EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000025/2022

Final Hearing Held at Aberdeen on 15 – 17 May 2022

Employment Judge A Kemp
Tribunal Member J Connolly
Tribunal Member K Pirie

Ms Eilidh Rattray	**Claimant** **In person**
Gas Call Services Ltd	**Respondent** **Represented by:** **Ms A Jervis** **Senior Litigation** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the Claim does not succeed and is dismissed.

REASONS

Introduction

1. This was a Final Hearing on the claims made by the claimant, which are for automatically unfair dismissal under section 100 of the Employment Rights Act 1996 and direct discrimination on the protected characteristic of sex under section 13 of the Equality Act 2010.

2. The hearing took place in person at the Aberdeen Tribunal. The claimant represented herself, and the respondent was represented by Ms Jervis.

3. There had been a Preliminary Hearing held on 3 October 2022, after which case management orders were issued, which included for exchange of documents on which the parties intended to rely at the hearing. An earlier Final Hearing had been postponed before any evidence was led.

4. At the commencement of the hearing I outlined for the claimant's benefit how it would be conducted, the leading of evidence to include referring to documents in the Bundle where that was thought to be appropriate, as otherwise the Tribunal would not read them, covering all points including remedy, the questioning of witnesses in cross-examination to include points not considered accurate and those not stated in evidence but which the witness was thought to know of, re-examination, and as to making submissions. I explained that a degree of assistance could be given to the claimant under the overriding objective in Rule 2 but not so as to act as if her solicitor.

5. The evidence was concluded late on the final day, and it was agreed that the respondent provide its written submissions thereafter, with the claimant having an opportunity to reply in writing. That was done by the respondent, and those submissions considered. The claimant confirmed that she did not wish to do so.

Issues

6. The parties had helpfully agreed a list of issues. They are as follows

> **Health and Safety Disclosures – S.100(1)(c) Employment Rights Act 1996**
>
> 1.1. For matters of health and safety at work, was there a Health and Safety representative or committee? If so, was it reasonably practicable for the Claimant to raise matters of health and safety by those means?
>
> 1.2. If not, did the Claimant bring to the Respondent's attention, by reasonable means, circumstances connected with her work

which she reasonably believed were harmful or potentially harmful? The Claimant asserts she did in the following ways:

1.2.1. On 25 April 2022 during telephone calls to Jamie Tugman and Kevin Trainer the Claimant raised issues about safety devices inside boilers being disconnected.

1.2.2. On 9 May 2022 via a WhatsApp message to Jamie Tugman the Claimant raised issues about safety devices inside boilers being disconnected.

1.2.3. On 7 June 2022 via a WhatsApp message to Jamie Tugman the Claimant raised issues about safety devices inside boilers being linked out/removed with photographs.

2. Automatic Unfair Dismissal – S.100(1)(c) Employment Rights Act 1996

2.1. As the Claimant has short service, has she discharged her burden in establishing that the principal reason for dismissal was because of her alleged health and safety disclosures at 1.2 above? If so, the Claimant will be regarded as unfairly dismissed.

2.2. The Respondent will say that the principal reason for the Claimant's dismissal was misconduct. The Tribunal need not decide whether the Claimant was fairly dismissed for misconduct as it is agreed that the Claimant does not have the requisite service to bring an ordinary unfair dismissal claim.

3. Sex Discrimination

3.1. Did the Respondent do the following things:

3.1.1. Force the Claimant to carry out servicing and not allow her to work on repairs, despite her alleged requests to move off servicing

3.1.1.1 The Claimant says she made these requests to Jamie Tugman and Stuart Laming on [dates]. Following conversations with Jamie Tugman and Stuart Laming, the Claimant believes it may have been Alan Lowe or Christine Mitchell who made the decisions about the work she was to carry out but did not know this for certain.

3.1.1.2 The Claimant says that she explicitly told Jamie Tugman during a phone call on or around April 2022 that she would do anything other than the full servicing.

3.1.1.3 The Claimant says she had a face-to-face conversation with Stuart Laming and Jordan Perry on the office carpark in Altens Aberdeen (Citrus House) on or around February / March 2021 during which she told Stuart Laming she was not doing services only. The Claimant asserts that Stuart Laming's response was that this was ok as they were taking contractors to do it.

3.1.1.4 The Claimant says she had a telephone with Stuart Laming on or around April / May 2022 during which she stated she did not want to do servicing and requested to go on voids full time following Stuart Gorry leaving. The Claimant asserts this was agreed as an option but later found out Kris McNaughton had been on the voids instead.

3.1.1.5 The Claimant says she had a telephone call with Jamie Tugman on or around 5 April 2022 during which she stated she wanted off full servicing as she was constantly overwhelmed with the workload.

3.1.2 Not discipline Marc Easton, her male colleague who created an unsafe environment. The Claimant asserts that Marc Easton attended a job on 25/26 May 2022 and that he removed a safety device within the boiler and used a broken leg from the device to link the device out bypassing its function entirely allowing the boiler to run constantly without any means of proving the various things this safety device proves, leaving this boiler open to overheating and ending up going on fire, commonly known as superheat with the simes boilers, superheat can cause the boiler to melt inside and sometimes catch alight.

3.2. Was that less favourable treatment in comparison to her male colleagues? The Claimant has named Jordan Perry, Robert Allan, Kevin Trainor, Stephen Fleming, and Marc Easton as her comparators.

3.3. If so, was it because of her sex?

4. Remedy – Automatic Unfair Dismissal

4.1 The Claimant does not wish to be reinstated or re-engaged.

4.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.1.1. What financial losses has the dismissal caused the claimant?

4.1.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

4.1.3. If not, for what period of loss should the claimant be compensated?

4.1.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.1.5. If so, should the claimant's compensation be reduced? By how much?

