EMPLOYMENT TRIBUNALS

Claimant: **Miss C Mills**

Respondent: **First Greater Western Limited**

Heard at: **Bristol Employment Tribunal**
On: **23-27 October 2023**

Before: **Employment Judge Youngs**
Mrs D England
Ms S Maidment

Representation
Claimant: Mr H Menon, counsel
Respondent: Ms I Egan, counsel

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant did not make a protected disclosure. The Claimant's claims for whistleblowing detriment (s.47B Employment Rights Act 1996).and automatic unfair dismissal (s.104 Employment Rights Act 1996) fail and are dismissed.

3. A Polkey deduction of 50% will be made to the compensatory award.

REASONS

JUDGMENT having been given orally and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Claims and process

1. The Claimant brought claims of unfair dismissal, automatic unfair dismissal due to whistleblowing, and claims for whistleblowing detriment. The Respondent denied the

entirety of the Claimant's claims.

2. The Hearing of the Claimant's claims took place over five days commencing on Monday 23 October 2023. It took place as a hybrid hearing so that the Claimant's witness could attend and give evidence remotely. The rest of the evidence was heard in person.

3. The Claimant was represented by Mr Menon of counsel. The Claimant gave evidence herself, and called one further witness, Mr Antony Oakey. The Respondent was represented by Ms I Egan of counsel. Five witnesses gave evidence on behalf of the Respondent, namely Ms Nicole Beech, Employment Relations Manager, Ms Claire White, Head of Employee Relations, Mr Amit Bhargava, Senior On Board Services Manager (and the Claimant's line manager at the material times), Mr David Crome, Head of On Board, and Mr Diggory Waite, Regional On Train Manager.

4. We had before us an agreed Bundle of Documents, and some additional documents were permitted to be admitted during the course of the hearing. We also had a chronology, which was agreed by the Claimant at the start of the hearing. Both counsel made written and oral submissions, which we took into account.

Issues

5. The issues were discussed at the start of the hearing and the List of Issues on pages 86-90 of the Bundle (as set out in the Order sent to parties on 30 January 2023) was amended:
    a. The Claimant's application to amend issue 3.1.1.2 so that the is referred to the alleged protected disclosure being an email in March 2022 (not April 2022) was allowed;
    b. The Claimant withdrew allegations of detriment, for example due to duplication of factual allegations.

6. It was agreed to deal with liability first, including any Polkey or contributory fault issues.
7. The final List of Issues that the Tribunal had to determine was as follows:

Time limits

1.1 The claim form was presented on 2 October 2022. The Claimant commenced the Early Conciliation process with ACAS on 12 September 2022 (Day A). The Early Conciliation Certificate was issued on 30 September 2022 (Day B). Accordingly, any act or omission which took place more than 3 months before the first early conciliation date, (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Was the unfair dismissal / detriment complaint made within the time limit in section 111 / 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?
1.2.2 [DETRIMENT] If not, was there a series of similar acts or failures and

was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Unfair dismissal

2.1 Was the Claimant dismissed?

2.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct or some other substantial reason, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

2.3 MISCONDUCT Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

2.3.1 The Claimant asserts that she had permission to raise the matters that she raised.

2.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

2.5 Did the Respondent adopt a fair procedure?

2.6 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

2.7 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged

3. Protected disclosure ('whistle blowing')

3.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the Claimant say or write? When? To whom? The Claimant says she made disclosures on these occasions:

3.1.1.1 On February 2022 the Claimant had a conversation with Ahmit Bhargava in which she stated concerns that the equipment was too heavy and that there was a lack of training or risk assessments and control measures in place.

3.1.1.2 in April 2022 the Claimant emailed Clare White and told her of her concerns;

3.1.2 Were the discloses of 'information'?

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

3.1.4 Was that belief reasonable?

3.1.5 Did she believe it tended to show that:

3.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation ,namely unsafe working practises and health and safety regulations;

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

3.1.6 Was that belief reasonable?

3.2 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to;

3.2.1 to the Claimant's employer?

4. Automatic unfair dismissal (Employment Rights Act 1996 section 104)

4.1 what was the reason or principal reason for the Claimant's dismissal?

4.2 Was the reason or principal reason for the Claimant's dismissal that she had made any of the protected disclosures set out above.

5. Detriment (Employment Rights Act 1996 section 47B)

5.1 Did the Respondent do the following things:

5.1.1 The Respondent, by actions and attitude of Diggory White; David Crome; Nicola Beech and Clare White, was dismissive towards the Claimant's concerns? The Claimant relied on the Respondent's attitude in the disciplinary and appeal hearings and the warning given by Ms White in respect of breach of the COT3.
5.1.2 - Withdrawn
5.1.3 the Respondent commenced and took forward disciplinary proceedings against the Claimant;
5.1.4 - Withdrawn
5.1.5 - Withdrawn;
5.1.6 - Withdrawn
5.1.7 - Withdrawn

5.2 By doing so, did it subject the Claimant to detriment?

5.3 If so, was it done on the ground that she had made the protected disclosures set out above?

6. Remedy Unfair dismissal

6.1 The Claimant does not wish to be reinstated and/or re-engaged OR The Claimant wishes to be reinstated to their previous employment or reengaged to comparable employment or other suitable employment. Should the Tribunal order reinstatement? The Tribunal will consider, in particular, whether such an order is practicable and, if the Claimant caused or contributed to the dismissal, whether it would be just to make it and upon what terms it ought to be made.

6.2 What basic award is payable to the Claimant, if any?

6.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

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

- *6.4.1 What financial losses has the dismissal caused the Claimant?*
- *6.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
- *6.4.3 If not, for what period of loss should the Claimant be compensated?*
- *6.4.4 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?*
- *6.4.5 If so, should the Claimant's compensation be reduced? By how much?*
- *6.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? No breach is identified. If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?*
- *6.4.7 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 her compensatory award? By what proportion?*
- *6.4.8 Does the statutory cap of fifty-two weeks' pay or £89,493 until April 2022, £93,878 thereafter) apply? Detriment (s. 47B)*

6.5 What financial losses has the detrimental treatment caused the Claimant?

6.6 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6.7 If not, for what period of loss should the Claimant be compensated?

6.8 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

6.9 Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

6.10 Is it just and equitable to award the Claimant other compensation?

6.11 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

6.12 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the Claimant's compensation? By what proportion?

6.13 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

Findings of Fact

8. The Claimant began employment with the Respondent in 2013, originally as a Gateline Assistant and subsequently as a Customer Care Assistant at Reading Station (referred to in the proceedings by the parties as "the Platform Role"). In early 2019 the Claimant applied for a Lead Customer Host Role onboard a train (referred to in the proceedings by the parties as "the Onboard Role").

9. She was stood off from work in 2019.

10. In 2020 she brought claims to the ET. As part of these proceedings there was a preliminary hearing to consider whether the Claimant was disabled within the meaning of s.6 Equality Act 2010. The Claimant was found not to be disabled. The parties agree that the Judge at that hearing found that an OH report relied upon by the Respondent was not consistent with the other medical evidence. The Claimant was found not to be disabled.

