EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss N Garvin	AND	Cancer Research UK

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 29, 30 and 31 January and 1 February 2024
By Video (CVP)

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs R Barrett
Ms R Clarke

Representation

For the Claimant: In person
For the Respondent: Miss K Eddy of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are not well-founded, and they are all dismissed.

RESERVED REASONS

1. In this case the claimant Miss Nicole Garvin, who was dismissed by reason of gross misconduct, claims that she has been unfairly dismissed, and that the principal reason for her dismissal was because she had made protected public interest disclosures. The claimant also claims that she has suffered detriment for having made these disclosures, and/or for having made a flexible working request. She also claims that she has been directly discriminated against on the grounds of her age. The respondent contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, and that there was no unlawful detriment or discrimination. The respondent also asserts that a number of the claimant's claims have been presented out of time.
2. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because

it was not practicable and all issues could be determined in a remote hearing. The documents to which we were referred to are in a bundle of 924 pages, the contents of which we have recorded. Some six or so additional pages were subsequently added by agreement.

3. We have heard from the claimant. For the respondent we have heard from Mrs Yvonne O'Connor, Mrs Ingrid Wills, Mrs Elizabeth Lang, Mr Mark Badcoe, Mr Daniel Broderick and Mrs Lisa Harlow. We were also asked to consider a statement from Ms Jennifer Johnstone on behalf of the respondent, but we can only attach limited weight to this because she was not here to be questioned on this evidence.
4. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts:
6. The respondent is the well-known national charity Cancer Research UK. The claimant Miss Nicole Garvin was born on 11 January 1966. She was employed as the Shop Manager of the respondent's shop in Falmouth in Cornwall from 29 March 2013 until her summary dismissal for gross misconduct which took effect on 13 September 2022. At that time the claimant was aged 56 and she describes herself as being in the age group of over 55's.
7. The respondent has an HR Department and a number of policies and procedures applied to the respondent's employees. These include contract of employment; a Disciplinary Procedure; a Grievance Procedure; a Dignity at Work policy; and a GDPR Policy to prevent the misuse of personal data. The claimant was a Shop Manager and had received induction and/or training from time to time on these policies. They were all also available at all times to the claimant through the respondent's internal SharePoint IT facilities.
8. In May 2016 the claimant agreed with her line manager Mrs Scott, the Area Manager South, that her working hours could change from 8 am to 4 pm Monday to Friday. The respondent's shop also opened at weekends, and although the claimant says that the core trade in her Falmouth shop was between 10 am to 4 pm, the respondent's normal requirements were for managers to be in attendance from 9 am to 5:30 pm which were their normal standard retail hours.
9. In July 2021 Mr Mark Badcoe, from whom we have heard, became the respondent's Area Manager, and he took over as the claimant's line manager. This role involves responsibility for 21 of the respondent's shops in its South Area, including Falmouth where the claimant worked, and around 63 employees. The claimant alleges that Mr Badcoe discriminated against her on the grounds of her age in connection with his recruitment decisions during two specific periods in which the claimant asserts that she was not properly supported.
10. The first such period is between July and October 2021. Mrs Daniela Voronevska (who is referred to in this judgment as DV) was the Shop Assistant in the Falmouth Shop and she reported directly to the claimant. She was absent on certified sick leave from July 2021 until the end of October 2021. To cover her absence Mr Badcoe made a request to recruit a Store Assistant the three months working two days per week and Amelia Robinson was recruited to fill this role. Although DV had been contracted to work one day per week Amelia was engaged to work two days per week to provide extra support for the claimant.
11. The second period is from December 2021 to May 2022. The full-time Assistant Shop Manager at Falmouth, namely Mr Olaleye, had resigned his employment with effect from 16 December 2021. Mr Badcoe did not immediately replace Mr Olaleye, because the claimant had submitted a Flexible Working Request (for which see further below) which had not been resolved. Mr Badcoe was unaware at that time exactly how much support would be needed. However, to ensure that the claimant had proper support, DV worked extra days and on average at least four days per week. In addition, in March 2022 Mr Badcoe recruited a full-time Assistant Shop Manager on a fixed term contract for six months. This was Mrs Mancini who was recruited into the role on 11 April 2022. However, by the time she had completed her induction in May 2022, Mr Badcoe had decided that the environment in the Falmouth shop had become so "toxic" that he decided not to place a new employee into that environment.

12. The respondent is a charity with strict budget controls. There has to be a strong business case to recruit additional staff. Mr Badcoe was of the view that the claimant had been properly supported during this time. We accept Mr Badcoe's evidence that his decisions with regard to recruitment, and the amount of staff support provided for the Falmouth shop, had nothing to do with the claimant's age. In any event, as a matter of fact, Mr Badcoe had taken steps to provide additional staff to support the claimant. We reject the claimant's assertion that the respondent did not support the claimant with additional staff because it is factually incorrect.
13. The respondent generally operates bimonthly meetings for its Shop Managers, and on 6 October 2021 Mr Badcoe held one such meeting with the 21 shop managers in his region. The claimant attended. Mr Badcoe was supported by Mrs Maciol the respondent's Divisional Operations Manager South. They divided the various managers into three tables and Mrs Maciol arranged the seating so that newer managers could sit next to more experienced managers, such as the claimant. The claimant objected to being made to sit at a different table from her friends. She earlier alleged that this was an act of direct age discrimination by Mr Badcoe, but that allegation is now withdrawn.
14. During these meetings various awards are announced to celebrate the achievements of shops and to boost staff morale. The respondent seeks to celebrate different shops if possible, and not all shops can be celebrated on each occasion. The claimant complains that her shop in Falmouth was the third highest performing shop and that Mr Badcoe deliberately failed to recognise this at meetings on 6 October 2021 and/or on 12 April 2022, and that this decision was taken because of the claimant's age. The claimant pursues this allegation despite an earlier email which she had sent on 19 November 2021 in which she confirmed to Mr Badcoe that she did not consider his actions "to match or correspond with ageism".
15. We find the claimant's allegations that Mr Badcoe decided where to sit the claimant and/or to fail to recognise her shop as the third highest performing to be fanciful to say the least. In the first place the decision with regard to seating was that of Mrs Macio in any event, and we accept Mr Badcoe's evidence that the decisions he made were in no way connected to the claimant's age. The respondent recognised the two highest performing shops, which did not include Falmouth simply because it was the third highest performing. We accept his evidence that these decisions were normal and sensible decisions in the context of running a business and encouraging staff throughout the respondent's large number of charitable shops.
16. Meanwhile, Mr Badcoe had reviewed the operating structures of the various shops within his area of responsibility. He noted that the claimant was the only manager who was not working from 9 am to 5:30 pm. It became clear to him that the shop often had to close early and that this came at a cost to the respondent. In addition, he had concluded that the claimant had been unable to manage performance issues with her staff effectively. He reached the conclusion that there were difficulties at the Falmouth shop which needed to be addressed. He was of the view the claimant's reduced hours were an informal arrangement only and that the shop could be better managed and more productive. He concluded that it was necessary for the claimant to return to working normal manager's hours from 9 am to 5:30 pm.
17. Matters came to a head after the claimant submitted a formal Flexible Working Request on 28 November 2021. She wished to continue to work from 8 am to 4 pm, but now only on four days a week, instead of five. Mr Badcoe then prepared an internal report in which he set out his concerns with this proposal. He met the claimant on 12 January 2022 and suggested that his view was that the respondent would need the claimant to work standard manager's hours, and that the respondent was entitled to ask the claimant to do this under her contract. Nonetheless he agreed that HR would give her flexible working request proper consideration.
18. The respondent's HR department decided to reject the claimant's request and Mr Badcoe met with the claimant on 1 February 2022 to explain the decision. The claimant became extremely rude, and shouted at Mr Badcoe, and closed off the meeting. The next day Mr Badcoe emailed the claimant explaining the reason for the decision and confirming that the