4.1.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? The Respondent asserts it does not apply as this is a claim for automatic unfair dismissal, not ordinary unfair dismissal.

4.3. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award?

4.4. Does the statutory cap of fifty-two weeks' pay apply?

5. Remedy – Sex Discrimination

5.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2. What financial losses has the discrimination caused the claimant?

5.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4. If not, for what period of loss should the claimant be compensated?

5.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? The Respondent asserts it does as the Claimant unreasonably failed to bring a grievance about any of the alleged discrimination.

7. The Tribunal did not consider that they were entirely appropriate in all respects, and summarised the issues briefly for the purposes of this case as follows:

(i) Was the reason, or principal reason, for the claimant's dismissal a reason that is in contravention of section 100(1)(c) of the Employment Rights Act 1996 such that the dismissal was automatically unfair?

(ii) Did the respondent directly discriminate against the claimant contrary to section 13 of the Equality Act 2010 on grounds of her sex?

(iii) If any claim is successful, to what remedy is the claimant entitled?

Evidence

8. Evidence was given by the claimant, who did not call any other witness, and then by the respondent commencing with that of Mr Lowe the appeal officer and Operations Director. During his evidence that of Mr Tugman, who at the time was Operations Line Supervisor, was interposed as he attended remotely, as he was working in Wales. Mr Lowe then completed his evidence. Evidence was then given by Mr Donnelly the Managing Director who decided on the dismissal, Mr Laming the Operations Manager for Scotland, and Mr Malone the Health and Safety Director.

9. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence. The parties added to it slightly, without objection, during the course of the hearing. The parties had also agreed a Statement of Agreed Facts, and a chronology. The Tribunal is grateful to

the parties for their co-operation in doing so, and for the helpful manner in which they conducted the hearing.

10. During the hearing the Tribunal asked questions of a number of the witnesses in order to elicit the facts under Rule 41, and having regard to the overriding objective in Rule 2.

Facts

11. The Tribunal considered all of the evidence before it, and found the following facts, material to the case before it, to have been established:

Parties

12. The claimant is Ms Eilidh Rattray.

13. The respondent is Gas Call Services Limited. It provides servicing and repair services for domestic boilers, and other services. It was established by Mr Michael Donnelly in 1996, and has grown to around 220 employees with branches in a number of places in Scotland, including in Aberdeen. It has a wide range of accreditations and awards, including for health and safety. Some of the accreditations and awards involve an audit of there being processes in place in writing, and that they are followed in practice. The respondent has not previously dismissed an employee for gross misconduct.

Contract and policies

14. The claimant had continuous service with the respondent as an employee with effect from 11 January 2021. She had had an earlier period of employment with the respondent. She had an induction in December 2020, and signed a checklist of documents she had been referred to, which included those as to health and safety. The induction was carried out by Mr Laming.

15. The claimant was employed under a contract of employment with the respondent. It referred to a Disciplinary Procedure and a Grievance Procedure. Those procedures were in a Company Handbook.

16. The respondent had a separate Disciplinary Policy and Procedure. Its provisions included the following:

> "3.2.1 If it is decided that there is a disciplinary case to answer, the Company will provide the employee with written notice informing them that this constitutes the first stage of the formal disciplinary procedure and as such outline
>
> > 3.2.1.1 the alleged misconduct or poor performance and any possible consequences of these…
> >
> > 3.2.1.3 details as to the time and venue of the disciplinary meeting….
>
> 3.2.3 The meeting will be scheduled in order to vie the employee reasonable time to prepare
>
> 3.2.4 The Company will establish the facts before the meeting by collecting documents, identifying any relevant people to interview and taking statements before memories start to fade….
>
> 3.5.1 Employees have the right to appeal against any formal disciplinary action……
>
> 5.1 In the event that an employee commits an act of gross misconduct the Company is entitled to summarily terminate the employee's contract of employment without notice or pay in lieu of notice.
>
> 5.2 The following non-exhaustive list gives examples of offences that the Company will normally regard as gross misconduct:…….
>
> > 5.2.10 Conduct likely to bring the Company's name into disrepute…..
>
> 5.3 If the Company decides to summarily terminate the employee's contract of employment without notice or pay in lieu of notice the Company must be acting fairly and reasonably to take this action rather than following the Disciplinary Procedure set out in Clause 3 above."

17. The respondent operated a Health and Safety Policy, under which it had a Committee, and Health and Safety Director. There were safety representatives, and that for the engineers was Kevin Traynor.

18. The respondent held a contract with Aberdeen City Council ("the Council") to service and repair heating systems in their tenants' homes. The respondent had taken over that contract from a previous contractor Richard Irvin, in or around 2013. Following its doing so there was a social media campaign against the respondent which sought to have Richard Irvin re-instated as the contractor.

19. The respondent sought to build up its reputation in the Aberdeen area, and provide a good service to the Council and its tenants. The contract it held with the Council was for approximately 17,000 properties. Good Service and Repair Technicians were difficult to employ in the Aberdeen area.

Claimant's role

20. The claimant was employed by the respondent as a Service and Repair Technician. Under her contract her line manager was Mr Stuart Laming the Operations Manager.

21. The contract with the Council involved a service on each property being carried out once every nine months. They were generally conducted outwith the winter period of around December to March each year. If a service found a fault, that may require repair or replacement of the boiler. Minor repairs or replacement of parts could be carried out on site at the time, and other repairs or replacements could require a later visit to do so.

22. Service work tended to be allocated by postcode. It was allocated automatically by a computerised system. Service jobs had a code starting with "S". If the service indicated that a repair of some kind was required, that meant that a different job was created for it, with a code starting with "M". Jobs that were carried out included work for boiler breakdowns, where there was a fault in the boiler or system meaning that the central heating was not working. They were allocated as repairs and also given an "M" coding. There were liable to be many more of such breakdowns during the winter months.