11. The 2020 proceedings were subsequently settled in November 2021 following judicial mediation. As part of the settlement, the Claimant agreed to return to work in the Onboard Role.

12. The COT3 that settled the 2020 proceedings included the following terms:

    a. At clause 1.1 - without admission of liability on behalf of itself or any Associated Company, and in full and final settlement of the Claim, the Respondent has agreed to pay to the Claimant the sum of £5000 (Five Thousand Pounds only) (the "Settlement Payment") which is consideration for the conciliated settlement in clause 2.

    b. At clause 4.3 - the parties acknowledge that nothing in this COT3 Agreement shall prevent the Claimant from making a protected disclosure within the meaning of section 43A of the Employment Rights Act 1996, making a disclosure to a regulator regarding any misconduct, wrongdoing or serious breach of regulatory requirements, reporting a criminal offence to any law enforcement agency or cooperating with a criminal investigation or prosecution.

c. At clause 5.1 - the Claimant agrees to return to her substantive Lead Customer Host role [the Onboard Role] on 1 December 2021 and fulfil the duties and responsibilities of that role, as required.

d. At clause 5.2 - the Claimant agrees to withdraw any grievance or appeal that remains outstanding and acknowledges that, as a result of entering into this COT3 Agreement, the Respondent will take no further steps in respect of any grievance or appeals. The Claimant warrants that as at the date of this Agreement, she has no further grievances or complaints against the Respondent or any Associated Company and agrees that she will not submit any future grievances to the Respondent or any Associated Company arising directly or indirectly out of or in connection with the Claim and all or any complaints connected to the Claim and or the facts surrounding the Claim.

13. On 1 December 2021 the Claimant and her line manager, Amit Bhargava, Senior Onboard Service Manager, and Nicole Beech, Employee Relations Manager, met to discuss the Claimant's return to work and any training needs. Mr Bhargava wrote to the Claimant on 23 December 2021 to confirm the training plan, subject to dates for an occupational health appointment and physio assessment. There was to be a mixture of online and in person training.

14. The Claimant returned to work on 31 December 2021 to commence her training. She undertook various training between 31 December and 4 March 2022. She then went off sick and did not return to work.

15. During the period of training, an occupational health / physio assessment was carried out on 12 January 2022. It was attended by a Senior Occupational Health Physiotherapist, a Service Development Coach (who carries out peer training for the Respondent), the Claimant and her trade union representative. The assessment included observing the Claimant in relation to her moving ramps, which she was observed to do with ease and good manual handling techniques. The assessment was comprehensive. A recommendation was made that the Claimant would benefit from more ramp training. A specific recommendation was made in relation to the Respondent giving the Claimant clear advice on company policy in respect of deploying ramps in windy conditions, as the Claimant had asked about this during the assessment. The Claimant was provided with a copy of this report.

16. The Claimant says that subsequently, whilst undertaking online training as part of her return to work training, she discovered reference to a dynamic risk assessment and how to carry ramps in adverse weather, in particular windy weather. Whenever it was that the Claimant found out about this, it upset the Claimant because she came to think that her previous standing off in 2019 could have been avoided had she known then that the techniques she had found were approved by the Respondent.

17. On 15 February 2022 the Claimant emailed the Director of Human Resources, Ruth Busby as follows:

> *I'm writing to seek your help with a work situation. I attended a tribunal on 21st October 2021 following a lengthy grievance I raised first raised between 2019-2021 which were not upheld the court was upheld and I wanted to know when I'm likely to get my job back at Reading station as Customer Care Assistant* [Platform Role] *and my salary back?*

18. In fact, the Claimant's claims had not been upheld, as there was no final hearing of her claims, although the Claimant genuinely believed that by highlighting the inconsistency of the particular occupational health report referred to at the preliminary hearing on disability, that her position in relation to being stood off was correct (and therefore upheld). There was however no basis for the Claimant to believe that she was likely to get her Platform Role back or any additional salary, as both of those matters had been settled as part of the November 2021 COT3 agreement.

19. Ms Busby forwarded the Claimant's email to Claire White, Head of Employee Relations. Ms White responded to the Claimant on 22 February 2022 to say that the issues the Claimant had raised were settled. Ms White reminded the Claimant of the terms of the COT3. There followed a chain of emails between Ms White and the Claimant between 22 February 2022 and 8 March 2022. In total, including the request to the Respondent's Director of Human Resources, the Claimant asked five times when she would get her role back (and backpay), and Ms White told the Claimant four times that these issues were settled by the COT3. Ms White repeatedly asked the Claimant not to continue to raise matters that were settled by the COT3.

20. Also on 22 February 2022, the Claimant wrote an email to Alok Sharma MP raising the same points as she had raised with the Respondent's Director of Human Resources. This prompted Mr Sharma to write to the Respondent on 7 March 2022.

21. The Claimant says that at some point in February 2022 the Claimant had a discussion with Mr Bhargava about the Claimant having found health and safety information that she had not seen before. This related to how to handle the ramps in windy weather. This discussion is relied upon by the Claimant as a protected disclosure. The Claimant's position is not consistent as to what she says was discussed. The Claim Forms, the letter from the Claimant on page 175 of the Bundle and the Claimant's witness statement are all different as regards this alleged conversation. It is only latterly that the Claimant has suggested that she told Mr Bhargava that she was concerned for colleagues or that further training was required. We conclude that the Claimant is misremembering what was said, and likely adding to the discussion and/or conflating discussions with hindsight. The position as set out in the Claim Forms in August and October 2022 are more likely to be accurate than her statement over a year later. In addition, the letter on page 175 of the Bundle (emailed on 9 March 2022) was written some time after the discussion with Mr Bhargava, and we conclude that the Claimant's concerns and position developed in that period between the discussion and the writing of the 9 March 2022 letter.

22. On 28 February 2022 the Claimant made a subject access request ("SAR"). The Respondent considered that the majority of the requests in the SAR were repetitious and were for documents that had already been provided to the Claimant, the Claimant having made previous SARs. The Claimant disagreed with the extent to which the 2022 SAR was asking for the same information as had been provided previously, and this led to further correspondence between the Claimant and the Respondent on the matter.

23. On 9 March 2022 the Claimant wrote to Ms Beech raising a number of issues including the following:

1. This refers to accident form 15/04/2015 where weather conditions and not provided with correct peer trained. this should have been investigated correctly and a lack of training could have been flagged up at the time. and the chain of events that followed would not have happened.

3. Refers to the manual handling ramp refresher training I recently enrolled on to assesstech. This evidences that carrying the ramp with one hand close to your body to place my other hand onto the ramp in adverse weather conditions (medium to high winds) this evidence is that I was adapting the correct manual handling technique.

Considering this new evidence – the stood off could not have happened.
Going forward I'd like for these incidences to be looked into as unsafe working practises.

