keep laying out your wage and getting nothing in return it's as

simple as that, don't forget I have products to pay for and shop rent so it's not just your wage I need to make back, it's more so I'm running at a massive loss. I wouldn't be so bothered if you were doing all that you could to get busy but some of you are not even posting on your feed everyday x."

22. The apprentices were each provided with a black uniform T shirt. When this was in the wash, they were expected to wear suitable alternative dark clothing. I accept the claimant's evidence that she usually complied with this direction. I find that Ellie more frequently wore clothing that was not dark and was less suitable for the working environment than the clothing worn by the claimant.

23. When they were not dealing with clients, posting work-related material on social media or doing work in their workbooks, the apprentices were expected to do jobs around the salon including cleaning and tidying up stock.

24. Ellie developed a client base more quickly than the claimant. She started with some friends and family as clients and was able to increase her clientele. By the time the claimant was dismissed, she was rarely having more than two clients in a working day. Because Ellie was more occupied with clients, the claimant was expected to spend more time than Ellie doing cleaning and other tasks around the salon.

25. Both apprentices were told by Ms Boardman when they started that they should manage their own breaks around clients. I find that Ellie managed this without difficulty. It appears that the claimant found this difficult. She had opportunities to take breaks and get food e.g. when collecting food for other workers in the salon from the supermarket, but did not always take the opportunity to buy food for herself at the same time, perhaps because she did not feel hungry at the time.

26. I find that work-related tasks did not occupy both apprentices for all their working time each working day. I have seen photographic evidence which suggests to me that there was a fair amount of what I will describe as messing about e.g. taking selfies and photos of each other during the working day, when there were no customers in the salon. Both apprentices were very young, with little experience of the workplace at the time. It appears to me that both were having some difficulty learning how it was appropriate to behave in the workplace.

27. I accept the evidence of the claimant and her mother that during July and August, the claimant was telling her mother and other family members that she was having difficulty taking breaks at work. They told her that she needed to speak to Ms Boardman about this. The claimant did not do so.

28. On 25 August 2021, there was an incident where a customer, Nicola France, was unhappy about the conduct of staff, including the claimant, in the salon when she arrived for an appointment. Ms Boardman was on holiday at the time. Nicola France complained to staff members and Boardman was informed about the complaint. The claimant messaged Ms Boardman on 26 August 2021 to apologise and said she had apologised to the client and would do better next time. Ms Boardman contacted the client on 9 September 2021, after her return to work, apologising for what had happened. She asked to speak to the client about the matter. Subsequently, Ms Boardman asked the client to put a complaint in writing, which the client did on 14 September. I accept Ms Boardman's evidence that she made the request to help her

at a time when she was considering whether or not to continue to employ the claimant and Ellie at the end of their trial period. The complaint was not only about the claimant.

29. Part of the work the apprentices learned was application of false eyelashes. At first, the respondent allowed them to take some lashes home to practise but later the apprentices were told not to take tools and lashes home.

30. On 1 September 2021 there was an incident where the claimant took some lashes home. This was after employed staff had been told not to take stock home. Ms Horrocks and Ms Boardman were concerned that stock was still going down more quickly than usual.

31. I accept Ms Horrocks' evidence that she considered the claimant was acting suspiciously on 1 September 2021, taking her bag to the stock cupboard before leaving and that Ms Horrocks then discovered that some lashes (D11s) were missing from the cupboard. The claimant had not had any lash clients that day. Ms Horrocks sent a voice message to the claimant at 19.07 on 1 September saying the D11s were not at the salon and asking if they were in the claimant's bag. The claimant replied at first that she only had some of her mum's in her bag and then, in response to a further message, that she would look when she was home.