23. Other work included for "voids" where a property was empty. The claimant did that void work when she was pregnant, before commencing maternity leave. The claimant's maternity leave was from 9 August 2021 to 25 March 2022. On return from maternity leave the claimant was permitted to work 40 hours per week from Mondays to Thursdays.

24. The claimant after her return from maternity leave carried out what was generally a mixture of service and repair work for the respondent, with some void work also. She believed that she was being allocated more service work than her male colleagues, and raised a request to work on more repairs several times with Mr Jamie Tugman, the Operations Line Supervisor, who operated as her line manager and believed himself to be her line manager, and on an occasion in around April 2022 with Mr Laming. She mentioned that she would be interested in doing installation work in general terms but did not pursue that further than an initial comment. Other engineers also complained to Mr Tugman and Mr Laming about doing too much service work.

25. The claimant did not raise a formal complaint of not being treated the same as her male colleague during her employment with the respondent. She did not raise a grievance. She did not raise in writing any request to change her job role. Another Service and Repair Engineer, Mr Kevin Traynor, made a written request to change his job role, and moved to a different role in a different department, Installations, when that was granted.

Microswitch incidents

26. On 25 April 2022 the claimant attended a tenant's property for a service. She discovered that a microswitch on the boiler had become disconnected, such that it was not working properly. A microswitch proves that the pump is working satisfactorily. If it is not, the microswitch indicates a fault via the central processing unit on the boiler. It is a party of the system to ensure the safe operation of the boiler, which operates by gas. It is not the only part of the safety system, and there are three other parts of it which all operate if temperature levels are exceeded and then operate to cut off operation of the boiler. It is only if all four safety elements fail that

there is a risk of the boiler continuing to operate unsafely with a potential for fire breaking out.

27. The claimant reported the disconnected microswitch by telephone to Mr Tugman. In the documentation she produced after the visit to the property, which included a Landlord Gas Safety Record, she did not identify a fault at the time of her annual service visit.

28. A microswitch can become disconnected either unintentionally, by it coming loose from matters such as the removal of a plate, or by vibrations, or intentionally if someone decides to do so.

29. On 9 May 2022 at another property to conduct a service the claimant found a boiler which also had a microswitch that had become disconnected. She reported that by WhatsApp message to Mr Tugman. She also noted it on the Call Slip for her attendance there.

30. On 7 June 2022 at another property the claimant was carrying out an annual service visit. She discovered that the microswitch in the boiler had been removed, and a connection made so as to by-pass it. That meant that the safety element provided by the microswitch was absent. The tenant of the property was annoyed when the claimant said that she was going to get a part from her van. She was told by the tenant that the previous engineer had said that he would return to replace a part but had not, or words to that effect. She obtained a microswitch from her van and fitted it. She checked that it was working properly and left. She completed a Call Slip stated “asv complete” meaning that she had completed the annual service visit. She did not refer to the removed microswitch and its replacement.

31. She telephoned Mr Tugman to report that the microswitch had been removed. She then sent to Mr Tugman at his request by WhatsApp message sent at 14.18 a photograph of the part of the boiler showing the missing microswitch. She also sent by WhatsApp a screenshot of the previous visit to the property undertaken by another engineer Marc Easton. Mr Tugman acknowledged receipt of them with the word “Thanks”. He did not suggest that she should report it to anyone else, including a health and safety committee or representative. She was called back to the

same property as there had been a fault, and did so between around 18.00 and 19.00. She attended to the fault and repaired it. She completed a Call Slip for the same.

32. A microswitch cannot become removed in such a manner save by deliberate act of someone.

33. Mr Tugman printed out the messages with the photograph and screenshot and raised them with Mr Laming (at a time not given in evidence).

Facebook posts

34. During the afternoon or evening of 7 June 2022 the claimant's cousin made a post on her Facebook page, referring to a visit by one of the respondent's engineers and complaining at the service she had received, including that she had been ignored. The claimant replied to that, and to another post the same day. The claimant's page was not open to the public, but capable of being viewed by around 300 – 400 of those she had identified as friends, and those who were friends of her cousin. (The number of her cousin's friends was not given in evidence.)

35. The posts by the claimant replied to those of her cousin in which there was reference to "gas call". The claimant stated the following in response to a post which referred to a visit by an engineer complaining about what had happened:

> "Not even shocked. I highly suggest making a complaint not something I would normally say but at this point no one seems to want to do their jobs right and its causing so much freaking hassle"

36. After another entry from her cousin referring to the engineer as a "C**T" the claimant replied:

> "there's a few of them to be honest and it's not acceptable there's one guy in particular I wonder if it was him, I'll message you. I'm wanting out now it's that bad!"

37. She took down her posts after about an hour, realising that they were not in appropriate terms. She made the posts when upset and frustrated at

the events that had happened, particularly earlier that same day with the microswitch she found missing.

38. At some time on 7 June 2022 the claimant made an application for employment outwith the respondent, (the time of which was not given in evidence).

39. The claimant's posts were passed on to Mr Tugman that day by one of those who viewed it (whose identity was not established in the evidence). He passed it to his manager Mr Stuart Laming, who was in the contract of employment stated to be the claimant's line manager. He passed it on to Alan Lowe, Operations Director, who passed it to Lyndsey Robertson Business Services Manager, who passed it to Mike Donnelly the Managing Director.

40. Mr Donnelly was shocked at what had been posted. He was concerned at the potential for damage to the reputation to the respondent. That was in the context that the respondent had taken over the contract for Aberdeen City Council in 2013 after which there had been a social media campaign to seek to have the respondent removed and the previous contractor, Richard Irvin, returned. He was concerned that employees of the respondent would generally become aware of it, that it could be circulated more widely to tenants of the said Council, managers there, and councillors.