I'd like to discuss this further and return to my role [the Platform Role] *now I have been provided with the correct manual handling training and risk assessments.*

24. Ms Beech, Employee Relations Manager, forwarded this email to Ms White, copying in the Claimant.

25. On 10 March 22 the Claimant wrote to the Respondent's "ask the directors" email address complaining that she was stood off in April 2019, still not permitted to return to her Platform Role, and asking whether this was anything to do with not being provided with peer training. Whilst Peer training was a matter raised in the 2020 claims, the reason that the Claimant had not returned to the Platform Role was that she had agreed as part of the COT3 settlement that she would return to the Onboard Role.

26. On 15 March 2022, the Claimant emailed Claire White, with additional information to add to her 9 March 2022 email. The new information concerned the use of platform ramps.

27. There were further emails between the Claimant and Ryan Jones, the Respondent's Data Protection Compliance Officer, and/or Human Resources personnel between 10 March and 17 March 2022, about the Claimant's SAR and documentation that the Claimant wanted to be provided to her.

28. On 6 April 2021 the Claimant wrote to Ms Beech asking for copies of interview notes from job interviews she had undertaken in 2021 and 2019.

29. On 11 April 2022, Ms White wrote to the Claimant:

    a. The first part of Ms White's letter set out what was going to happen with the allegations of unsafe working practises raised by the Claimant in her e-mail of 9 March 2022. Miss White suggested that the Claimant had not raised any information that she had not had prior to settling her 2020 employment tribunal claims. However, Ms White confirmed that the matters raised would be investigated under the Respondent's whistle blowing policy.

b. The Claimant is also told that her SARs have been dealt with and there is no outstanding information to be provided.

c. Ms White then set out her position in relation to matters settled under the COT3 agreement in November 2021. Ms White comments that the Claimant had agreed not to raise any further complaints or grievances in connection with the settled claims or the facts surrounding those claims, but that since February 2022 the Claimant had continued to raise the same issues with various individuals both inside and outside of the Respondent company. Ms White indicated that this was not permitted under the terms of the COT3e agreement. Miss white also highlighted that the information presented by the Claimant had been factually incorrect, for example because no decision was made (by an Employment Tribunal) as to whether or not the Claimant had been lawfully stood off in 2019 because there was no hearing of the matter and the case was settled. Ms White reiterated that the agreement was that the Claimant would return to the Onboard Role. There was no agreement that she would return to her previous Platform Role or receive any back pay. Ms White wrote:

> *I am therefore making a reasonable management instruction to ask you to refrain from raising these matters, which have been settled under the COT3, any further, both internally and externally. By continuing to raise these matters, you are in breach of your COT3 Agreement. So that there is no further confusion, this matter is closed and we will not be responding to any further correspondence relating to this subject matter.*
>
> *If however you do continue to raise these questions then we will have no choice but to consider our position as to the feasibility of your ongoing employment with the company. I would also draw your attention to the fact that the sanction for breaching the agreement is £5,000 and I will not hesitate to take steps to recover the sums paid to you under the same if you continue to raise the same issues.*

30. The Claimant did not continue to ask when she could return to the Platform Role. Neither did she persist with any request for back pay. She did refer to matters related to the same time period as the claims settled by the COT3 agreement.

31. On 27 April 2022 the Claimant (who was off sick) attended a welfare meeting with Mr Bhargava. Ms Beech and the Claimant's RMT trade union representative were also in attendance. The Claimant confirmed that she had had one of six CBT sessions, with the second later that day. She was asked about being off sick with depression, and asked what was stopping her from returning to work. It was clear that the Claimant still had training to do, which is in line with the recommendations of the physio report referred to above. During the course of this meeting, Mr Bhargava was supportive and listened to the Claimant's concerns, as he did in his other interactions with the Claimant that were referred to in the course of these proceedings. The Claimant, when asked what was stopping her from being able to return to work, referred to the events of the previous three years, including being unpaid, and said that she could not get to the root cause to resolve this. She said that the situation had been ongoing for over three years and was continuing for her. In response to questions from Mr Bhargava and Ms Beech, the Claimant made clear that she wanted to return to the Customer Care Assistant role. She did not ask to be moved, but rather she expressed that she wished that the events of the past three years had not happened.

32. On 3 May 2022 the Claimant requested interview notes and training records back to 13 February 2013. She did not raise any complaint or grievance in this correspondence.

33. On 9 May 2022 the Claimant wrote to Mr Jones alleging that he had not handled her request for her personal information properly. She said that she had asked for her full personal file and it had not been provided. She indicated that she intended to complain to the Information Commissioner but was giving Mr Jones a chance to deal with her complaint first. Whilst the Claimant refers to the previous "settled" issues, this email is about the data request, not about those details *per se*.

34. Between 6 and 19 May 2022 there was a series of emails between the Clamant and Ms Beech in which the Claimant asked to know the identity of someone who had written an email about her. This was refused by Ms Beech. The Claimant does not identify the email at this stage, or give any indication as to what it is about.

35. On 19 May 2022 the Claimant wrote to the "ask the directors" email address to enquire whether a wheeled ramp project had progressed.

36. On 24 May 2022 the Claimant attended a welfare meeting with Mr Bhargava. The Claimant had asked for this meeting to discuss concerns that she had having reviewed her personal file. Having asked for her personal data, the Claimant found out that people had said things about her that she wasn't happy about or that she didn't agree with. These were historic matters dating back to before the COT3, but not matters that the Claimant knew about when she signed the COT3. Mr Bhargava asked the Claimant what she wanted to achieve and the Claimant said that she wanted to get to the "root cause" of the issues. Mr Bhargava asked if that would give the Claimant closure. The Claimant did not really answer this. Mr Bhargava asked the Claimant what her desired outcome was and the Claimant said it was to return to her Platform Role.

37. On 27 May 2022 the Claimant wrote to Ms White setting out information about her medical condition and absence from work, and the matters that she considered were affecting her anxiety, depression and IBS. The Claimant's GP advised her to write to Ms White, although we anticipate that the detail was not prescribed. All of the issues raised by the Claimant as contributing to how she was feeling were historic issues, pre-dating the COT3. There is no obvious purpose for writing this letter. The Claimant did not ask for anything. She merely said that her GP advised her to tell her employer how she was feeling.

38. On 1 June 2022 the Claimant wrote to Mr Jones complaining about matters relating to her SAR. She did not refer to any settled issues. The information he requested includes information that existed prior to the COT3, but her only complaint – or indeed grievance – is in relation to what she perceives as an inadequate response to her then current SAR.

39. Also on 1 June 2022, the Claimant forwarded a risk assessment to Ms White and commented on it and what she considered to be a gap in training, this assessment having not been covered with the Claimant previously (she said). It is not clear whether the Claimant would be required to use the sort of ramp she referred to, or whether she had since had the relevant training (the email does not say that this issue was not covered in the 2021 training for example). The Claimant indicated that she

thought that she and the customer had been put at risk. The issues raised by the Claimant related to the period of time prior to the Claimant being stood off in 2019, and therefore prior to her agreeing the COT3 agreement. This email was sent in response to an update from Ms White in relation to the investigation under the Respondent's whistleblowing policy and we conclude that it was intended to add issues for consideration under that investigation.