32. Ms Horrocks sent a voice note to Ms Boardman at 19.10 on 1 September, telling Ms Boardman she had been watching the claimant taking her bag back and forth and that she walked out from the drawers, grabbed her bag and left. Ms Horrocks said she noticed the 11s had gone. She said: "she's definitely taking them, if its by mistake, it just seems a coincidence that lashes have been going very quickly and after the meeting when we told them to put stuff in their drawers and she's still taking it home, erm so she's either working from home cash in hand or she's doing something with the lashes, I don't know but I don't know what you want me to do or say anything to her?"

33. Ms Horrocks sent a further message to the claimant at 22.16 on 1 September 2021, asking if the claimant had checked. The claimant replied: "Yeh, I though I had put them away but they are in my bag sorry."

34. I find that, on 1 September 2021, the claimant took home lashes (D11s) without permission. It is not necessary for me to make any finding as to whether it was a mistake that the claimant took the lashes home and, if it was deliberate rather than a mistake, what the claimant's intentions were in taking the lashes home and I do not make any findings about these matters. However, I find that Ms Horrocks had a genuine suspicion at the time that the claimant had taken the lashes deliberately, contrary to instructions to staff not to take stock home. This finding is supported by the terms of the voice note left by Ms Horrocks for Ms Boardman. No reason has been suggested as to why, on 1 September, Ms Horrocks should have said anything in this voice note to Ms Boardman which she did not believe to be true. Ms Horrocks passed on her suspicions to Ms Boardman by means of the voice note at 22.16 on 1 September 2021. At this time, the claimant had made no complaint to anyone at the respondent about not getting breaks.

35. On 3 September 2021, at 18.33, Ms Horrocks messaged the claimant about the claimant needing to do as another senior member of staff said. The claimant responded, explaining why she had not done a particular task. About 10 minutes later,

the claimant then messaged Ms Boardman (E-41), writing that she had felt a bit targeted by the senior member of staff because Ellie had not done her jobs. She added:

“Also I have had no lunch breaks because I am being asked to clean up and I’m not bothered about the cleaning it’s not being able to have some lunch because I’m going home hungry after a full day of working. I am not just cleaning up after myself I’m cleaning up after other people that should also be cleaning xx”

She wrote that she wanted to tell Ms Boardman because she was quite upset about it.

36. This was the first time the claimant had said or written anything to Ms Boardman about not getting breaks.

37. The claimant messaged Ms Horrocks again, after this, writing that she did not get a lunch break the previous day because she was being asked to clean up.

38. Ms Boardman replied to the claimant that she would speak to everyone when she was back and sort it out then.

39. At almost exactly the same time on 3 September 2021 that the claimant was messaging Ms Boardman, the claimant’s mother, on her own initiative, and not at the request of the claimant, also messaged Ms Boardman (E-25). She wrote that the claimant had come home upset and was having to stay extra hours to make sure jobs were done while other staff sat around. Her message included the following: “Yesterday she was in all day until 8 pm with no lunch break. She came home starving. Can’t have this happening in your absence x”. Ms Boardman replied that she would speak to everyone and get to the bottom of it when she was back.

40. Neither the claimant nor Ms Aldred gave any thought at the time as to whether their messages about the claimant not getting breaks was information disclosed in the public interest. I find that the concern of both of them was about the claimant not getting breaks and not about anyone else.

41. Ms Boardman, who was still away at this time, forwarded the claimant’s message to Ms Horrocks. Ms Boardman wrote in a message to Ms Horrocks (E-16): “Need to be careful with her cause I know her mum. Have a word with ellese, don’t want people targeted. I know it’s prob not the case but I will speak to everyone when I’m back.xx”

42. Ms Horrocks replied to this message (E-17):

“She’s full of shit. I’ve messaged Libby cause Ellese phoned me frustrated that she’s not listening. I know a few staff are getting aggy with her always on face time and got head phones in and not listening. I’ve told Ellese she needs chill a little and just note what there doing at let you know when you’re home.