Dismissal process

41. The claimant was required to attend a meeting, by email from Mr Laming sent on 7 June 2022 at 19.35, to take place at 8am on 8 June 2022 to discuss it. No reason for the meeting was given.

42. The meeting took place at 08.21 on 8 June 2022 with Mr Laming and Mr Tugman in attendance. The claimant accepted that she had posted the Facebook entries, and explained the context in which she had done so, apologised, and stated that the entries she had made had been removed within about an hour of being put up. Notes of the meeting were prepared by Mr Tugman during the course of it.

43. Mr Laming sent the notes to his manager, and they were passed on to Mr Donnelly. He ascertained that the claimant did not have two years' continuous service. He also ascertained that she had not made any formal complaint or grievance. He did not consider in detail the terms of the respondent's disciplinary policy and procedure. He spoke by telephone to Annette Bateman, who held a senior Human Resources role in a Group company of the respondent named Dyson Energy. Mr Donnelly is on the board of directors of the Group, with other directors from other Group companies. He read out to her the posts that the claimant had made, and the context of them. He sought her advice. That was to the effect that there was a strong case for summary dismissal, but that there was a risk. He considered that there was no such risk as the claimant had less than two years' service and admitted that she had made the posts. He believed that the posts were likely to bring the respondent into disrepute, including its employees, given the terms of them, with a risk of leading to others using it against the interests of the company. He decided to dismiss the claimant in the latter part of the evening on 8 June 2022.

44. He passed on that decision to Mr Lowe early in the morning of 9 June 2022, who in turn passed it to Mr Laming by telephone.

45. The claimant attended a further meeting with Mr Laming and Mr Tugman on 9 June 2022 at 8.15am and was told that they had heard back from HR late yesterday that her employment was to be terminated summarily for gross misconduct by bringing the Company name into disrepute in the Facebook posts. Notes of the meeting were prepared by Mr Tugman during the course of it.

46. The claimant received a letter from the respondent's "HR Department" confirming the same dated 9 June 2022, which stated that her posts were gross misconduct as likely to bring the respondent into disrepute.

47. On or around 9 June 2022 Mr Laming and Mr Tugman met Mr Easton. They asked him about the messages from the claimant. He denied that he had removed the microswitch at that property. His work on about six other properties was checked later, and found all to be in order. Mr Laming and

Mr Tugman did not speak to the tenant whose property it was, or take any further action on the matter.

Appeal

48. The claimant appealed that decision on 11 June 2022. Arrangements were made to hear it, but delayed to allow a representative to attend.

49. The appeal was heard by Mr Lowe on 6 July 2022. The claimant was alone as her representative did not attend. Mr Lowe explained that he had not made the decision to dismiss, and stated that the decision had been taken by HR consultants. He did not disclose that the managing director had taken that decision. He dismissed the appeal by letter dated 21 July 2022 sent by the respondent's HR department. No reasons for that decision were given in the letter.

50. The reason for the appeal being dismissed was the view held by Mr Lowe that the claimant had not shown remorse for her actions, had not offered an apology to the employees of the respondents or put any context in the posts referred to, and that the posts were likely to bring the respondent into disrepute such as to be gross misconduct warranting summary dismissal.

51. The claimant did not raise any concern over sex discrimination or health and safety using the respondent's whistleblowing procedure during her employment.

Events after dismissal

52. Shortly after her dismissal the claimant's relationship with the father of her child, then aged about ten months, broke up. That meant that she became a single parent, who did not have childcare for the night-time, and in turn meant that she could not work on call or similar arrangements in the gas industry. Initially she sought to set up her own business as a self-employed engineer, but then applied for a post with Peter Vardy, attending an interview on 21 June 2022 and being offered the role to commence on 11 July 2022. She accepted that role, and did not pursue her business. She was in receipt of Universal Credit during the intervening period.

53. Whilst employed by the respondent the claimant had a gross income of £680 per week for a 40 hour week. She also had pay for overtime and Sunday working. Her average net income was £674.67 per week. The respondent paid pension contributions of £6.80 per week.

54. When employed by Peter Vardy she had a net income of £1,959.75 per month initially which reduced to £1,038.46 per month after a period of three months when she moved to a new role.

55. The claimant was upset by her dismissal, and that upset has continued.

56. The claimant commenced early conciliation in relation to the respondent on 4 August 2022. The Certificate in relation to the same was issued on 8 August 2022. The present claim was presented to the tribunal on 9 August 2022.

Submission for Claimant

57. The claimant understandably did not wish to make a written submission. The Tribunal was however aware of her position from the evidence that she had given, and took that fully into account in considering matters.

Submission for respondent

58. The following is a very basic summary of the respondent's written submission, which was detailed and clearly had involved much work in its preparation. It had been sent to the claimant in advance of the time given for the claimant to respond, if she had wished to. The respondent argued that neither of the two claims made had been made out. The Tribunal was invited to prefer the respondent's evidence on matters of fact to that of the claimant. The issues should be decided in the respondent's favour. The claims should be dismissed accordingly. A point as to jurisdiction was raised in relation to the discrimination claim, addressed below.

Law

(i) Automatically unfair dismissal

59. Section 100 of the Employment Rights Act 1996 provides as follows:

"**100 Health and safety cases**

1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise);

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which

> he reasonably believed were harmful or potentially harmful to health or safety,……."