respondent was now entering a consultation period with her for eight weeks concerning her working hours.

19. The claimant then appealed against that decision, which the respondent rejected. Mr Badcoe was not involved in that decision. On 25 May 2022 the HR Department asked Mr Badcoe to email the claimant to the effect that from 30 May 2022 she was required to work normal manager's hours of 9 am to 5:30 pm. Mr Badcoe sent that email on 26 May 2022 and confirmed that the claimant could be subject to disciplinary action if she failed to follow the respondent's reasonable management instructions in this respect.
20. The claimant asserts that the requirement for her to work standard hours was less favourable treatment caused by her formal flexible working request. We accept Mr Badcoe's evidence this was not the case, because we accept his evidence that he had already decided to address her working hours prior to her formal request. Even before the claimant's flexible working request, his view was that what he perceived to be an informal arrangement as to her working hours was negatively impacting both the efficient management and the commercial trade in the Falmouth shop. He was also the view that it was an informal arrangement and that the relevant provisions in the claimant's contract of employment allowed the respondent to insist that she worked her previously normal hours of 9 am to 5:30 pm.
21. Mr Badcoe then found that the claimant became increasingly difficult to manage following the refusal of her request. She was certified as too unwell to attend work by reason of work-related stress from 27 May 2022 and did not return to work before her dismissal on 13 September 2022. Meanwhile there were other difficulties concerning the staff and volunteers at the claimant's shop.
22. The claimant then raised a complaint about Mr Badcoe by email dated 2 February 2022. This was received by Ms Henson, a Divisional Business Manager, and she then sent the claimant a supportive email on 3 February 2022, and telephoned her to discuss her complaint the following day. She agreed to arrange for an HR specialist to call the claimant to discuss the options available to her under the respondent's grievance procedure, and also by way of a possible appeal against the refusal of her flexible working request.
23. The HR specialist who then dealt with this matter was Mrs Lisa Harlow from whom we have heard. She discussed the matter with the claimant on 11 February 2022. The claimant disputes that this call took place, but Mrs Harlow's version of events is supported by contemporaneous documentary evidence, and we prefer her version. The upshot of that discussion on 11 February 2022 was that the claimant agreed that she would not proceed with a formal grievance against Mr Badcoe but rather that she would wait for the outcome of the appeal against the refusal of her flexible working request and then have an informal facilitated discussion with Mr Badcoe. Mrs Harlow's documents show that she closed off the possible grievance procedure at that stage for this reason.
24. The claimant asserts that she suffered detriment because she had protected public interest disclosures in that Ms Henson did not have contact with her following her letter of complaint about Mr Badcoe and that Ms Henson did not invite the claimant to meetings. We reject these assertions as being factually incorrect, given Ms Henson's response to the claimant's complaint and the fact that she arranged a meeting with Mrs Harlow. In any event both of these alleged detriments took place before the first of the alleged public interest disclosures upon which the claimant relies, for which see further below.
25. Meanwhile the staff difficulties continued at the Falmouth shop. Mrs Ingrid Willis, from whom we have heard, is the respondent's Deputy Divisional Manager for the respondent's South Division and is a Regional Support Manager. On 21 March 2022 DV complained that she no longer felt safe at the Falmouth shop because a volunteer MR had shouted at her and threatened her. The respondent's Divisional Business Manager Mrs Rosie Henson asked Mrs Willis to investigate this incident in the absence of Mr Badcoe who was on holiday.
26. Mrs Willis investigated DV's complaint and considered that there was sufficient evidence, including CCTV footage, to substantiate the allegation, and MR was asked not to volunteer at the shop any further. The claimant has asserted that during her call with DV, DV gave Mrs Willis an ultimatum stating the respondent either had to back the claimant, or back DV.

The claimant asserts that as a result of this conversation Mrs Willis then began to look for evidence to dismiss her. Mrs Willis denies this, and she considers this allegation of a plot to be entirely fanciful, because DV had not made this statement to her, and Mrs Willis had not had previous dealings with the claimant. The discussions related to MR's conduct only.