She’s only worked extra cause her mum dropped her early and her lashes ran over. She’s leaving early tomorrow again for hospital too. I’ve been noting it all for when your back. Sorry they bothered you when you’re away. Xx

Oh and she went to Morrison's for lunch today. She's gonna be trouble. I've caught her out on several lies already this week."

43. Ms Boardman replied, asking Ms Horrocks to "write everything down cause I'm gonna speak to them individually and Libby's mum is messaging me xx".

44. In a voice message on 5 September 2021 (E-17), Ms Horrocks said "I don't think any of the staff are very happy at the minute with Libby by the sounds of it, I think it's both but mainly Libby, don't worry about it nothing we can do until your home anyway so just enjoy your last night."

45. Ms Boardman returned to work after the weekend of 4/5 September 2021. As noted above, she contacted Nicola France, the client who had complained, on 9 September.

46. I accept Ms Boardman's evidence that she was intending to review the positions of both the claimant and Ellie, to decide whether to keep them on after their 3 month trial period. This is consistent with a message she sent to Ms Horrocks on 13 September 2021. Ms Horrocks had sent a voice note (E-18) asking "are you definitely keeping the girls on before I encourage them to open their Christmas diary, I don't want to tell them to do it then have to cancel or shall I leave it for now see how they get on for this month?" Ms Boardman replied: "I've not made my mind up decisions this week xx".

47. On 14 September 2021, the claimant and Ms Boardman signed a "commitment statement" document supplied by Saks, which included a statement that the employer committed to employ the apprentice for the duration of the apprenticeship. The document was never signed by the Training Provider, Saks. Ms Boardman and Ms Horrocks say that Ms Boardman signed this document with her eyes closed, her hand guided by the claimant as to where to sign, when Ms Boardman was having her lashes done by Ms Horrocks. They say the claimant did not explain what she was asking Ms Boardman to sign. The claimant said in her witness statement that she could not get the agreement signed until Ms Boardman was finished having her lashes done. The claimant was not asked about this part of her evidence in cross examination. I find that Ms Boardman was not aware what she was signing at the time. Other evidence is consistent with Ms Boardman not having decided at that time whether to keep the claimant on, so I consider it more likely than not that she did not intend, on 14 September 2021, to sign something committing her to continuing to employ the claimant beyond her trial period. Whilst I am able to put little weight on the statement of Ms Ockerby of Kleek, since she was not available to be cross examined, I consider her statement to be consistent with Ms Boardman not having made a commitment to keep the claimant on.

48. On 14 September 2021, while Ms Boardman was having her lashes done, the claimant told her she was starving and was going to ask her Mum for a Subway. Ms Boardman asked the claimant why she had not eaten and she said she had been with the Saks Educator all day.

49. Between the claimant first raising the matter of breaks on 3 September 2021 and the conversation on 14 September 2021, Ms Boardman had spoken to the claimant about taking breaks. I accept Ms Boardman's evidence that she told the claimant she



must take breaks and fit it around her work. This is consistent with what the claimant was told when she started work.

50. On 14 September 2021, at 15.31, the claimant's mother messaged Ms Boardman (E-28), writing: "Libby just informed me that she's not had lunch today but Ellie has. She come out of work starving. I know the salon gets busy etc but she need to have her lunch/break gem.x," I accept Ms Aldred's evidence that she sent this message at her daughter's request. I find that the claimant and Ms Aldred gave no thought at the time as to whether the message Ms Aldred sent was in the public interest. I find that, when it was sent, it was about the claimant's position only.