The reason

60. It is for the claimant to prove the reason for her dismissal under that section.

61. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

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

62. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

63. The statutory provision on the related issue of trade union activities as the reason or principal reason for dismissal was considered by the Court of Appeal in ***Morris v Metrolink Ratp Dev Ltd [2019] ICR 90,*** which reviewed relevant authority***.*** Whilst the statutory provision in that case was different to section 100 the same basic principles apply to each, as they are both based on the principle of automatic unfair dismissal.

64. The initial onus is on the employee to raise a *prima facie* case. It is not necessary for the employee to prove that she comes within the statutory provision: ***Maund v Penwith District Council [1984] ICR 143***; and ***Serco Ltd v Dahou [2017] IRLR 81.*** If a *prima facie* case is made out, the onus shifts to the employer. Should the employer fail to convince the tribunal of the truth of the reason it has sought to rely on, the tribunal must nevertheless consider what the real reason or principal reason was: ***University of Bolton v Corrigan UKEAT/0408/14.*** On the issue of

bringing to the employer's attention the health and safety matter guidance is given in ***Balfour Kirkpatrick Ltd v Acheson and others [2003] IRLR 683*** that –

(i) It was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or committee

(ii) The employee brought to the employer's attention by reasonable means circumstances she reasonably believed were harmful or potentially harmful to health or safety and

(iii) The reason or principal reason for the dismissal must be the fact that the employee was exercising her rights.

65. On the first issue it held that the important matter was that the message was communicated quickly and succinctly. It noted the terms of Article 13(2)(d) of the Framework Directive 89/291 and that a purposive construction of the section was appropriate in light of that.

66. What are reasonable grounds for a belief was considered in ***Kerr v Nathan's Wastesavers Ltd EAT 91/95***, which held that not too onerous an obligation should be placed on employees.

(ii) Direct discrimination

67. Section 13 of the Act provides as follows:

"**13 Direct discrimination**
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."

68. Section 23 of the Act provides

"**Comparison by reference to circumstances**
(1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case…."

69. Section 39 of the Act provides:

> "**39 Employees and applicants**
> An employer (A) must not discriminate against a person (B) –
> ……..
> (c) by dismissing B
> (d) by subjecting B to any other detriment."

70. Section 136 of the Act states as follows:

> "**136 Burden of proof**
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

71. Section 212 of the Act defines "substantial" as "more than minor or trivial."

72. The provisions of the 2010 Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC,*** as well as the ***Burden of Proof Directive 97/80/EC.*** The dismissal was prior to the United Kingdom withdrawing from the European Union, and those provisions remain part of the retained law under the European Union (Withdrawal) Act 2018.

73. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was

endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

74. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

75. In ***Glasgow City Council v Zafar [1998] IRLR 36*** the House of Lords held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

76. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

77. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

78. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

79. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** it was held that if the part of the reasoning was more than a trivial part of it that could suffice in this context. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the following (in a case which concerned the protected characteristic of disability):

> "5
> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.

6

In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

Burden of proof

80. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or victimisation, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or *prima facie* case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748*.**

81. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***)

82. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v***

Efobi [2019] IRLR 352 at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

83. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

84. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a *prima facie* case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no

> sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

85. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***

Observations on the evidence

86. The Tribunal's assessment of each of the witnesses who gave evidence is as follows:

The claimant

87. The Tribunal considered that the claimant was a credible and in most respects a reliable witness. She gave evidence on the basis of what she believed to have happened. She answered questions directly and candidly. She accepted some propositions put to her. There were some aspects of her evidence not borne out by the written documentation, as we address below. Not all of her evidence therefore was accepted as being reliable, but the majority of it was. On the issue of what the sole or principal reason for dismissal was she had a belief, but we required to assess matters from all the evidence before us on the reason for dismissal, which primarily came from the respondent.

Mr Lowe

88. Generally we regarded Mr Lowe as a credible and reliable witness. He assessed the appeal on a somewhat restricted basis but this is not a case of unfair dismissal under section 94 of the 1996 Act, or what might be described as "ordinary" unfair dismissal. He answered several questions from the Judge on the steps taken and the detail of what had occurred. Whilst there were some differences of detail with other evidence they were minor, and of a kind that is expected where a witness is being honest.

Mr Tugman

89. Mr Tugman was we considered seeking to be credible. He did not recall a number of matters put to him as to what the claimant had said to him

during her employment, and on those matters we generally preferred the evidence of the claimant. He explained that he had noted both meetings on 8 and 9 June 2022, and that he had done so as near to verbatim as he could. He had asked parties to stop so that he could do so. His evidence was supported by Mr Laming. On balance we considered that the evidence of these witnesses as to what had been said during those meetings to be more reliable than that of the claimant, although neither note had been sent to her at the time.

Mr Donnelly

90. Mr Donnelly's evidence was the most significant evidence on the question of the reason for the dismissal. He was the decision-maker for that. That was not clear from the process the claimant saw, or the letter of dismissal, or the appeal hearing at which Mr Lowe had said that the decision had been taken by HR. We required to consider his evidence carefully because of that. The claimant's position was in effect that he was not credible or reliable when saying that the only reason for the dismissal was the Facebook posts. For reasons we address more fully below we did not agree, and we accepted his evidence. He gave it directly and clearly. Whilst he was at times a little combative he explained in terms we considered convincing why the posts caused him such concern, and why he thought that dismissal was appropriate. The procedure by which he reached that decision was not one we consider fair and reasonable, although the wording of the respondent's own policy refers to fairness and reasonableness, but that is not determinative not least as this is not a case of "ordinary" unfair dismissal.

Mr Laming

91. We considered Mr Laming to be a credible and reliable witness. He spoke directly and candidly as to what had happened. We had some concerns over how the induction had taken place from the evidence the claimant gave, and noted that the form provided had ticks against all but a very few entries, even though it appeared from the form that it required both initials and a date. The claimant's evidence was that it was, in effect, rather rushed because she had been an employee before. It was not clear to us

exactly what had happened at that stage as the evidence was limited, and documents that the respondent might have produced to support its position were not provided to us. That was taken into account in the issue of to whom the health and safety concerns were reported.