27. On 5 April 2022 Mrs Willis was then asked to investigate another allegation namely that DV had stolen some CDs and glasses belonging to another volunteer who is referred to in this judgment as Mr X. On 13 April 2022 the claimant informed Mrs Willis that she reviewed CCTV of the alleged theft and that she had reported it to the Police. She also informed Mrs Willis that she had reported to the Police that a customer's daughter had allegedly been sexually assaulted by Mr X on the same day in the shop. Mrs Willis was concerned that the claimant had not reported the matter to Mr Badcoe first, before calling the Police, because shop managers are required to report any such incidents or issues to their Area Manager who are generally better trained to deal with these incidents.
28. Mrs Willis told the claimant that she was not to view CCTV without permission and that she had to involve Mr Badcoe. On 22 April 2022 Mrs Willis spoke with the claimant and she confirmed that she had recorded CCTV of incidents on her personal phone which she intended to keep for further investigations. She told Mrs Willis that she checked CCTV on Mondays in order to see what DV had been doing in the shop on Sundays when the claimant had her day off. Mrs Willis was very concerned because she had instructed the claimant that she should not view CCTV and certainly not to do so to check up on her employees. When she subsequently took a statement from Mr X on 22 April 2022, he confirmed that the claimant had shown him the CCTV footage. Mr X later retracted that statement. Nonetheless Mrs Willis considered that the claimant's acts of viewing, recording and showing CCTV footage to other volunteers was a misuse of personal data and in serious breach of the respondent's policies. Mrs Willis reported this to Mrs Henson.
29. Mrs Willis continued to investigate the alleged theft, and she interviewed DV and Mr Badcoe to ascertain the relevant background. The claimant also provided information in which she described DV's movements on CCTV over a number of weeks, although the claimant had not been in the shop at the relevant time of the alleged theft. Mrs Willis concluded on 5 May 2022 that there was no conclusive evidence of theft from the CCTV footage and that no further action should be taken, other than to recommend that the claimant should attend a disciplinary investigation concerning the misuse of personal data and breach of the respondent's policies in this respect.
30. The claimant relies on three disclosures which she asserts to have been protected public interest disclosures. The first of these was her report to the Police on 13 April 2022 to the effect that an elderly volunteer (namely Mr X) had had his belongings stolen. This relates the allegation that DV had stolen some CDs and glasses which belonged to him. It seems that the claimant spoke to the Police and confirmed her complaint by way of the submission of an online 101 reporting form. However, the claimant was given no evidence as to the exact content of this form, what information she claims to have made to the Police. It seems that this was in some way an allegation that DV had stolen this property. In any event it is clear that Mrs Willis was unaware of the content of any complaint or information which the claimant had made to the Police.
31. There was subsequently a dispute about the CCTV footage in the shop, and the extent to which the claimant and others were entitled to view this information. The claimant said in her evidence that she telephoned the Information Commissioner's Office ("the ICO") to check the legality of how this information could be processed. This is slightly different from the second alleged protected public interest disclosure upon which the claimant relies, which is that on 16 May 2022 she also reported to the ICO that the elderly volunteer (namely Mr X) that had his belongings stolen.
32. Meanwhile Mrs Willis was sufficiently concerned by the multiple allegations of volunteer misconduct and apparent conflict between the claimant and DV that she commenced a further investigation into the working environment in the Falmouth shop. All of the former volunteers were given the opportunity to discuss the matter confidentially with Mrs Willis. Five of them wished to do so and Mrs Willis summarised their comments in a statement to the HR Department. These were not disclosed at the time to the claimant because they

were confidential. Nonetheless Mrs Willis's report was balanced in that it reflected that both DV and the claimant were at fault.

33. The claimant asserts that Mrs Willis was deliberately seeking to find evidence in order to dismiss her. Mrs Willis denies this. We accept Mrs Willis's evidence that she only recommended further investigations because of her concerns about the claimant's apparent breach of the data protection requirements. She had no further involvement with the claimant, or her subsequent disciplinary process.
34. On 9 June 2022 the claimant made a formal written grievance which was addressed to Mrs Josephine Mewett the respondent's Head of Retail. She made a number of complaints against DV and Mr Badcoe, including what she perceived to have happened in the Falmouth shop. The claimant relies on this written grievance as her third and final protected public interest disclosure. She says of her letter to Mrs Mewett that it provided information about the covering up of the criminal offence (namely Mr X having had his belongings stolen). We have considered that letter carefully. Although there are a number of complaints about the conduct of the various parties, we reject the assertion that the claimant provided information in that letter which tended to show that the respondent had covered up a criminal offence.
35. At that time DV was pursuing a formal grievance against the claimant, and the claimant was now pursuing a formal grievance against Mr Badcoe, (having earlier agreed in February 2022 that she would await the outcome of her appeal against the refusal of her working request). As noted above the rejection of that appeal had been communicated to her by 25 May 2022. The claimant has asserted that Mrs Willis also misrepresented evidence in the course of that grievance investigation in order to assist DV and/or persecute the claimant. However, Mrs Willis did not have any involvement in that grievance process. The claimant also asserts that Mrs Willis was looking for reasons to condemn her because she had submitted a formal grievance against Mr Badcoe. Mrs Willis denies this. She had been copied into an email which referred to this grievance, but she was otherwise unaware of it. The claimant also asserts that Mrs Wilson subjected her to detriment as a result of her previous disclosures because Mrs Wilson failed to mention that the claimant's shop had received a cheque for over £20,000 on 31 May 2022 in a weekly email celebrating shop achievements. However, it was not Mrs Willis's responsibility to select notification of these achievements, which were supplied by Area Managers. In any event there was a subsequent slideshow to the South Division Shop Managers on 6 June 2022 which does celebrate the fact that the Falmouth shop had received such a generous cheque.
36. With regard to the alleged disclosures, we accept Mrs Willis's evidence that she was unaware of what the claimant said to the Police in April 2022, that she had no knowledge that the claimant had tried to report on alleged theft to the ICO, and that she was unaware of the contents of the grievance against Mr Badcoe on 9 June 2022. Against this background we reject the claimant's assertions that Mrs Willis had failed to praise the claimant for good work in her shop in May 2022; that she looked for evidence to dismiss the claimant on or after 21 February 2022; and that she had misrepresented evidence in connection with DV's grievance against her.
37. On 6 May 2022 Mrs Henson determined DV's grievance against the claimant, and she upheld certain aspects of it. As a result of these findings, she recommended that there should be a disciplinary investigation against the claimant in connection with three issues: her bullying of DV; the misuse of CCTV; and her poor performance and relationship with the staff in her shop.
38. Mrs Yvonne O'Connor, from whom we have heard, is the respondent's Area Manager for West Sussex and Hampshire. She was asked to conduct a preliminary disciplinary investigation. She had not hitherto been involved in any of the issues. She invited the claimant to an investigatory meeting to discuss the three disciplinary issues mentioned above, and the meeting took place on 24 May 2022. The claimant was accompanied by her chosen staff representative Mr Lonsdale. Mrs O'Connor was alarmed to discover that the claimant largely agreed with the allegations which were put to her but she failed to see anything wrong with her actions. For instance, Mrs O'Connor was very concerned that the claimant had viewed CCTV for her own purposes to check up on DV and to invade her

privacy. She had also emailed DV on Christmas Eve and required her to explain her position regarding the sale price of a handbag immediately upon her return. Mrs O'Connor recommended the matter should proceed to a disciplinary hearing against the claimant, and she prepared a report for that purpose. This coincided with a report prepared by Mrs Willis on 27 May 2022 following her investigation into the working environment of the volunteers in the Falmouth shop.