40. Also on the same day, 1 June 2022, the Claimant wrote to Lucy Mcgiveron, HR Business Partner, regarding a pay issue from 2019. The Claimant's pay had been stopped and reinstated back in 2019 and the Claimant had been reimbursed at the time. The Claimant wanted to know who Ms Mcgiveron had been in touch with at Reading station about this and what had instigated the change from nil pay to sick pay. The Claimant is seeking information about how something positive came about, rather than raising a complaint.

41. On 20 June 2022, Lee Bladen, the Respondent's Safety Manager, wrote to the Claimant responding to her concerns about unsafe working practices. This was the outcome of the investigation under the Respondent's whistleblowing procedure. The outcome deals with the training, policies and practices in place at the Respondent. it does not deal with the issues raised by the Claimant insofar as they were alleged to have affected her personally. Mr Bladen expressly confirmed this to the Claimant in his 20 June 2022 letter, i.e. that he had not commented on details applicable to the Claimant, as this was not within the scope of his investigation. It is not clear why Mr Bladen did not consider whether there had been any impact on the Claimant as a result of her concerns, and no evidence was brought on this, but it is consistent with the Respondent's position that anything relating to the Claimant prior to the 2020 COT3 was settled and a line had been drawn in the sand.

42. On 22 June 2022, because the Respondent considered that the Claimant had continued to breach the COT3 agreement, the Claimant was sent a letter inviting her to attend a disciplinary hearing. She was informed that the purpose of the hearing was to consider an allegation of gross misconduct against her. The letter stated that:

> *The basis of this allegation is that you have continued to disregard a reasonable management request made to you on 11th April 2022, not to raise matters that have been settled under a COT3 agreement dated 26 November 2021.*
>
> *At this hearing I will also consider the potential breakdown of the employment relationship as a consequence of your conduct, your continued persistence in sending emails to numerous colleagues raising issues about various matters which are connected to your settlement, and your unacceptance of the company position on these matters...*

43. The Claimant attended a disciplinary hearing chaired by Diggory Waite on 26 July 2022. She was found guilty of gross misconduct and dismissed. Mr Waite did not know the content of the Claimant's 9 March 2022 email and was not aware of any alleged protected disclosure to Mr Bhargava. The outcome letter sets out six examples of what Mr Waite considered to be refusals by the Claimant to comply with the management instruction of Ms White, namely:
    a. The Claimant's conduct in the 27 April 2022 Welfare Meeting.

b. The Claimant's email to Mr Jones of 9 May 2022.
c. The Claimant's conduct in the meeting requested by the Claimant and held on 24 May 2022.
d. The letter from the Claimant to Ms White on 27 May 2022.
e. The email from the Claimant to Ms White on 1 June 2022.
f. The Claimant's email to Mr Jones of 1 June 2022.

44. Mr Waite gave the following reasons for his findings:

> *The list not being exhaustive, shows clear examples of your refusal to comply with this reasonable management instruction.*
>
> *You have continued to raise matters that have been settled under a COT3 agreement dated 26 November 2021. The position was made very clear to you, and you were warned of the consequences. For these reasons, I am therefore upholding the gross misconduct charge, as I believe that you have continued to disregard a reasonable management request made to you on 11 April 2022, not to raise matters that have been settled under a COT3 agreement dated 26 November 2021.*

45. Whilst the outcome letter says that this list is a non-exhaustive list of the breaches by the Claimant of the management instruction, in evidence Mr Waite confirmed that these were all of the breaches of the management instruction that he found and that he considered as gross misconduct. Mr Waite further confirmed that he found each of the above acts of the Claimant to amount to gross misconduct, both individually and cumulatively.

46. Mr Waite further considered that in any event trust and confidence had broken down irretrievably. He referred to the Claimant's persistent sending of emails to numerous colleagues raising issues about settled matters, the Claimant's persistence in raising issues that he considered were settled by the COT3, and persistence submissions of SARs. He further stated that he did not believe that the Claimant had any intention of taking up the Onboard role, which he said was evidenced by her not working a day in this role and remaining off sick:

> *I have also considered the employment relationship. Having taken into account all the points you have made and the evidence that is available to me, I have concluded there has been a complete breakdown in employment relationship for the following reasons...*
>
> *All of this demonstrates that you clearly are not happy and whatever the company does is just not going to work, the relationship has broken down.*
>
> *From the discussions today and the reasons I have just outlined, I do not feel that you would be able to accept the company position on these matters. I feel that it is untenable for you to continue working for GWR as the evidence clearly demonstrates that you have lost trust in the company and this goes to the heart of the employment relationship, which I believe is completely broken.*

47. The outcome was confirmed in writing to the Claimant by letter dated 4 August 2022.

48. On 2 August 2022 the Claimant issued an employment tribunal claim, case number 1402454/2022.

49. The Claimant appealed her dismissal by letter dated 15 August 2022. She attended an appeal hearing on the 12 September 2022, chaired by David Crome. At the start of the hearing, the Claimant read out an e-mail that she had sent to Ms White on 12 September 2022, confirming that she would now abide by Ms White's instruction and the COT3 agreement. In the event the appeal was not upheld. Mr Crome did not know the content of the Claimant's 9 March 2022 email and was not aware of any alleged protected disclosure to Mr Bhargava. The Claimant was given reasons for this on the day by Mr Crome, including (as recorded in the notes of the appeal meeting) that:

> *The GWR position was that they cannot allow someone to sign an agreement such as a COT3 and not abide by the terms of it – it is a serious issue. There were appropriate warnings issued even prior to 12th April at which point C White spelled it out very clearly that further communications in breach of your COT3 would result in your dismissal. There was a clear warning issued to you that you. Desisted in your behaviour, you would face likely dismissal, and the potential of a fine if you do not adhere to the terms of the court three. And Despite that you continue to pursue objectives which were precluded by the settlement she made with GWR in the COT 3.*
>
> *By definition, a charge of gross misconduct would normally, if proven, result in dismissal. It is of course possible that a lesser sanction could be issued, though in this case it is hard to imagine what that might have been.*
>
> *You have been paid a lot of money from GWR in the last couple of years whilst not being productive. At the same time you have taken up a huge amount of management time in seeking to resolve your issues. The amount of work having to be expended on you is utterly disproportionate to any possible benefit to the business of employing you. In your disciplinary hearing, GWR has concluded that there is no realistic possibility of that subsiding and you assuming your customer host role in a constructive way and eliminating or even reducing all of that management time.*
>
> *It's clear to me from spending a little bit of time with you today and from my reading of the hearing notes that despite the COT3 agreement and despite the severe warnings, there remains unfinished business, far from resolved - on that basis I have to question why I would wish to reinstate when it appears at this unfinished business would prevent you from becoming a Customer Host and doing so reliably?*

50. A brief outcome letter was then sent to the Claimant on 12 September 2022.

51. It is not disputed that the Claimant started working for a third party on 8th of August 2022.

52. The Claimant issued a further claim on 20 October 2022, case number 3312743/2022. The Claimant's claims are dealt with together.