51. Ms Boardman replied:

"Tell her to just ask me, they have plenty of time to get their lunch she's only done one client and she's been with the saks educator most of the day. Ellie has done the same work as her but had an extra client in than her so im not sure why Ellie has managed and Libby hasn't. I'm in and out with clients so she can always take 5 minutes before a client to get something. Or she could have ate while she was with the educator. If I don't know there is nothing I can do about it. We don't get set lunch breaks in the salon environment really, they can have one if they wish but it's an extra half an hour they would have to work on top of their working day so if she wants to do that she can, I can't babysit them while I'm busy with clients, they can get food whenever they want they just have to speak up, so tell her not to sit their going hungry, im the same most days xx." She added: "For the last hour I'm sure she's just been sat with us on the bed while I had my lashes done so she could also have got something then.xx"

52. I accept Ms Boardman's evidence that when she wrote about not getting set lunch breaks, she meant breaks to be taken at a specific time in the day. When she had told the apprentices to manage their own breaks, the intention was that they could take a break in paid time, if they managed this around their clients.

53. Ms Aldred replied:

"I just want her to get what she's entitled to, I know you're not a babysitter but she is an employee and still only a "young person" she needs to get her 30 min entitlement when she's working over 4hrs 30 mins.

She said when Ellie had clients she was with the educators and when Ellie was with educators Ellie asked Libby to do her client?

Anyway – when with an educator she not getting her break is she and that's a must, which you will be aware of.

I've told her to speak up and she said she will do but until she does and until she is 18 then as her mum I'm going to aren't I x."

54. Ms Boardman then wrote:

"And she mentioned that she was gonna ask you to take her to subway so whether it's something to get one from you I'm not sure. I'm just a bit frustrated with it tho because there is no way that I would not let them eat. To be quite

honest there has been a few things I've noticed that's getting said back to you and they are being twisted. Believe me they both have it really really easy and are sat about most days then on a busy day they moan. If they don't want to work in that kind of environment then I don't think the job is for them because we are only gonna get busier with the winter months. I'm not going tit for tat or who's done this and who's done that but I am gonna have a think about both their roles tonight because they are both making my job a lot harder to be quite honest with the complaints and they are still in the trial Period and I don't think that it's worth the hassle to be quite honest when I have been so laid back with them and from my point of view been very good with them. Xx"

55. Ms Aldred replied (E28-29):

"OK, that's your prerogative, trial period or not Libby has entitlements and is only a young person.

Every time I say to speak to you, Libby says you are not there?

I think your message is hasty about their positions and being an employer isn't easy regardless of who you employ.

I'm aware you've had a complaint from a woman that spends a lot in your salon but to be honest, if I knew someone had been in a shouted at my staff, my staff would be priority as one client doesn't prop the business up. It's also something that needs to be addressed and moved on from.

I'm not interested in what Libby says she's going to do after work for food, my concern is eating and having the entitled break within working hours. It's been noted by Danielle that Libby's hands start to shake when she hasn't eaten.

At no point have I said Libby has come out complaining. If Libby is complaining in the salon I'm sure you will have a log of it and will have spoken to her about it?

And as for things being twisted, let me know what is being twisted by Libby and I will address it here.

To be clear, has Libby said she doesn't want to work in the salon environment?

Maybe you have been lenient and they don't realise it, but that is something to address with Libby and explain how things are going to change, it can't be used against them if they "aren't aware".

Gemma, I didn't message you to fall out and I didn't message you to put extra pressure on you, but I think the tone of messages threatening towards Libby's position and don't find that fair in any way. It's like you are basically saying if she complains that she loses her job!?

You've also just said in one of your messages that if she wants a lunch break then she has to add 30 minutes onto each day that she wants one, that's not the case at all.

And for the record no one has said you haven't been good with Libby. As her mother and her being a young person, I just want her to have her entitlement. xxx"

56. Ms Boardman replied asking if Ms Aldred could go in the next day so she could have a meeting with them both. She wrote that she had told both [which I understand to refer to the apprentices] the previous week that she was going through everything that had happened over the last month and was going to have a meeting with them all individually to discuss everything formally so she thought it probably best that Ms Aldred come in with the claimant. They agreed to meet at 3 p.m. the following day.