39. Mrs Elizabeth Lang, from whom we have heard, is the respondent's Area Manager for the North Division. She was appointed as the disciplinary chair. Mrs O'Connor invited the claimant to a disciplinary hearing on 23 June 2022 to be determined by Mrs Lang. Mrs O'Connor provided the claimant with copies of the reports, the relevant documents, and a list of staff representatives. The invitation to the disciplinary hearing confirmed that if proven the allegations could constitute gross misconduct and that dismissal without notice was a possible sanction. The disciplinary hearing was rescheduled at the claimant's request because of her sickness absence on two occasions. It eventually took place on 7 September 2022.
40. The claimant was accompanied by her chosen staff representative Mr Lonsdale, together with two colleagues by way of support. The claimant was aware of the allegations against her and she had the opportunity to state her case in full against the allegations. The claimant had asked whether she could invite eight witnesses to the hearing, and question six of the respondent's other employees. Mrs Lang was concerned because many of these individuals had left the respondent's employment, and she wished to ensure that any questioning was relevant to the three allegations of misconduct which the claimant had to face. She proposed asking questions herself provided that they were relevant.
41. On 5 September 2022 the claimant sent a list of written questions which she wished to ask to both DV and Mr Badcoe. Mrs Lang reviewed these and decided that they were not directly relevant to the issues which the claimant was facing, and that they were accusatory and hostile, and very likely to worsen relations between the three individuals. She was concerned as to the long-term impact that this would have in the event that the claimant was not dismissed and had to return to work. The claimant was aware of this at the hearing, but she did not mention these questions nor ask Mrs Lang to clarify anything with DV or Mr Badcoe. Mrs Lang's findings in connection with the three allegations were as follows.
42. The first allegation was that the claimant had misused CCTV footage in store and was in breach of the GDPR by recording this footage on to a personal telephone and sharing it with others. Mrs Lang was satisfied that the claimant had received GDPR training in 2018 which would have referred to the CCTV policy and the claimant had confirmed that she had recently received a copy. In addition, the claimant had access to the respondent's policies through its SharePoint. Despite this Mrs Lang found that (i) on 13 April 2022 the claimant had viewed the CCTV footage of the incident on 21 March 2022 where MR had raised his voice at DV; (ii) on 13 April 2022 after a customer had reported Mr X had sexually assaulted her daughter, the claimant viewed the CCTV footage whilst on the phone to the customer and then reported the incident to the Police before informing Mr Badcoe, and against the wishes of the customer; and (iii) on 22 April 2022 the claimant had recorded CCTV footage of the alleged theft of Mr X's belongings by DV on to her unsecured personal phone and had showed it to Mr X. Mrs Lang concluded that the claimant should not have conducted investigations as a shop manager because this was only within the remit of an Area Manager, and she had not sought permission or guidance in clear breach of the respondent's CCTV policy. She therefore upheld this allegation.
43. The second allegation was one of "poor people management of paid and unpaid staff". As a shop manager the claimant was expected to create a safe and inclusive environment for staff. Instead, Mrs Lang decided that the claimant had been anti-authority and rude to staff. She encouraged volunteers to complain to the respondent's head office and did not intervene when an ex-volunteer sent her a Facebook message volunteering to pose as a customer in order to fabricate a complaint against DV. She also provided confidential details of the grievance and disciplinary processes to volunteers who were friends of hers to seek to drum up support for her, and against DV. For these reasons Mrs Lang also upheld this allegation.

44. The third allegation related to bullying of DV. Mrs Lang concluded that it was clear that the claimant had an inappropriate vendetta against DV who was her junior and her direct report. Mrs Lang concluded that the claimant wanted to make life so difficult for DV that she left the respondent's employment. The documentary evidence supported these allegations and included: (i) rude notes which the claimant left in the public handover diary for DV; (ii) accusatory emails which the claimant had sent both to and about DV; (iii) the deliberate disclosure of confidential information about DV to other members of staff; and (iv) using CCTV without authority to check up on DV and to report on her activities. Mrs Lang concluded that the claimant's behaviour towards DV worsened after DV had raised a grievance against the claimant which was an inappropriate response for a line manager. Mrs Lang was particularly concerned that the claimant did not accept that she had done anything wrong and had no intention of changing her behaviour. She refused to acknowledge that she been rude to others and lacked empathy.
45. Mrs Lang considered the evidence in the round at the end of the hearing, and she reviewed the respondent's disciplinary policy. Mrs Lang concluded that this third allegation of bullying DV had been maintained and it was sufficiently serious on its own to justify the claimant's summary dismissal for gross misconduct. Mrs Lang genuinely believed that the claimant had committed this gross misconduct and that she did not need to rely on the other two allegations which have also been upheld (the misuse of the CCTV footage and poor management of the shop staff) in order to justify her decision. Mrs Lang met with the claimant on 13 September 2022 and confirmed at that meeting that the claimant was summarily dismissed by reason of gross misconduct. She confirmed her reasons in a letter dated 14 September 2022, and that letter afforded the claimant the right of appeal in accordance with the respondent's disciplinary policy.
46. It is worth recording that the contemporaneous documents supported the allegations that the claimant had bullied DV on a number of occasions. This included the following information and/or allegations: (a) the claimant had posted a written series of messages on her Facebook group which included about 20 of the respondent's employees, volunteers and former volunteers. By way of these messages the claimant publicly denigrated DV; (b) whilst absent on sick leave during March and April 2022 the claimant encouraged volunteers to raise complaints about DV, and made it clear to "her volunteers" that when MR was being investigated as to whether he had threatened DV, that she had taken his side; (c) when another member of the group suggested that volunteers should boycott the shop (in the claimant's absence) the claimant responded "good theory but she'll just bring her own team", referring to DV; (d) when that same member suggested that she should pose as a customer in order to fabricate a complaint against DV, but was concerned she might be recognised, the claimant's response was to encourage her to do so to the effect: "she wasn't working there when you volunteered, and so what if she does?" and (e) the claimant continued to make derogatory remarks about DV during her absence.
47. The claimant also accepted that her email to DV on Christmas Eve 2021 was both accusatory in tone and threatening. She wrote a lengthy email to the respondent running down DV in detail. The claimant continued to conduct herself in this manner despite Mr Badcoe's express concerns and his encouragement to the contrary in his attempts to persuade the claimant to maintain professional standards with her subordinate DV. On 20 April 2022 the claimant was told by Ms Henson and Mrs Harlow that she was not to share CCTV footage with anyone else, but despite this clear instruction she did so. The claimant's explanation for this deliberate disobedience was that she suspected Mr Badcoe would withhold evidence from the Police because she did not trust him. However, the claimant had no basis upon which to reach that conclusion. The claimant also deliberately used the CCTV to check up on DV despite management instructions to the contrary.
48. In any event the claimant appealed against the decision to dismiss her by letter dated 18 September 2022. Mr Daniel Broderick, from whom we have heard, is the respondent's Divisional Business Manager with responsibility for nine Area Managers and nearly 200 shops. On 26 September 2022 he was asked to chair the claimant's disciplinary appeal. Although he knew the various managers who had been involved thus far in the process, he had had no interactions with these managers in connection with the claimant's case

prior to hearing the appeal, and he had no association with the claimant. We are satisfied that he was both senior to Mrs Lang who had made the decision to dismiss, and entirely independent of the previous decisions which had been made.