The Law

Unfair dismissal

53. The right not to be unfairly dismissed is set out in sections 94 and 98 of the Employment Rights Act 1996:

> 94 The right
> (1) An employee has the right not to be unfairly dismissed by his employer. …
>
> 98 General
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it— …
> (b) relates to the conduct of the employee, …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case…."

54. In order to decide whether the Respondent has shown that conduct was the reason for the dismissal of the Claimant, the Tribunal is required to consider the evidence available to the Respondent at the time of dismissal. It is not permitted to substitute its view as to whether it personally thinks the Claimant's actions constituted gross misconduct or what it personally would have done in the circumstances if it had been the employer.

55. The well-known case of *British Home Stores Ltd v Burchell* [1978] IRLR 379 sets out the points to be considered when dealing with a conduct dismissal (there is a neutral burden of proof for these questions):
    a. Did the Respondent genuinely believe in the misconduct of the Claimant?
    b. Was that belief based on reasonable grounds?
    c. Was a reasonable investigation carried out in the circumstances? The cases of Sainsbury v Hitt [2002] EWCA Civ 1588 and RSPB v Croucher [1984] 3 WLUK 152 are relevant in this situation. Sainsbury v Hitt requires that the Respondent carries out an investigation which would be within the range of reasonable responses carried out by a reasonable employer. This can mean that less or no investigation is required if the employee accepts some or all of the facts alleged (Croucher).
    d. Was dismissal within the band of reasonable responses open to a reasonable employer in all the circumstances?

56. In this case, the Tribunal also considered whether the dismissal was for "some other substantial reason", and whether dismissal for some other substantial reason was fair in all the circumstances of the case. The *Birchell* principles are not limited to conduct dismissal; they can apply equally to dismissals for some other substantial reason (*Perkin v St George's Healthcare NHS Trust* [2005] EWCA Civ 1174).

57. The Tribunal also needs to consider whether the procedure adopted by the Respondent was fair, reasonable and complied with the ACAS Code of Practice for Disciplinary and Grievance Procedures or the relevant procedure operated by the Respondent.

58. If the Tribunal finds that part of the *Burchell* test has been answered in the Claimant's favour or there is an issue with the procedure adopted to dismiss the Claimant, the Tribunal is required to consider the percentage chance that the defect made no difference and the Claimant would have been dismissed anyway (Polkey v AE Dayton Services Ltd [1987] UKHL 8, [1988] ICR 142).

59. In relation to the evidence about the Claimant's conduct, as stated previously the Tribunal cannot substitute its view or assessment for that of the Respondent's. The point of any review of evidence is to assess whether the Respondent's conclusions and analysis of that evidence was fair and reasonable.

Protected disclosures

60. The relevant statutory provisions are sections 43A, 43B and 43C of the Employment Rights Act 1996 which provide as follows:

> 43A Meaning of "protected disclosure"
>
> 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
> 43B Disclosures qualifying for protection
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject...
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> …
>
> 43C Disclosure to employer or other responsible person
>
> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure – (2)
> (a) to his employer…

61. In *Cavendish Munro Professional Risks Management Ltd v Gedul*d [2010] ICR 325, the EAT held that the ordinary meaning of giving information is 'conveying facts', which is distinct from the mere making of an allegation. The Court of Appeal has however subsequently held that 'information' can potentially include statements which might also be categorised as allegations (*Kilraine v London Borough of Wandsworth* [2018] ICR 1850). The statement must however have sufficient factual content that it tends to show one of the matters listed in section 43B(a) to (f).

62. The disclosure relied upon must pass the sufficiency test in itself, and a claimant cannot rely upon wider context or information not provided in the disclosure (*Williams v Michelle Brown AM* UKEAT/0044/19).

63. A disclosure does not have to be in writing to fall within section 43B of the ERA. Oral communications which convey facts and which meet the other requirements of the section may be covered (*Eiger Securities LLP v Korshunova* [2017] ICR 561).

64. In order for a disclosure to be a qualifying disclosure, the employee must reasonably believe that it tends to show one of the relevant matters. The employee must also reasonably believe that the disclosure is in the public interest.

65. The test for 'reasonable belief' is both objective and subjective. The Tribunal must focus on what the claimant believed (rather than what a hypothetical reasonable worker may believe) but there must also be some objective basis for the claimant's belief (*Korashi v Abertawe Bro Morgannwy University Local Health Board* [2012] IRLR 4). In *Phoenix House Ltd v Stockman* [2017] ICR 84, the EAT, endorsing the approach taken in *Korashi*, held that, on the facts that the claimant believed to exist, a judgment must be made firstly as to whether the belief was reasonable and secondly whether looking at matters objectively, there was a reasonable belief that the facts tend to show one of the relevant matters.

66. The leading case when considering the question of public interest is *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* [2018] ICR 731. In that case the Court of Appeal held that when considering whether a disclosure is in the public interest, factors that may be relevant include: 1. The number of people whose interests the disclosure served; 2. The nature of the interests affected and the extent to which they are affected by the wrongdoing that is being disclosed; 3. The nature of the wrongdoing disclosed; and 4. The identity of the alleged wrongdoer.

Whistleblowing detriment

67. A worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An unjustified sense of grievance is not enough (*Shamoon v Chief Constable of the Roval Ulster Constabulary* [2003] IRLR 285).

68. The Claimant bears the burden of proving that she suffered a detriment on the balance of probabilities. If she does so, the Respondent bears the burden of proving the reason for the treatment.

69. Whether detriment is on the ground that the worker has made a protected disclosure involves an analysis of the mental processes of the employer when it acted as it did. It

is not enough to apply a "but for" causation test (*Chatterjee v Newcastle Upon lyne Hospitals NHS Trust* [2019] 9 WLUK 556).

70. The test for causation is different from that for automatically unfair dismissal (sole or principal reason) and the Tribunal must instead ask whether the protected disclosure materially influenced the employer's treatment of the worker (*NHS Manchester v Fecitt and others* [2012] IRLR 64).

Automatic unfair dismissal (whistleblowing)

71. The Respondent bears the burden of proving the reason for the dismissal. If the making of a protected disclosure was the reason or principal reason for the dismissal, then the dismissal was automatically unfair pursuant to s103A ERA 1996.

72. The Tribunal must enquire into what facts or beliefs caused the decision-maker to decide to dismiss (Abernethy v Mott [1974] ICR 323).

Unfair dismissal remedy issues

73. The object of compensation is not to penalise an employer for unfairly dismissing an employee, it is to compensate the employee for their losses, which cannot extend beyond the period when the Tribunal predicts that they may have been fairly dismissed, or otherwise left employment (*Stonehouse Coaches Ltd v Smith* UKEATS/0040/13).

Polkey

74. Where a Claimant has been unfairly dismissed, if the Tribunal considers that there is some likelihood that the Claimant would still have been dismissed had a fair process been followed, then the Tribunal must make a reduction in the compensation awarded to the claimant to reflect this (*Polkey v A E Dayton Services Lt*d [1988] AC 344).

75. The Tribunal must consider:
    a. If a fair process had been followed, would it have affected when the employee would have been dismissed?
    b. What chance was there of the employee still being dismissed at some point anyway, apart from unfairness in the process?
    c. Where there is a chance that the employee would not have been dismissed had there been no unfairness, an award of a percentage of the loss may be made for the loss to the employee of the chance that fairness would have saved them from dismissal.