57. As previously noted, on 14 September 2021, Nicola France sent Ms Boardman a written complaint as requested by Ms Boardman. I find, based on Ms Boardman's oral evidence, that she made her request to Ms France after she had received the complaint about breaks from Ms Aldred on 14 September.

58. I find that Ms Boardman did not make her final decision to dismiss the claimant until after the exchange of messages with Ms Aldred, when she sat down to go through everything. However, based on her evidence, I find she had been thinking that this was likely to be her decision from some time after the incident with the lashes on 1 September 2021. I accept that this incident had damaged Ms Boardman's trust in the claimant.

59. Ms Boardman wrote the letter of dismissal before meeting with the claimant and Ms Aldred on 15 September 2021. There has been some dispute of fact as to whether Ms Boardman had an initial meeting with the claimant before meeting with the claimant and Ms Aldred together. Whichever version of events is correct on this point will not make any difference to my decision but, having arranged that the meeting was to be with the claimant and her mother together, I think it likely Ms Boardman is mistaken in her recollection that she met first with the claimant. The evidence is consistent that Ms Boardman told the claimant she was giving her notice before any of the matters in the letter were discussed. Ms Boardman went through the points in the letter and there was then some discussion. Since Ms Boardman had made her decision before the discussion, there is no need for me to make any findings of fact as to what was said.

60. The dismissal letter (C-72-74) recorded that, in relation to the beauty skills aspect of the role, the claimant's skills and standards were high and had not been an issue. However, the letter went on to set out various issues in relation to which Ms Boardman wrote that she considered the claimant had failed to improve despite being repeatedly asked. These came under the headings: advertising; professionalism; work time keeping; stock and cleaning. Under the heading "stock", Ms Boardman wrote: "despite being advised on various occasions not to take stock home, you have repeatedly disobeyed instructions and taken company stock home." Ms Boardman also responded in the letter to issues raised by the claimant and Ms Aldred about breaks and feeling targeted to clean more than other employees. Ms Boardman referred to the claimant being made aware the beginning of employment of the type of environment claimant will be working in and responsibilities and initiative that would be part of her role, including cleaning and managing her time in terms of breaks. Ms Boardman asserted that the claimant had plenty of opportunity to take breaks. She wrote that, from what she had witnessed, the claimant had never been afraid to take a break or grab food and she had been advised that she was able to do so at any point because they did not have a set time for dinner or breaks. Ms Boardman wrote, in

relation to the complaint about being asked to clean more than others, that she was satisfied that the claimant had been asked to complete duties when she had the capacity to do so and these had not been unreasonable requests. Ms Boardman wrote that, given the severity of some points and lack of improvements made, she had reached the decision that the claimant's apprenticeship role was not sustainable.

61. I find that many of the issues set out in the letter to the claimant were also problems with Ellie's performance. Ellie was not dismissed but received a warning. I was not shown the warning letter but was told by Ms Boardman that the same points about advertising, professionalism and cleaning as in the claimant's letter were set out in the warning letter. Ellie is still in the respondent's employment.

62. Ms Boardman gave evidence that the point which made the difference between the claimant and Ellie was the 1 September incident when the claimant took lashes home, contrary to instructions. She had trust issues with the claimant which she did not have with Ellie. It was suggested to Ms Boardman in cross examination that Ellie had taken money. I accept Ms Boardman's evidence that Ellie had told her she had taken her lash bag home with money from the last client in it and Ms Boardman told her not to worry but not to take it home again. Ms Boardman said the 1 September incident was different in terms of the way the claimant was seen, denied having the lashes, then admitted it. Since the credibility of this evidence goes to the heart of the reason Ms Boardman dismissed the claimant, I deal with my evaluation of this evidence in my conclusions, rather than my findings of fact.