49. Mr Broderick dealt with the appeal by way of a review of the dismissal decision, rather than a full rehearing. That said, he determined to ascertain whether there was any new information upon which the claimant wished to rely which might have undermined the decision to dismiss her. Mr Broderick had before him, and had considered, the grounds of appeal; the relevant background documents and procedures; the disciplinary investigation report; the disciplinary outcome letter; and the notes of the disciplinary meetings. The claimant also submitted further new information on 5 October and 10 October 2022. Mr Broderick reviewed these documents thoroughly in advance of the hearing, which took place on 18 October 2022. The claimant was accompanied by her staff representative Mr Lonsdale. The claimant complained that she had not seen all of the volunteer witness statements to which Mrs Willis had referred in her statement and Mr Broderick therefore agreed that he would not take them into account when considering his decision.
50. Mr Broderick's unchallenged evidence was that the claimant was abrasive and difficult to deal with during the appeal process and that she continued to make accusations of a witch-hunt against her to the point that it became overwhelming.
51. Mr Broderick only reviewed the decision to dismiss the claimant for bullying DV. He decided that the claimant had not provided any evidence to undermine that conclusion and that there were no mitigating circumstances. He genuinely believed that the claimant had committed gross misconduct. He therefore decided to uphold the original decision to dismiss the claimant for that reason. He confirmed this to the claimant in a letter dated 21 October 2022.
52. Mr Broderick confirmed that he was unaware that the claimant had made any complaints to the Police and/or the ICO, and that he had never seen the claimant's formal grievance. He was therefore unaware that the claimant had made the disclosures upon which she relies to suggest that the reason, or principal reason, for her dismissal was that she had made these disclosures. We accept Mr Broderick's evidence, and we find that the sole reason for the claimant's dismissal, and his rejection of her appeal, was for bullying DV which amounted to gross misconduct. That then concluded the disciplinary process.
53. The claimant had had access to advice and support throughout the above events. She was represented by her chosen Staff Representative during the disciplinary process. She also had discussions with ACAS and in her evidence before us she confirmed that she had spoken to the CAB and an employment law solicitor. All this was before May 2022. She also wrote on 14 May 2022 to the respondent in the context of her appeal against the refusal to agree a flexible working request. She suggested at that stage that the parties should participate in the ACAS Arbitration Scheme. It seems to us highly likely that she was aware of her statutory rights with regard to employment claims and time limits at that stage.
54. Finally, before concluding our findings of fact, we make the following observations. The claimant's case, and her various claims, were often difficult to follow. Allowing for the fact that the claimant was a litigant in person it was often unclear exactly what the claimant was asserting. She also made concessions only to resile from those concession shortly thereafter. In any event as her case developed during the course of this hearing, it became clear that her allegations were now based on there having been some grand conspiracy perpetrated against her involving each of a number of senior managers of the respondent. This is despite the fact that they were all drawn from various parts of the country, and had had no previous dealings with the claimant, and they were independent of earlier involvement as matters progressed. We have no hesitation in rejecting that very serious allegation. It is clear from the evidence of these various managers from whom we have heard, and the contemporaneous documents, that they took their responsibilities to both the claimant and the respondent seriously and afforded the claimant a fair and considered response to all matters, despite the fact that the claimant was often abrasive, rude and frequently unprofessional.

55. In addition, this is a case in which the gross misconduct for which the claimant was dismissed was for the most part admitted by the claimant. There is contemporaneous written evidence of the claimant bullying DV. The claimant also agreed in her cross-examination that her conduct had been completely inappropriate. This is against the background that the allegations against the claimant were clearly very serious because they concerned a targeted attack from a manager on a junior employee who was the claimant's direct report.
56. In any event the claimant went on to commence the Early Conciliation process with ACAS on 14 October 2022 ("Day A"). ACAS issued the Early Conciliation Certificate on 25 November 2022 ("Day B"). The claim form for these proceedings was then presented on 15 January 2023.
57. Having established the above facts, we now apply the law.
58. The Law:
59. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
60. We have considered section 98 (4) of the Act which provides "…. 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".
61. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
62. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
63. Under Section 43F(1) of the Act a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker – (a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and (b) reasonably believes – (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and (ii) that the information disclosed, and any allegation contained in it, are substantially true. Under the Public Interest Disclosure (Prescribed Persons) Order 1999 the Schedule of prescribed persons includes the Information Commissioner (the "ICO"), but only in connection with: "Compliance with the requirements of legislation relating to data protection and to freedom of information.".
64. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
65. Under section 47B of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

66. Under section 47E of the Act, an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee (a) made (or proposed to make) an application under section 80F.
67. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
68. Section 80F of the Act provides a statutory right for employees to apply for a change in the terms and conditions of employment (a "Flexible Working Request").
69. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination.
70. The protected characteristic relied upon is age, as set out in sections 4 and 5 of the EqA.
71. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
72. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
73. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
74. We have considered the cases of: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen Ltd v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Amnesty International v Ahmed UKEAT/0447/08/ZT; Ayodele v Citylink Ltd [2018] ICR 748 CA; Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Polkey v A E Dayton Services Ltd [1988] ICR 142 HL; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 Fecitt and Ors v NHS Manchester [2012] ICR 372 CA Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ; Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
75. The Issues to be Determined:
76. The issues to be determined in this case were originally set out in a List of Issues in the Case Management Order of Employment Judge Youngs dated 25 May 2023. It was then determined at a subsequent preliminary hearing that the claimant was not a disabled person as alleged, and her claims for disability discrimination were therefore dismissed. The remaining claims are for "general" unfair dismissal; for "automatically" unfair dismissal for having protected public interest disclosures; for detriment said to have arisen from those disclosures; for detriment said to have arisen from having made a flexible working request; and for direct age discrimination. The respondent denies the claims and asserts that some of them were presented out of time. We deal each of these in turn.
77. Public Interest Disclosures:
78. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph

80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.