Contributory fault/conduct

76. If a Tribunal finds that the dismissal was unfair, then pursuant to section 122(2) of the Employment Rights Act 1996 the Tribunal may reduce the basic award where the Claimant's conduct before the dismissal makes it just and equitable to do so. Pursuant to section 123(6) of the Employment Rights Act 1996, a reduction can be made to the compensatory award where the dismissal was, to any extent, caused or contributed to by any action of the Claimant.

77. The correct test is to consider if the conduct was culpable, blameworthy, foolish or similar which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract (Nelson v British Broadcasting Corporation (No. 2) [1979] IRLR 346. [1980] ICR 110, CA)). The tribunal is not supposed to answer, as part of this consideration, whether the respondent would have dismissed the claimant for the conduct if it had acted properly, reasonably, or fairly (Renewi UK Services Ltd v Pamment EA-2021-000584 (26 October 2021, unreported) at [66]).

Dicussion, further findings and conclusions

78. In reaching our decision we considered the totality of the evidence that we were directed to during the course of the hearing, and where we have been directed to part of a document we have read the whole of it, along with the witness evidence and the helpful submissions by both parties. Not every matter is referred to in these reasons, which are given to assist the parties in understanding why we have reached our decision.

79. We reminded ourselves that in considering whether a dismissal was fair or unfair we must not substitute our own view for that of the employer and we have considered this case on the basis of the reasonableness of the Respondent's beliefs and decisions, and whether its actions were within the range of reasonable responses.

Whistleblowing

80. The Claimant did not pursue her claim for automatic unfair dismissal or whistleblowing detriment based on the two pleaded disclosures in any meaningful way during the course of the proceedings. There was an indication that the Claimant accepted that those responsible for her dismissal were not aware of the alleged whistleblowing, and none of the Respondent's witnesses were cross examined on the alleged detriments.

81. Nonetheless, the Tribunal has considered the Claimant's whistleblowing claims and makes the following conclusions:

82. Did the Claimant make a protected disclosure? And if so, did the Respondent subject the Claimant to detriment on the ground of any such disclosure?

    a. The conversation with Mr Bhargava in February 2022.
        i. Mr Bhargava's evidence was that he could not remember any such discussion, although he did not say there was none. It is likely that there was a discussion, but Mr Bhargava cannot confirm whether it took place in Febraury 2022.
        ii. In any event, as set out in our findings of fact, the Claimant's evidence changed on the contents of the discussion. We concluded that the Claimant told Mr Bhargava that she had found some health and safety information that she had not seen before. The Claimant's evidence about this conversation is not reliable, given the number of times it has changed since the submission of the first claim in early August 2022.
        iii. We are not satisfied that the Claimant is able to show on the balance of probabilities that she gave information to Mr Bhargava that tended to show that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject, or that the health or safety of any individual had been, was being or was likely to

be endangered. Simply saying that the Claimant had found new information, even if she said that she was concerned that she had not seen it previously, is not information tending to show malpractice as required.

iv. If it was the case that the Claimant included in her discussion with Mr Bhargava that as a result of not having seen the information before her (or someone else's) health and safety had been endangered because she had had an accident, this may have been sufficient. But in March 2022 the Claimant was alleging that she had adopted the correct techniques, which does not suggest that her health and safety was endangered. We therefore conclude that the Claimant did not make a verbal protected disclosure to Mr Bhargava in February 2022.

v. Even if we are wrong about this, it was not suggested to any witness that they knew about the discussion with Mr Bhargava, and it is clear to the tribunal that discussions with Mr Bhargava in February 2022 were not the basis of any treatment of the Claimant.

b. The letter of 9 March 2022 is more detailed and our assessment is as follows:

i. Numbered paragraph 1 is not entirely clear in meaning. On balance we find that it amounts to a disclosure of information that back in 2015 the Claimant had an accident where weather conditions were relevant and she had not had peer training in respect of handling ramps in windy conditions. Whilst the Claimant is not explicit about what she is alleging, we are satisfied that she is suggesting that her health and safety was or may have been endangered in 2015 because of a lack of peer training.

ii. However, we have been informed on behalf of the Claimant that paragraph 1 must be read with paragraph 3. Paragraph 3 states that the evidence of training materials found by the Claimant in 2022 indicated that she, the Claimant, had been undertaking the correct manual handling techniques back in 2015. The Claimant is, in effect, unhappy that she had been criticised for using a technique that was in fact an approved technique, and she is disgruntled that she did not see the Respondent's training materials at the time to know that this was approved. This suggests to us that the Claimant did not believe that health and safety had been endangered by the lack of training, because she had undertaken the correct technique as a matter of common sense. We therefore conclude that the Claimant's letter emailed on 9 March 2022 was not a protected disclosure.

iii. If we are wrong about that, in any event it is clear that neither Mr Waite nor Mr Crome knew about the contents of the Claimant's alleged whistleblowing and they were not motivated by the fact of any alleged protected disclosure. The whistleblowing occurred in March 2022, the warning was given in April 2022, and only matters arising after April 2022 were relied on in dismissing the Claimant. Her dismissal was not, therefore, because she wrote the letter on 9 March 2022, or because of any discussion withMr Bhargava in February 2022.

iv. Ms White, in issuing the warning, did so because she considered that the Claimant was persistently repeating a request to go back to her previous role, despite her role being agreed under the COT3. The Claimant was invited to a disciplinary hearing because the Respondent

considered that she was not moving on from historic issues after being given a warning, not because of anything prior to that. We have considered the timing of the invitation to the disciplinary hearing. It may well be that the Respondent held off inviting the Claimant to a disciplinary hearing pending her receiving an outcome to her complaint of unsafe working practices, but this was not covered in evidence and in any event is not alleged to be a detriment and is not to the Claimant's disadvantage.

83. In summary, even if the Claimant did blow the whistle, the Claimant cannot link her alleged whistleblowing to the treatment of her by the Respondent, as set out in the list of issues, and the whistleblowing claim fails in its entirety, both the claim for automatic unfair dismissal and the claims for detriment.

Unfair dismissal

84. The Respondent dismissed the Claimant for failure to follow a reasonable management request, which is a conduct reason, or for a breakdown in the working relationship due to the Claimant's conduct in not being able to put issues behind her, which is a potentially fair reason as "some other substantial reason".

85. Looking first at conduct as the reason for dismissal.

86. The Tribunal was satisfied that both Mr Waite and Mr Crome genuinely believed that the Claimant had failed to follow a reasonable management request, and that this was misconduct. However, that belief must be held on reasonable grounds.

87. Was there reasonable grounds for the Respondent's belief that the Claimant has committed misconduct?

88. The Claimant agreed that it was reasonable to instruct her not to raise issues that were settled. This was in the context of the Claimant having asked at least five times for back pay and a return to the Platform Role, in circumstances where she had agreed not to go back to that role as part of a settlement. The wording of the instruction was not to raise "these questions" or "these matters". The questions the Claimant had been asking, and which are referred to in the 11 April 2022 letter containing the management instruction, were for back pay and to return to the Platform Role. The Claimant did stop raising requests for back pay or, subject to what we say below, to make requests to return to her Platform Role.