Mr Malone

92. Mr Malone gave general evidence as to health and safety practices and procedures in the company and we accepted his evidence as credible and reliable.

Discussion

93. The Tribunal decision is unanimous. We address each of the issues before us in turn:

(i) Was the reason, or principal reason, for the claimant's dismissal in contravention of section 100(1)(c) of the 1996 Act?

94. The respondent argued that the sole reason for the dismissal was conduct, in that there was a belief that the claimant was guilty of gross misconduct in having made the Facebook posts, which they considered likely to bring the respondent into disrepute. The claimant argued that the principal reason was what she believed to be her having made health and safety disclosures. She accepted that she had made the Facebook posts, and ought not to have done so, but argued that although that was part of the background it was not the principal factor, as what she had done did not she felt merit summary dismissal.

95. We considered that although the respondent did have a health and safety committee, and representative, it had not been reasonably practicable for the claimant to have reported it to that body or representative. Although the respondent asked questions around documents such as posters and emails sent regarding health and safety policy matters, amongst others, it had not produced them. It had not complied with the order in that regard for exchange of documents, if it wished to rely on them. The points were put to the claimant who denied seeing them. We did not consider that the respondent had proved that the claimant did have the knowledge of committees or representatives as they alleged. In addition Mr Tugman

accepted that he was the claimant's line manager, and Mr Malone said that the normal course expected was to report health and safety concerns to the line manager. The nature of the statutory provision in this respect was explained in ***Acheson,*** and having regard to that authority and the facts we found, we considered that the claimant had established the first part of the test.

96. The second part is whether she reasonably believed that the matter was harmful or potentially harmful. For the disconnected microswitches on 25 April and 9 May 2022 we were not satisfied that that test was met, as it was accepted, and at least proved by the respondent, that that can occur without human intervention at least deliberately. The matter on 7 June 2022 however was different. There the concern that the claimant had was that the microswitch had been deliberately removed and by-passed. That raised the potential that that had been done by the previous engineer, but that was not the only explanation. It could have been by another person such as the tenant or someone acting for the tenant, or (at least in theory) the claimant herself. That was not specifically put to her, but in any event we did not consider that that had happened. We considered that she had a reasonable belief that what she found was potentially harmful, as she believed that the absence of a safety feature of that kind had a risk that could lead to some form of fire.

97. The respondents argued that that belief was not reasonable, as there were three other safety features in the boiler which would prevent any fire, and that there was no risk of it superheating. That evidence has limitations however. Firstly the test is one of the belief of the claimant, subject to that being reasonable. The focus is on what she believed, rather than what they believed. Secondly, although the respondent had a contrary belief, and explained that, that does not mean that the claimant's belief is unreasonable. Thirdly, whilst there are three other safety features, as spoken to in evidence, the manufacturer had designed there to be four. That one was missing was we considered an obvious concern as a safety matter, particularly so where a domestic gas boiler is concerned. An analogy we drew is of a medium sized passenger plane, with four engines. It is designed to operate normally and safely with four engines. It can fly with three engines, and be safe when doing so, albeit less so. It can fly

indeed with one engine and be safe, albeit substantially less so. The fact that there are three other engines, or in this case three other safety features, does not mean that the absence of one such feature is without risk, or that the claimant was unreasonable to believe that there was something potentially harmful to health or safety by that fact. That one of four safety features of a gas boiler was not operating as the manufacturer intended is a sufficient basis, in our view, for someone to consider that the situation was potentially harmful.

98. The next issue is whether the claimant could establish a *prima-facie* case that the sole or principal reason for dismissal was her having raised that health and safety matter, to paraphrase the statutory provision. We concluded that she had. That arose from the following facts –

(i) The claimant sent a photograph of a missing safety feature, and screenshot of the earlier visit by an engineer. She believed that that showed a safety concern, and that that was or ought to have been obvious to any engineer or manager with experience. We considered that her evidence on that should be accepted

(ii) She was required to attend a fact-finding meeting for early on the following day in an email sent at 19.35 on 7 June 2022 without knowing what it was for.

(iii) She was seen on the morning of 8 June 2022, the day after the messages she had sent to Mr Tugman. By the evening of that same day, Mr Donnelly had decided to dismiss her.

(iv) He did not follow the normal process for the respondent set out in the respondent's own disciplinary policy and procedure. Clause 3 sets that out, and it was comprehensively breached by the respondent, which in reality did none of it at the dismissal stage, but did give a right of appeal under its terms thereafter.

(v) If clause 5.3 has meaning, and that meaning is not clear from its terms, the decision required to be taken fairly and reasonably if the procedure in clause 3 was not followed. It was not fair and reasonable for a decision to be taken by someone who did not see

or speak to the claimant. That is a basic matter of fairness, judged by the meaning of that word, and not as it is understood under section 98(4) of the Employment Rights Act 1996 or by consideration of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

(vi) Mr Donnelly at best had limited information to go on. He thought that the posts could be seen by all, did not know about Facebook settings, and did not know the detail of the claimant's explanation about why she had done so, and for how long they were live. He also was not aware of her comments about the health and safety matter.

(vii) Mr Laming referred in the meetings to taking advice from HR. Mr Lowe in the appeal hearing said that he had passed the information to HR and that they had taken the decision. That was not correct. Mr Donnelly had done so. The comment in the appeal was at best lacking in candour.

(viii) Mr Lowe who heard the appeal was junior to Mr Donnelly who had decided the dismissal. Another member of the group board of directors could have been appointed to hear it.