79. [24] "As for the words "in the public interest", inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).
80. In whistleblowing claims the test of whether a disclosure was made "in the public interest" is a two-stage test which must not be elided. The claimant must (a) believe at the time that he was making it that the disclosure was in the public interest, and (b) that belief must be reasonable. See Ibrahim v HCA International Limited [2019] EWCA Civ 2007.
81. The statutory framework and case law concerning protected disclosures was also summarised by HHJ Tayler in Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ. He referred to the dicta of HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00 at para 9: "it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."
82. The claimant relies on three disclosures, and we deal with each of these in turn.
83. The first disclosure is on 13 April 2022 to the Police that an elderly volunteer (that is Mr X) had had his belongings stolen.
84. The parties agree that the claimant contacted the Police on 13 April 2022 by the submission of an online 101 reporting form. However, it is not entirely clear what information the claimant says that she disclosed at this time, and she did not give an account of this in her witness statement. It is clear from the Agreed List of Issues that the claimant relies upon sections 43B(1)(a) and 43C(1)(b)(ii) of the Act, that is to say that a criminal offence had been committed and that she was disclosing this not to her employer, but to the Police, in circumstances where she reasonably believed that the relevant failure relates to any other matter for which the Police have legal responsibility.
85. In our judgment the claimant faces a number of difficulties with this analysis. Whereas the respondent accepts that disclosing information which tends to show a criminal offence has been committed will almost always be in the public interest, more is required. The burden is on the claimant to prove that she had made a protected disclosure and the respondent asserts that the claimant has not done so. The claimant has not made it clear exactly what the information was which she claims she disclosed to the Police. The burden of proof is on the claimant to show that she reasonably believed that the information she disclosed tended to show that DV had committed a criminal offence (namely the alleged theft), which is different from her assertion in her evidence that DV had actually committed the offence. A further difficulty is that the Police do not meet the requirement of the section in question in the required sense of being "liable" for the provision relied upon in s43C(1)(b)(ii) of the Act.

86. For all of these reasons we do not accept that the claimant's interaction with the Police on 13 April 2022 was a protected public interest disclosure which engages the detriment and unfair dismissal provisions in section 47B and 103A of the Act.
87. The second disclosure is on 16 May 2022 to the ICO that an elderly volunteer (that is Mr X) had had his belongings stolen. Although it is not expressly set out in the Agreed List of Issues, this disclosure requires the claimant to rely upon s 43F of the Act in that it was a disclosure to a prescribed person.
88. The difficulty which the claimant faces with this disclosure is that under the Public Interest Disclosure (Prescribed Persons) Order 1999 the Schedule of prescribed persons includes the Information Commissioner (the "ICO"), but only in connection with: "Compliance with the requirements of legislation relating to data protection and to freedom of information." Although the claimant indicated in her evidence that she wished to check with the ICO whether she was in breach of data protection requirements and/or regulations, that was not the basis upon which her case was originally put. Given that the claimant's disclosure related to the alleged theft of the property of the elderly volunteer, it was not a disclosure relating to the compliance with requirements of legislation relating to data protection or to freedom of information. This disclosure does not therefore meet the statutory requirements of section 43F(1)(a). If on the other hand the purpose of her discussion with the ICO was to check whether she could be criticised by her employer for any breach of data protection requirements, that is not in our judgment disclosure of information to show that a criminal offence had been committed, and in the sense that it was a personal enquiry, (and in the absence of any evidence from the claimant on that point) it could not have been in the public interest.
89. For these reasons we do not accept that the claimant's disclosure to the ICO on 16 May 2022 was a protected public interest disclosure.
90. The third disclosure is that on 9 June 2022 the claimant disclosed to Josephine Mewett (Head of Retail) in her written grievance that there had been a cover-up of the above criminal offence. For this disclosure the claimant relies upon ss 43B(1)(f) and 43C(1)(a) of the Act, namely that she disclosed information to her employer that the criminal offence of this alleged theft was being deliberately concealed.
91. We have considered the claimant's formal grievance letter of 9 June 2022 in detail. In our judgment there is no information in that grievance letter which refers to any cover-up of the criminal offence. There is therefore no information in that grievance letter that tended to show that a criminal offence was being covered up, and we therefore do not accept that the claimant has demonstrated a reasonable belief to that effect. In any event the claimant has not given evidence that this was the case. In addition, the claimant's grievance was concerned with the conduct of DV and the claimant's own employment situation. We do not accept that the claimant reasonably believed that her complaint made in the grievance letter was made in the public interest, and she has given no evidence to discharge the burden of proof in that respect. For these reasons we do not accept that the claimant's grievance letter dated 9 June 2022 amounted to a protected public interest disclosure.
92. In our judgment therefore the claimant has not made any protected public interest disclosures and she does not enjoy the protection of the detriment and unfair dismissal provisions in section 47B and 103A of the Act. Notwithstanding this conclusion, and for the sake of completeness, we address below the allegations which she has raised under those provisions.
93. <u>Automatically Unfair Dismissal - s103A of the Act:</u>
94. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
95. We have accepted the evidence of the dismissing officer Mrs Lang that the disclosures relied upon by the claimant were nothing to do with her decision to dismiss the claimant which was solely because of her finding of gross misconduct to the effect that she had bullied DV. Similarly, we have accepted the evidence of the appeal officer Mr Broderick that his decision to reject the appeal had nothing to do with the disclosures relied upon by the claimant. Indeed, Mr Broderick had no knowledge of these alleged disclosures.