89. We therefore considered whether the Respondent acted reasonably in concluding that the Claimant was in breach of the management instruction by raising matters that were settled.

90. The Respondent says each of the Claimant's letters and emails set out in paragraph 43 above (and stated within the six bullet points on page 292 of the Bundle) breach the management instruction and are individual acts of gross misconduct or cumulatively amount to gross misconduct, in either case warranting dismissal. Looking at each in turn:

    a. Conduct in the 27 April 2022 Welfare Meeting, attended by Mr Bhargava, the Claimant, her RMT trade union representative, Ms Beech and a note taker.

i. In this meeting Mr Bhargava asked the Claimant about her depression, said that he wanted to see her back at work so she could finish the training. He asked the Claimant what was stopping her from being able to return to work. The Claimant responded by saying that the situation over the last three years had caused her stress. She said that she could not get to the root cause to be able to solve it. The Claimant said the issue was ongoing because the root cause had not been resolved. The Claimant was clear in this meeting that the settlement had not resolved the issues for her. Mr Bhargava made it clear that he would support the Claimant back into her Onboard Role and that he could not change the past.

ii. The Respondent was reasonable in considering that matters referred to by the Claimant in this meeting, fell within the scope of the factual matters that the Claimant had been instructed not to raise, in particular her expressing (in response to her manager's questions) that she wanted to work in the Platform Role.

iii. However, as the Claimant herself said in this meeting, she cannot explain why she feels how she feels without talking about it.

iv. Given that the Claimant was answering questions and not asking to move roles, we conclude that the Respondent's conclusion that this amounted to misconduct (whether gross misconduct or otherwise) was unreasonable in the circumstances. The finding was outside of the range of reasonable responses. Whilst it is clear that the issues were raw for the Claimant and affecting her mental and physical health, and she was struggling to move forward at this time, this panel finds that it was not reasonable for the Respondent to find that answering her manager's questions in the way that she did amounted to misconduct. The Respondent relies on the Claimant's acts being a serious act of insubordination. We do not consider that a reasonable employer would conclude that speaking frankly with her manager and responding politely to his queries in relation to the matters discussed would be insubordination.

b. Email to Ryan Jones of 9 May 2022.

i. This email was a complaint by the Claimant about the Respondent's handling of the SAR. Whilst it references the issues that were settled by the COT3, it is not a complaint or grievance about those issues.

ii. Mr Waite said in evidence that context is critical in determining whether something is a breach of the instruction. We agree. However, what the Respondent has done (in relation to this email and the other documents relied on as misconduct) is seen reference to matters that fall within the factual matrix of matters settled to the COT3, and found that of itself to be sufficient to be misconduct, without any indication that it considered the context. The Respondent's evidence did not suggest that there was consideration of whether the purpose of this (or the Claimant's other) correspondence was relevant to whether the Claimant was guilty of misconduct. The context of this email is to try to get personal data, not to make a complaint about the settled issues or raise those issues for the Respondent to act on. The Claimant is, in fact, indicating that she wants to be able to move on, albeit it is clear from this letter that the issues are not yet behind her.

iii. In its context, even though the Claimant is expressing unhappiness relating to settled issues, the Respondent did not have a reasonable basis for a belief that raising issues as background to a complaint about the adequacy of the SAR response was misconduct.

c. The Claimant's conduct in a meeting requested by the Claimant and held on 24 May 2022.

i. At this meeting the Claimant explained to her manager that she had found an email from 2019 indicating that she had been observed at work without her knowledge. Mr Bhargava tried to encourage the Claimant to move on.

ii. The Respondent considered this to be re-hashing settled matters, and indeed a complaint or grievance about that. However, it again failed to consider the context of these points being raised, which was not reasonable. In the context of an employee being asked what she wants, we consider that a reasonable employer would not find it to be misconduct for that employee to express what she wants.

iii. What is clear as of this date, 24 May 2022, the Claimant had not made any progress in terms of moving forward in the Lead Customer Host role. If anything, the Claimant had taken a step backwards – she looked for and found further issues of historic concern.

d. Letter from the Claimant to Ms White on 27 May 2022.

i. The Claimant was advised by her GP to write to her employer. She references discussions with her GP throughout this letter. The Claimant still had anxiety and depression, and there is no issue in telling the Respondent that. She instead wrote a stream of consciousness setting out why she was still depressed and anxious. It is not disputed that the Claimant was unwell with her mental health at this time. That health situation was continuing. Mr Waite's statement refers in evidence to the reference to ramp training by the Claimant, which he says was settled by the COT3, but he did not in fact see the previous claim forms and there is no suggestion that he considered the Claimant's health in terms of the context of the letter, or considered whether the Claimant saying that she had discovered information that she had not had access to (at the time of the COT3) had any impact on whether her writing this letter should be considered to be misconduct.

ii. Accordingly, we do not consider that the Respondent had a reasonable basis for concluding that there was misconduct in expressing that the reason for current ill health is historic issues.

e. Email from the Claimant to Ms White on 1 June 2022.

i. This email was written to Ms While less than a week after the Claimant wrote to her about seeing her GP. The Claimant had been updated by Ms White as to the progress of the whistleblowing report and replied to Ms White to say that she had found something else that needed to be looked into. Having referenced this new document she raises concerns about historic issues.

ii. We are not required to find whether the Claimant was blowing the whistle in sending this email, as it is not a matter in issue. At the disciplinary hearing, Mr Waite noted that Ms White had said safety

concerns would be investigated, and then queries why the Claimant was raising these issues. The Claimant's email refers to her and a customer having been at risk. It is clear that the Claimant intended this to be considered as part of the whistleblowing investigation. Again, we can see why the Respondent considered that this was dredging up old issues, but in the context of the Respondent having told the Claimant that her concerns about workplace safety would be investigated, it was unreasonable of the Respondent to find that this was a matter of misconduct or a breach, in that regard, of the COT3 in this context.

f. Email from the Claimant to Ryan Jones of 1 June 2022.

i. In this email the Claimant complains about the handling of subject access requests by the Respondent. Mr Waite said that he considered this to be a breach of the COT3 because he thought it related to the Claimant having been observed in the Customer Care Assistant role and that the COT3 closed all issues in relation to that role. The Claimant has a legal entitlement to make subject access requests, whether or not they cover a period prior to agreement of a COT3. There is no complaint or grievance in this email about the settled matters, only a complaint about how her subject access requests had been dealt with. We do not consider that the Respondent was acting reasonably in treating the raising of these questions as a matter of misconduct in the circumstances. We further note that the Respondent suggested that the Claimant had already had information that she was requesting as part of her previous Tribunal proceedings. However, it transpired that no one from the Respondent checked whether this was the case. Disclosure in the 2020 proceedings was only ordered in relation to disability, and the Respondent did not seek to bring evidence of what was disclosed in 2020, despite this being raised in front of this Tribunal.