63. Ms Boardman gave evidence that she had not referred specifically to the 1 September incident in the dismissal letter out of respect for the claimant's mother. She said she chose to go down what she considered was a kinder way of dismissing, since she was evaluating whether to continue employment anyway, rather than going down the gross misconduct dismissal route for alleged stealing. This evidence also goes to the heart of the reason for dismissal, so I deal with my evaluation of this evidence in my conclusions, rather than my findings of fact.

64. Ms Boardman told the claimant she was giving her one week's notice. Although the claimant attended work on 16 September, she was subsequently told to remain at home for the rest of her notice period.

65. I heard some evidence as to other events following the claimant's dismissal. I do not consider these cast any light on the reason for dismissal or whether the claimant made protected disclosures so I make no findings of fact about these events.

### **Submissions**

66. Ms Aldred and Ms Boardman each made brief oral submissions.

### **Law**

67. Section 103A Employment Rights Act 1996 (ERA) provides: "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason), for the dismissal is that the employee made a protected disclosure."

68. What constitutes a protected disclosure is defined by sections 43A to 43H ERA. Section 43A provides: “In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.”

69. The relevant parts of section 43B for this case are as follows:

“(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a).....,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

.....

(d) that the health or safety of any individual has been, is being or is likely to be endangered,.....”

70. It is agreed in this case that the disclosure was made to the claimant’s employer, so section 43C is relevant.

71. Section 104(1) ERA provides: “An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –

(a) .....

(b) Alleged that the employer had infringed a right of his which is a relevant statutory right.”

72. S.104(2) provides that it is immaterial whether or not the employee has the right or whether or not the right has been infringed but the assertion has to have been made in good faith. S.104(3) provides that it is sufficient that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

73. S.104(4) sets out relevant statutory rights which include rights conferred by the Working Time Regulations 1998.

74. The Working Time Regulations 1998 confer, amongst other rights, the right for a young worker (someone under age 18) who works more than four and a half hours in the day to a rest break of at least 30 minutes which shall be consecutive if possible and they are entitled to spend it away from their workstation, if they have one. The Working Time Regulations do not require breaks to be paid.

**Conclusions**

The protected disclosure unfair dismissal complaint – s.103A ERA

75. The list of complaints identifies three alleged protected disclosures: Ms Aldred’s message on 3 September 2021 (E-25), Ms Aldred’s message of 14 September 2021

(both to Ms Boardman) and the repetition of these complaints by Ms Aldred and the claimant in a meeting with Ms Boardman on 15 September 2021.

76. In relation to the message of 3 September 2021, this was sent by Ms Aldred on her own initiative, not at the request of the claimant. For there to be a relevant protected disclosure, the disclosure of information has to be made by the employee (which could be by their agent, acting on their behalf). Section 43B applies to information being disclosed by a worker and section 103A refers to the dismissal of an employee who made the protected disclosure. I conclude that Ms Aldred was not acting as the agent of the claimant when she sent her message to Ms Boardman on 3 September 2021 since she did it on her own initiative, not at the request of the claimant. I conclude, therefore, that the message sent on 3 September 2021 was not a relevant protected disclosure.

77. Even if the message had been sent by Ms Aldred acting as the claimant's agent, I would have concluded that this was not a protected disclosure as the claimant (or agent acting on her behalf) did not have a reasonable belief that the information disclosed was made in the public interest. It related solely to the situation of the claimant.

78. The claimant's own complaint made on 3 September 2021 about not getting a break was not identified in the list of complaints as a protected disclosure. If it had been, I would have concluded that it was not a protected disclosure as the claimant did not have a reasonable belief that the information disclosed was made in the public interest. It related solely to the situation of the claimant.

79. In relation to the message of 14 September 2021, I conclude that Ms Aldred was acting as the agent of the claimant since she sent the message at the claimant's request. I conclude, however, that the claimant (or Ms Aldred acting on her behalf) did not have a reasonable belief that the information disclosed was made in the public interest. The information disclosed in the message about the claimant not getting the breaks to which she considered she was entitled related solely to the situation of the claimant. I, therefore, conclude that the message of 14 September 2021 was not a protected disclosure.