(ix) The respondent had not followed the ACAS Code of Practice at all. Whilst that is not directly applicable as this is not an "ordinary" unfair dismissal claim given the claimant's service being less than that required to bring it, it is not irrelevant to the issue of whether or not a *prima facie* case has been established. The Code applies to dismissals for conduct issues. It does not state that it is not applicable to those with less than two years' service. The Code gives guidance to both employers and employees on how to carry out the disciplinary process in such cases. It provides a basic structure for that process. Not following that process may mean that the dismissal is not a fair one in the normal sense of that word, not the sense in section 98(4) of the 1996 Act. If a fair (in that non-technical sense) process is not followed, it is possible that the

principal reason for the dismissal is other than that alleged by the employer.

99. On that basis, the onus passed to the respondent to prove that the reason or principal reason for dismissal was the claimant's conduct in posting the Facebook entries. It was here that the evidence of Mr Donnelly who made that decision became crucial. We considered his evidence carefully, and came to the conclusion that it should be accepted. We considered that the only reason he had dismissed the claimant was his view of the posts she had made. His view was that she had damaged the reputation of the company and its employees in a manner that could not be recovered from. We believed that evidence. Whilst others may have taken a more lenient view, given the claimant a final written warning and made clear to her the potential damage both internally and externally, with the possibility of apology to colleagues, that is not the issue before us. What we might have done is also not the issue. It is a more narrow one than that, and is to ascertain the reason or principal reason for the dismissal. In that connection the test is very different to that in discrimination law, in which the test is whether the unlawful reason is a significant influence on the decision, in the sense of being more than trivial.

100. The messages that had been sent to Mr Tugman had not been passed on to Mr Donnelly. We accepted that he was not aware of them at the time, and it followed from that fact that we accepted that they played no part in his decision. To hold otherwise would have required us to find that all of Mr Donnelly, Mr Lowe and Mr Laming were not telling the truth, which we did not consider likely.

101. We were satisfied that for Mr Donnelly to hold the view that the posts amounted to gross misconduct of such a kind that dismissal was plausible. We were satisfied that that was his genuine and honestly held belief, and that the evidence he gave should be accepted, such that the suggestion that it in effect concealed what was alleged to be the true principal reason – the raising of issues on health and safety – was not correct. In that we considered fully the terms of the posts themselves. In the context in which they were written they did have the potential to cause damage reputation both of the company itself, and of its employees, in our view. There was

both a general comment “no one seems to want to do their jobs right”, a more targeted one “there’s a few of them to be honest” and a particular one “there’s one guy in particular”. Those comments had been seen by one employee, and Mr Donnelly believed that they would be passed around others, such as to be discussed more widely. He had a concern of their being seen by tenants and managers of the Council, which was a major client, and could fuel another campaign to remove his company from the contract. These were rational concerns, based on the words of the posts that the claimant herself had used. His view that damage to reputation was likely was we considered one that he had held at the time of his decision to dismiss.

102. We might add also that there was a point put in cross examination that the message had been passed to the respondent by a manager at the Council, but the positive evidence as to that was lacking, and we did not consider that that had been established. Such evidence as there was did not indicate that the manager had expressed a view as to the matter at least at the time of the dismissal or the appeal.

103. It is notoriously easy to make such comments as those posted by the claimant, as a quick reaction to an event or series of events. The claimant was a young mother at the time, who was a good worker generally, as the respondent accepted. She did not deny making the posts, but did remove them herself the same night, as she made clear on 8 June 2022 at the fact-finding meeting. She had points to put forward in mitigation, including her frustration at what she had found at work that day, the earlier experiences of disconnected microswitches, and that the number of those who could see the posts was limited as it was not a public forum but one with restricted access. Mr Donnelly did not have all the information he could have had, had he himself met the claimant. He acted with such speed that it could be described as rushed. He did not apply either his company’s own procedure, or follow to any extent the ACAS Code. But despite that, and being aware of the risks that not following a proper process can indicate that there was a different reason than that he said I evidence, we accepted that the claimant’s making of those posts and his view of their potential to cause damage to reputation was the sole reason that he decided to dismiss.

104. On that basis, the claim under section 100 of the 1996 Act must fail.

(ii) Sex discrimination

105. We did not consider that the claimant had established a *prima facie* case. Firstly she argued that she had asked to be put on non-servicing work, but had only done servicing work. The evidence from a document Mr Laming prepared, and spoke to, showed that she had carried out a variety of work, including a material level of repair work. We accepted the respondent's evidence that those employed as Service and Repair Engineers, such as the claimant, required to carry out both servicing and repairs, and that the level of work changed according to circumstance and time of year, with more servicing being carried out outwith winter months (although the precise nature of the time period for that was not clear from the evidence as different witnesses gave different periods, but that was not material in our view). Work was allocated by postcode, which made sense as it allowed work in smaller geographical locations each day for each engineer, and we accepted the evidence that it was allocated automatically. We also accepted the evidence that many engineers did not like doing large volumes of service work, with the claimant being one of them, but that the claimant had not made a formal request, or one in writing, for a new role whereas Mr Traynor had done, and had moved to a different department, being installations. The claimant had spoken about her wish to do less servicing on occasions both to Mr Tugman and Mr Laming, but in an informal way. That contrasted with a formal application to move job roles by Mr Traynor, made in writing, and which led to his moving to a different department. The claimant had not raised any grievance, and we did not consider that she had raised issues of how she perceived that she was treated until the issue of the posts itself arose.