96. We have heard no evidence to suggest that the reason, or if more than one the principal reason, for the claimant's dismissal was because she had made the disclosures upon which she relies. The alleged disclosures had no material influence on the decision to dismiss her, nor on the decision to reject her appeal. We find that the reason for the claimant's dismissal was gross misconduct, and gross misconduct alone. In these circumstances we have no hesitation in rejecting the claimant's claim that she was automatically unfairly dismissed for having made protected public interest disclosures. That claim is not well-founded, and it is hereby dismissed.
97. Unfair Dismissal s98(4) of the Act:
98. Applying Iceland Frozen Foods Limited v Jones, the starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.
99. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. Applying British Home Stores Limited v Burchell, a helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. Applying Sainsbury's Supermarkets Ltd v Hitt, the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
100. In this case in our judgment the procedure adopted by the respondent was fair and reasonable in all the circumstances of the case. There was a detailed investigation into the claimant's conduct; a full disciplinary hearing; and an appeal which was determined by a senior manager who was independent of the previous decisions. Throughout this process the claimant had access to advice and support from her chosen Staff Representative. She was aware of the allegations against her, and she was aware that if proven they might result in her dismissal. She had the opportunity throughout to state her case in reply to those allegations. It is an interesting aspect of this case that most of the facts relating to the claimant's impugned conduct was not in dispute, and which related to documentary evidence which had been created and/or supplied by the claimant herself.
101. We did have one concern regarding the procedure for witnesses during the claimant's disciplinary hearing. The claimant was entitled to question the evidence in the disciplinary case against her, and to state her case in reply. She originally suggested a long list of witnesses whom she wished to question, but when asked to clarify their relevance was unable to do so. The claimant subsequently presented a long list of questions which she wished to be put to DV and Mr Badcoe. The respondent declined to put these questions to them. Mrs Lang decided to proceed as chair of the disciplinary hearing, by asking questions herself, but limiting them to what she considered to be the relevant questions. She considered the claimant's questions to DV and Mr Badcoe but decided that these questions were not relevant to the issues which were to be determined, and that they were inflammatory. She made that decision because she decided that there was sufficient contemporaneous material to hand (much of it supplied by the claimant), and the issues before her were not a trial of DV's conduct, nor that of Mr Badcoe. Mrs Lang accepted that DV had herself been rude and was concerned with the way that the claimant

had responded to that by way of retaliation and targeting DV. She therefore formed the view that putting inflammatory questions to DV and/or Mr Badcoe would not be conducive to fostering good employee relations if the claimant were not to be dismissed.

102. We think that Mrs Lang was entitled to reach that conclusion, and indeed the latter point indicates that her decision was not predetermined and was to be based on due consideration of the information before her. We do not consider that the respondent's failure to put the entirety of the claimant's chosen questions to DV and/or Mr Badcoe was a sufficiently serious procedural breach such as to render the procedure adopted to be unfair, particularly given that the claimant was accompanied by her chosen staff representative, and they had every opportunity to state the claimant's case in reply to the known allegations.

103. The allegations of gross misconduct which the claimant knew she had to face were set out in the disciplinary investigation report. This included the following information and/or allegations: (a) the claimant had posted a written series of messages on her Facebook group which included about 20 of the respondent's employees, volunteers and former volunteers. By way of these messages the claimant publicly denigrated DV; (b) whilst absent on sick leave during March and April 2022 the claimant encouraged volunteers to raise complaints about DV, and made it clear to "her volunteers" that when MR was being investigated as to whether he had threatened DV, that she had taken his side; (c) when another member of the group suggested that volunteers should boycott the shop (in the claimant's absence) the claimant responded "good theory but she'll just bring her own team", referring to DV; (d) when that same member suggested that she should pose as a customer in order to fabricate a complaint against DV, but was concerned she might be recognised, the claimant's response was to encourage her to do so to the effect: "she wasn't working there when you volunteered, and so what if she does?" And (e) the claimant continued to make derogatory remarks about during her absence.

104. The claimant also accepted that her email to DV on Christmas Eve 2021 was both accusatory in tone and threatening. She wrote a lengthy email to the respondent running down DV in detail. The claimant continued to conduct herself in this manner despite Mr Badcoe's express concerns and his encouragement to the contrary in his attempts to persuade the claimant to maintain professional standards with her subordinate DV. On 20 April 2022 the claimant was told by Ms Henson and Mrs Harlow that she was not to share CCTV footage with anyone else, but despite this clear instruction she did so. The claimant's explanation for this deliberate disobedience was that she suspected Mr Badcoe would withhold evidence from the Police because she did not trust him. However, the claimant had no basis upon which to reach that conclusion. The claimant also deliberately used the CCTV to check up on DV despite management instructions to the contrary.

105. Despite the totality of these concerns, and despite the fact that Mrs Lang upheld allegations against the claimant relating to the misuse of CCTV footage and inappropriate management of her shop, Mrs Lang determined that it was only the allegation of bullying DV which amounted to gross misconduct sufficient to dismiss the claimant.

106. It is clear to us that both Mrs Lang and subsequently Mr Broderick both genuinely believed that the claimant was guilty of the gross misconduct alleged, namely that she had bullied DV. There were clearly reasonable grounds upon which to sustain that belief. The documents were clear contemporaneous evidence of the same, and the claimant has accepted in evidence before us that her behaviour towards DV was completely inappropriate.

107. In conclusion therefore we find that the respondent genuinely believed that the claimant had committed gross misconduct; and that belief was based on reasonable grounds. That belief also followed a procedure which was full and fair in all the circumstances of the case.

108. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair. In this case, given that the claimant committed gross misconduct, being the deliberate denigration and

undermining of a junior colleague for whom she was line manager, we unanimously agree that dismissal was within the band of responses reasonably open to the respondent when faced with these facts.

109. Accordingly, even considering the size and administrative resources of this respondent, the decision to dismiss the claimant was fair and reasonable in all the circumstances of the case. The claimant's claim for unfair dismissal is not well founded, and it is hereby dismissed.

110. Detriment Generally:

111. What constitutes a detriment under the victimisation provisions was recently set out by the ET in Warburton v the Chief Constable of Northamptonshire Police. The key test is encapsulated in the question "is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" That precludes an unjustified sense of grievance from amounting to a detriment. The test is not a wholly objective one given the alternatives that the reasonable worker would or might take the prescribed view. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

112. The test of causation is similar to that for direct discrimination. Whether a detriment is because of a protected act should be addressed by asking why A acted as they did, and not by applying a "but for" approach. The protected act must be a real reason for the treatment – see Chief Constable of Greater Manchester v Bailey. Put another way, the correct legal test to the causation or "reason why" question is whether the protected act had a significant influence on the outcome - see Warburton, applying Chief Constable of West Yorkshire v Khan; Nagarajan v London Regional Transport and Chief Constable of Greater Manchester v Bailey.

113. Public Interest Disclosure Detriment – section 47B of the Act:

114. For the reasons explained above, in our judgment the claimant has not made any protected public interest disclosures and she does not enjoy the protection of the detriment provisions in section 47B of the Act. This claim is therefore not well-founded and is dismissed for this reason.

115. Notwithstanding this conclusion, and for the sake of completeness, we address the allegations which she has raised under those provisions. The claimant relies on five detriments which she asserts she suffered as a result of having made the above disclosures.

116. The first and second detriments are that Ms Henson the respondent's Divisional Manager no longer had contact with the claimant following the disclosures and/or no longer invited the claimant to meetings following the disclosure.