80. I have found that the decision to dismiss was taken by Ms Boardman before the conversation on 15 September 2021. Anything said in that meeting cannot, therefore, have been the reason or principal reason for the claimant's dismissal. It is not necessary, therefore, to decide whether anything said was a protected disclosure. However, since it is said to be a repetition of the complaints previously made, it would not be a protected disclosure because the claimant did not have a reasonable belief that the information disclosed was in the public interest. It related solely to the situation of the claimant.

81. The complaint of protected disclosure unfair dismissal must, therefore, fail on the basis that there were no protected disclosures made.

82. If I had decided that the claimant had made protected disclosures, the issue of whether the reason or principal reason for dismissal was the disclosures would have to be considered. This is, in effect, the same issue of causation as is relevant for the complaint of unfair dismissal for asserting a relevant statutory right which I deal with next. The complaint of s.103A ERA would have failed for the reasons I give about

the reason for dismissal, when dealing with the s.104 ERA complaint, even if I had concluded that the claimant had made protected disclosures.

The assertion of a statutory right unfair dismissal complaint – s.104 ERA

83. The issue to be determined is whether the reason or principal reason for dismissal was that the claimant had alleged that the respondent had infringed a right of hers which was a relevant statutory right.

84. I conclude that the claimant had asserted a relevant statutory right by Ms Aldred's message on 14 September 2021. She was asserting, as agent for the claimant, that the respondent had infringed the claimant's right to a rest break during the working day under the Working Time Regulations 1998. I do not need to decide whether or not the claimant and Ms Aldred were correct that the respondent was in breach of the Working Time Regulations. I accept that the claimant and Ms Aldred, who was advising the claimant, were genuine in their belief that she had rights to rest breaks which the respondent was not allowing. I conclude that the assertion was made in good faith.

85. I conclude that Ms Aldred's message on 3 September 2021 was not a relevant assertion of a statutory right since it was not made as agent for the claimant, being made on Ms Aldred's own initiative and not at the request of the claimant. The wording of s.104 requires the assertion to be made by the employee (or implicitly, by their agent).

86. I conclude that the claimant's own message on 3 September 2021, complaining that she had had no lunch breaks, was an assertion of a relevant statutory right. In accordance with s.104(3) it was enough that the claimant made it reasonably clear to the employer what the right claimed to have been infringed was. I consider that it was sufficiently clear from what the claimant said that she was complaining about not getting rest breaks and this is a relevant statutory right under the Working Time Regulations.

87. Anything said on 15 September 2021 was not a relevant assertion of a statutory right since the decision to dismiss had already been made and anything said on 15 September 2021 could not, therefore, be the reason or principal reason for dismissal.

88. The remaining issue, therefore, is whether the assertion of the statutory right by the claimant on 3 September and/or in the message from Ms Aldred of 14 September 2021 was the reason or principal reason for the claimant's dismissal.

89. I can understand how the claimant and her mother, looking at the chronology of events known to them at the time, reached the conclusion that the message of 14 September 2021 led to the claimant's dismissal: the message was one day and the dismissal followed the next. Evidence which was not available to the claimant at the time, however, gives a fuller picture of Ms Boardman's thought process.

90. Discontent with both apprentices, the claimant and Ellie, is apparent from messages sent by Ms Boardman to them and, in the one sent on 25 August 2021 (see paragraph 21), she warns them that she will be reviewing their employment. Both apprentices were on a trial period.

91. Real concern about whether they can trust the claimant is apparent from the messages on 1 September 2021 between Ms Horrocks and Ms Boardman about the lash incident. I make no findings about the claimant's intentions in relation to that incident but I conclude that Ms Boardman had a real concern about whether she could trust the claimant from that date, before any complaint was made by the claimant or her mother about not having breaks. These messages between Ms Horrocks and Ms Boardman were not known to the claimant or her mother until disclosed in these Tribunal proceedings.