91. Our overall conclusion, therefore, in relation to the Respondent's contention that each individual matter was an act of misconduct sufficient to dismiss the Claimant is that this was not a reasonable conclusion. For the reasons stated above, it was outside the range of reasonable responses to dismiss on the basis of a single act as found by the Respondent. Whilst the Respondent's evidence sought to suggest to the Tribunal that context is important, at the time that decisions were made the Respondent appeared to have closed its mind to the context of each act of the Claimant, and focused on its belief that referencing any historic matter was a breach of the instruction. For the avoidance of doubt, we do not find this to be a reasonable approach or an approach within the range of reasonable responses.

92. We have gone on to consider whether there were reasonable grounds for the Respondent's conclusion that these six incidents (or any of them) cumulatively amounted to a breach of the management instruction and/or a breach of the COT3 and therefore whether the Claimant committed misconduct.

93. Given the context of each of the acts relied upon by the Respondent as amounting to misconduct, we do not think there was a reasonable basis for a reasonable employer to make a cumulative finding of misconduct (or indeed gross misconduct).

94. The Respondent failed to consider the Claimant's reasons for referring to the various issues that they considered to be settled, the Respondent failed to reasonably consider whether the points she was raising were in fact settled, with neither the dismissing manager nor appeal manager seeking to understand for themselves what the settled issues were, the Respondent did not turn its mind to whether issues that affected the old role could also affect the new role, and the Respondent did not take into account the impact of historic events on the Claimant's mental health. The Respondent appears to have seen the dates of matters referred to by the Claimant, or the words "ramp" or "training" and finished its enquiries there. The appeal did not remedy these points. Both Mr Waite and Mr Crome appeared to rely on an interpretation of events put forward by Human Resourced, rather than actually considering the contents of the documentation in context.

95. Turning to consider the Respondent's case that trust and confidence had broken down (some other substantial reason).

96. Throughout the chronology that we have been referred to, the Claimant raised historic issues and the Respondent had a reasonable basis for concluding that she was not moving on from those historic issues. The Claimant repeated issues about not having had ramp training, and whilst she meant that she still had not had a specific aspect of ramp training that she thought she needed for her Onboard Role, in the context of how the Claimant expressed herself the Respondent was reasonable in believing, up to the point of the disciplinary hearing, that the lack of training related to the Platform Role and was historic.

97. However, it was made clear to the Respondent at the disciplinary hearing that the Claimant was saying that she still had not had relevant training. Mr Waite spent some time exploring with the Claimant whether she had said previously that she still hadn't had any element of training. There was not a discussion about the extent of what the Claimant considered to be outstanding, although Mr Waite did clearly state that "training is easy to arrange".

98. Towards the end of the hearing Mr Waite said to the Claimant that there had been a non-acceptance of information and he asked the Clamant what she wanted to "make peace and move on". The Claimant clearly stated that "once I have had the training I will be happy". The Claimant's trade union representative summarised to say that the Claimant had not understood what she had done wrong and had been struggling. It was clear that the Claimant was struggling with her mental health and it was submitted that she had not understood that raising issues that she felt were ongoing was wrong.

99. Having said that training was easy to arrange, and it being clear by the end of the disciplinary hearing that the parties had been at cross purposes as to why the Claimant considered that there was an on-going relevance of historic matters to her Onboard Role (e.g. ramps can be required to be moved in the Onboard role and the Claimant wanted training on this that she felt she had not had previously), and the Claimant having said that all she now needed was some training to move forward, it was outside the range of reasonable responses to then conclude that the relationship was irreparable and dismiss the Claimant without first offering her that training. It cannot be said that there was a dispute as to whether further training was needed, as the papers before both the disciplinary and appeal panels included the notes of the

meeting on 27 April at which Mr Bhargava had referenced there being further training to do.

100. It appears that the Respondent had misunderstood the Claimant's concerns as being entirely historic (and irrelevant to her present circumstances) and then when she explained them at the disciplinary hearing, the ongoing aspect in relation to the new role was not considered in reaching a conclusion.

101. We further note the finding made at the disciplinary hearing that the Claimant's sickness absence indicated that the Claimant had no intention of taking up the role. This was not a reasonable conclusion given that, as the Claimant said in her appeal, she raised these issues whilst at work, undertaking training for the new role.

102. This Tribunal therefore concludes that the Respondent did not have a reasonable belief that the relationship had irreparably broken down, it having been made clear that the issues were relevant to the new role and not wholly historic, and without having offered the further training sought.

103. This was not remedied on appeal. The Claimant repeated at the appeal that there was training that she had not had. The Respondent did not consider this, other than to assume that all training had been provided because the Claimant had had ramp training for her role. This conclusion was not reasonable given the acknowledgement in the meeting on 27 April that there was further training to complete, and the notes of this meeting being included in the documentation at the appeal hearing. We also note that at the appeal the Claimant again asked for training and her trade union representative reiterated that that should be the resolution.

104. As we have said before, the Respondent appears to have seen the dates of matters referred to by the Claimant, or the words "ramp" or "training" and then shut its mind to whether there is something ongoing that could be addressed.

105. We therefore conclude that the dismissal was unfair.

106. However, as we have referred to throughout this judgment, the Claimant's correspondence and various statements at meetings do indicate that she was not moving on from previous issues. We note that the Claimant knew from the physio report and the 27 April meeting with Mr Bhargava that further training was going to be provided, but this had not prevented the Claimant from being concerned about various other matters that she discovered. Fundamentally, based on the Claimant's evidence, the Claimant's concerns were not just about ramp training or peer training. She had issues dating back to an assault some years prior to the 2020 claims and on her own evidence she is still suffering with effects on her mental health from the various things that she believes happened to her during the course of her employment.

107. Whilst the unfairness is not solely procedural, we consider that that there is sufficient evidence to conclude that there is some realistic chance that the Claimant could have been dismissed fairly even if the training she wanted had been offered. The Claimant herself indicated that she had lost trust in the Respondent, in the context of her having had training and her manager having already told her that there was further training for her to do. However, the Claimant had completed a course of CBT and was going for further counselling. The way in which the Claimant expressed herself had changed

and she was increasingly indicating a willingness to move on, including writing to Ms White after her dismissal, but the detail of the matters that she kept referring to remained the same. There are factors that suggest the Claimant may have struggled to be able to let those things go simply with the provision of what seems to us to be a small amount of additional training, but other factors that indicate that she may have, and she was heavily focused on training not having been carried out throughout various correspondence.

108. Weighing these factors up carefully, and taking into account what is just and equitable, the Tribunal finds that the compensatory award should be reduced by 50% to reflect the likelihood of the Respondent being able to have affected a fair dismissal at some point.

109. We do not consider that the Claimant has displayed culpable conduct in respect of which it would be just and equitable to reduce the Claimant's compensation on top of the reduction referred to above, or at all given the circumstances.

110. Quantum of remedy is to be considered at a separate hearing.

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Employment Judge Youngs
24 November 2023

Judgment sent to the Parties on 13 December 2023

For the Tribunal Office