106. Against that background we did not consider that the claim in that regard could succeed. It did not appear to us that there was any material difference between the claimant and her comparators, save for Mr Traynor who was not an appropriate comparator as there were material differences in his case, as he had requested in writing a change of job role. We did not consider that there was a *prima facie* case of less favourable treatment established by the claimant. From the evidence we heard it appeared to

us that the claimant received a reasonably similar mix of work between services and repair to that of other engineers. The exact nature of that mix would inevitably change from day to day and person to person. The detailed information was only given in respect of the claimant herself, but the evidence from Mr Laming in particular, which we accepted, was that that was representative of the work allocated to other Service and Repair Engineers. The claimant's knowledge of the work others did was necessarily limited to what she had been told, or seen, and was therefore from a perspective of knowing far less than Mr Laming. We did not consider that there was any evidence to the effect that the claimant was singled out to be sent on more servicing jobs than other Engineers doing the same kind of work. She may have had that perception, but the evidence before us was not sufficient to establish that as a *prima facie* case.

107. The next issue is the allegation that Mr Easton was treated differently as he was not disciplined for what was alleged to be creating an unsafe environment. We did not consider that that fell within the terms of section 13 of the 2010 Act. Firstly the circumstances of the issue in respect of him were entirely different to those of the claimant. What he was alleged to have done, which was the removal and by-passing of a microswitch, was not sufficiently similar to the Facebook posts that the claimant had made. He was not a comparator in the sense required by the Act.

108. Secondly we accepted the evidence from Mr Tugman and Mr Laming that they had investigated the issue. It is true that it was not the most full of investigations, there was no written record of it, and steps that might have been taken such as interviewing the tenant were not, but there was both a discussion with him and a form of audit of six or so other jobs that he had done obviously to seek to find out if there was a pattern of unsafe or improper practices. He denied removing the microswitch. The audit did not reveal any issue of concern. In the absence of further evidence to support any allegation, and in light of his denial of having removed the microswitch, it was not entirely surprising that the issue was not raised as a disciplinary matter.

109. There is a further material aspect of distinction. Mr Easton denied any wrongdoing. The claimant accepted both that she had made the posts, and that she had been wrong to do so, but had removed them fairly quickly. These are all details that mean that the proposed comparator is not one that can be relied upon. We did not consider that there was evidence of less favourable treatment as that term is to be understood. We did not consider that the claimant had made out a *prima facie* case in this regard accordingly.

110. As a result, we must dismiss the claim under section 13 of the 2010 Act.

111. For completeness we should add that the respondent in its written submission made an argument on jurisdiction. That was something of a surprise, as it had not pled any point in its Response Form, and had not included that in the agreed List of Issues. No questions were asked of the claimant in cross examination on the point. The claimant had not had notice of the point accordingly, and had not had a chance to give any evidence on it.

112. We did not consider that the point had merit. Section 123 of the Equality Act 2010 requires to be considered in its full context. A claim is not out of time if there was conduct extending over a sufficient period, as we consider was the case in this matter on the claimant's arguments at least as she alleged that the decision not to take action against Mr Easton, on or around 9 June 2022, was an act of discrimination. In any event, if there was not conduct extending over such a period the issue of a just and equitable extension arises. In that regard the key consideration, the Inner House held in ***Malcolm v Dundee City Council [2012] SLT 457***, was whether a fair hearing was possible. There was no suggestion in this case that a fair hearing was not possible, and every indication from what happened at the hearing that it was fair. It is true that jurisdiction is a matter that the Tribunal must be satisfied on, and if there had been doubt on the point we would have required to invite the claimant to comment and lead evidence, but we did not consider that necessary under the overriding objective. We were satisfied from the evidence before us that there was jurisdiction. In light of the decision on the merits of the claim, that issue is in any event not determinative.

(iii) If any claim is successful, to what remedy is the claimant entitled?

113. This issue does not now arise. For completeness we might add that we did not consider that the claimant had failed to mitigate her loss, and that as some of the questions put to her about what she had done in relation to other employments were not followed by positive evidence from the respondent the basis on which those questions were put was not at all clear to us.

Conclusion

114. In light of the findings made above, the Tribunal dismisses the claims.

115. In so doing we should make it clear that that does not mean that the respondent handled matters in accordance with what may be described as good practice, or in accordance with basic principles of fairness. The case was not one of unfair dismissal under section 94 of the 1996 Act as we have stated, nor one of breach of contract in which the test is different in law, but the respondent's own policy (not contractual in effect) required either following the process set out in clause 3, or if clause 5.3 has meaning to take a decision fairly and reasonably. The rushed decision-making, without the claimant being told of the allegation and having a chance to respond to it before the person making the decision, was not possible to reconcile with being fair and reasonable.

116. That is all the more so when the respondent is a company with a laudable number of accreditations and industry awards including those for safety. A number of them involve audits of procedures being in existence and then being followed. Against that background of processes being in place and followed, as a matter of routine, it was a surprise that an employee was dismissed without following the normal procedure in the respondent's own disciplinary procedure, or if there is an alternative from clause 5.3 (which is at best an ambiguous provision) to do so following basic tenets of fairness, which include finding out all the material facts, giving the employee notice of the allegation, and having a meeting between the employee and decision-maker at which the employee has a chance to explain what happened and why.

117. It is not surprising if an employee dismissed summarily, so shortly after raising what she considered to be a health and safety matter, in the manner that she was, then presents a Tribunal claim. That is so notwithstanding that the claimant did not have the service to claim "ordinary" unfair dismissal. Her mitigating circumstances were not properly understood by the person taking the decision because she did not meet him. Whilst the reaction to the posts was one that was explained in the evidence in this case, having regard to their context and content, with that context including that the respondent had not dismissed an employee summarily for gross misconduct before, the respondent may wish to reflect on how such matters, if they arise in future, are appropriately handled.

Employment Judge: A Kemp
Date of Judgement: 1 June 2023
Date sent to Parties: 1 June 2023