92. The claimant made her first complaint about not getting breaks on 3 September 2021. Ms Boardman took no steps to dismiss her immediately after that complaint.

93. Ms Boardman's message to Ms Horrocks on 13 September 2021 (see paragraph 46) shows that Ms Boardman was still considering whether to dismiss or confirm in employment the claimant and Ellie.

94. I found that Ms Boardman had been thinking that she was likely to decide to dismiss the claimant from some time after the incident with the lashes on 1 September 2021. I accepted that this incident had damaged Ms Boardman's trust in the claimant. (See paragraph 58).

95. In paragraphs 62 and 63, I wrote that I would return to assess the credibility of certain evidence given by Ms Boardman since this went to the heart of the reason Ms Boardman dismissed the claimant. This was: the evidence that the point which made the difference between the claimant and Ellie was the 1 September incident when the claimant took lashes home, contrary to instructions and that Ms Boardman consequently had trust issues with the claimant which she did not have with Ellie; and evidence that she had not referred specifically to the 1 September incident in the dismissal letter out of respect for the claimant's mother. I find this evidence to be consistent with the private messages between Ms Horrocks and Ms Boardman on 1 September 2021 and plausible having regard to the nature of the relationship between Ms Boardman and Ms Aldred at that time. Ms Boardman and Ms Aldred had been friends since university. I find Ms Boardman's evidence on these points to be credible and accept her evidence about the difference between the claimant and Ellie being the 1 September incident. Ms Boardman took what she considered to be a kinder route of dismissing the claimant at the end of the trial period for a number of expressed concerns set out in the dismissal letter, including, without highlighting it, taking company stock home contrary to instructions, rather than take a disciplinary proceedings route which could, potentially, have led to the claimant's dismissal for gross misconduct. I express no view on the likelihood of whether disciplinary proceedings would, in fact, have resulted in the claimant's dismissal for gross misconduct. That is not relevant to the issue of whether the reason or principal reason for the claimant's dismissal was because she or her mother alleged infringement of the claimant's statutory right to take breaks. I conclude that the assertion of a statutory right was not the reason or principal reason for dismissal so the complaint of unfair dismissal fails.

Employment Judge Slater  
Date: 4 October 2023



RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12 October 2023

FOR EMPLOYMENT TRIBUNALS

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

## ANNEX

### Amended list of complaints and issues (liability)

#### Protected disclosure unfair dismissal – s.103A Employment Rights Act 1996

1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
  - 1.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:
    - PD1** Ms Eldred sent a text or similar message to Ms Boardman on 3 September 2021 (E-25) complaining that the claimant was not being allowed to take her entitlement to regular breaks, (in accordance with Rule 12 Working Time Regulations 1998)
    - PD2** Ms Eldred sent a text or similar message to Ms Boardman on 14 September 2021 (E-28-29) complaining that the claimant was not being allowed to take her entitlement to regular breaks, (in accordance with Rule 12 Working Time Regulations 1998)
    - PD3** Ms Eldred and the claimant repeated these complaints at a meeting with Ms Boardman on 15 September 2021.
  - 1.2 Did she disclose information?
  - 1.3 Did she believe the disclosure of information was made in the public interest?
  - 1.4 Was that belief reasonable?
  - 1.5 Did she believe it tended to show that:
    - 1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

1.5.2 the health or safety of any individual had been, was being or was likely to be endangered;

1.6 Was that belief reasonable?

2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.
3. If the claimant made a protected disclosure, was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

**Unfair dismissal – assertion of a statutory right – s.104  
Employment Rights Act 1996**

4. Was the reason or principal reason for dismissal that the claimant alleged that the employer had infringed a right of hers which is a relevant statutory right, being the right to take rest breaks as required by the Working Time Regulations 1998? If so, the claimant will be regarded as unfairly dismissed.