117. Although the claimant did not refer to this clearly in her evidence, it appears to be a complaint about Ms Henson's response to the claimant's email to her on 2 February 2022 in which she complains about alleged bullying by Mr Badcoe. We do not accept that the claimant's allegation is factually accurate. Ms Henson sent the claimant a supportive email on 3 February 2022 and telephoned her the following day. Ms Henson then arranged for an HR specialist to call the claimant to discuss the options available to her both by way of the respondent's grievance procedure, and by way of an appeal against the refusal of her flexible working request. We therefore reject the claimant's allegation that she suffered detriments in this respect.

118. The third, fourth and fifth detriments are set to be caused by Ms Willis, the respondent's Deputy Divisional Manager.

119. The third detriment is that she did not praise the claimant for good work towards the end of May 2022. The fourth detriment is that Ms Willis looked for evidence to dismiss the claimant 's on or after 21 February 2022. The fifth and final detriment is that Ms Willis

misrepresented evidence gathered in relation to the grievance against the claimant in connection with telephone interviews during the month of May 2022.

120. With regard to these alleged disclosures, we accept Mrs Willis's evidence that she was unaware of what the claimant said to the Police in April 2022, that she had no knowledge that the claimant had tried to report an alleged theft to the ICO, and that she was unaware of the contents of the grievance against Mr Badcoe on 9 June 2022. Even if it could be said that the claimant had suffered the detriment which she claims to have suffered, in our judgment it cannot be said that any such treatment was because of, or materially influenced by, any of these alleged disclosures. In any event, we have rejected the allegations of detriment, and we have rejected the claimant's assertions that Mrs Willis had failed to praise the claimant for good work in her shop in May 2022; that she looked for evidence to dismiss the claimant on or after 21 February 2022; and that she had misrepresented evidence in connection with DV's grievance against her.

121. For these reasons we do not find that the claimant suffered any detriment because she had made the alleged disclosures, nor that the respondent's treatment of her could be said to have been materially influenced by these. The claimant's claim that she suffered detriment said to have arisen from public interest disclosures is not well founded and is therefore dismissed.

122. In any event we would also have dismissed this claim as having been presented out of time for the reasons set out below.

123. <u>Flexible Working Request Detriment – section 47E of the Act:</u>

124. The claimant relies on two detriments said to have arisen as a result of having made her flexible working request.

125. The first detriment is that the respondent put pressure on the claimant to change her hours and/or to try to force her to change her hours at a meeting on 12 January 2022 and at an appeal hearing on 19 April 2022.

126. It is true that the respondent sought to persuade the claimant to change her working hours, and that the claimant had enjoyed an agreed variation to her hours and she had worked from 8 am to 4 pm as agreed for a number of years. To have this agreement removed, and longer hours imposed, is in our judgment something which amounts to a detriment.

127. However, we reject the claimant's assertion that the respondent's attempts to persuade the claimant to change her working hours were detriment caused by or contributed to because of her flexible working request. Mr Badcoe was seeking to persuade the claimant to agree to work longer hours because he was of the view that the claimant's informal arrangement was negatively impacting both the efficient running and the commercial trade in the Falmouth shop. We therefore reject the claimant's assertion that the threat of disciplinary action was caused by the claimant's original flexible working request.

128. The second detriment is that Mr Badcoe, in an email dated 26 May 2022, threatened the claimant with disciplinary action if she did not agree to work after 4 pm. In our judgment the threat of disciplinary action, which did take place, is sufficient to amount to a detriment.

129. However, we have accepted Mr Badcoe's evidence that he had already decided to address the claimant's working hours prior to her formal flexible working request, because his view was that what he perceived to be an informal arrangement as to her working hours was negatively impacting both efficient running and the commercial trade in the Falmouth shop. We therefore reject the claimant's assertion that the threat of disciplinary action was caused by the claimant's flexible working request.

130. In our judgment this claim was detriment is not well founded and it is dismissed. In any event, we would also have dismissed this claim as having been presented out of time for the reasons set out below.

131. <u>Direct Age Discrimination:</u>

132. With regard to the claim for direct age discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her age than an actual or hypothetical comparator was or would have been treated in circumstances which are the

same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.

133. As confirmed in Ayodele v Citylink Ltd, section 136 EqA imposes a two-stage burden of proof. Under Stage 1 the burden is on the employee to prove from all the evidence before the Tribunal facts which would, if unexplained, justify a conclusion not simply that discrimination was a possibility, but that it had in fact occurred. Under Stage 2 the burden shifts to the employer to explain subjectively why it acted as it did. The explanation need only be sufficient to satisfy the Tribunal that the reason had nothing to do with the protected characteristic.

134. For the burden of proof to shift in a direct discrimination claim, the claimant must show that he or she has been treated less favourably than a real or hypothetical comparator ("the less favourable treatment issue"). As confirmed in section 23(1) EqA there must be no material differences between the circumstances relating to the claimant and the chosen comparator. That means they are in the same position in all material respects, except that they do not hold the protected characteristic (Shamoon paragraph 110). "Material" means those characteristics the employer has taken or would take into account in deciding to treat the claimant and the comparator in a particular way (except the protected characteristic) (Shamoon paragraphs 134 to 137).

135. To fall within section 39 EqA it is also necessary to show that the less favourable treatment constituted detriment. A worker suffers detriment if they 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). Furthermore, the unfavourable treatment must be because of the protected characteristic ("the reason why issue").

136. The bare fact of less favourable treatment than a comparator only indicates a possibility of discrimination. There must be something more for the tribunal to be able to conclude that there is a probability of discrimination such that the burden of proof shifts to the respondent (Madarassy). The focus should be on the employer's conscious or subconscious reason for treating the worker as they did (Nagarajan). Whilst the test is subjective, in cases where there is not an inherently discriminatory criterion, a "but for" test can be a useful gloss on, but not substitute for, the statutory test (Amnesty International v Ahmed). The protected characteristic needs to "significantly influence" the less favourable treatment so as to be causally relevant (Nagarajan). However, sight should not be lost of the fact that the less favourable treatment and reason why issues are intertwined and essentially two parts of a single question (Shamoon).

137. In Madarassy Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in Ayodele v Citylink Ltd.

138. The claimant describes herself as being in the age group of over 55's. When the claimant was asked during the case management process to identify an actual or hypothetical comparator upon which she relies, she suggested that she been treated less favourably than other managers who are the same age as she is. When it was explained to her that this could not amount to less favourable treatment on the grounds of her age, the claimant decided to compare herself with people in the age group of the 30s and 40s. She has been unable to identify an actual comparator, and so relies on an hypothetical comparator, namely a shop manager in the same circumstances aged in the 30s or 40s whom she says would not been treated in the same discriminatory manner.

139. The claimant originally relied on three allegations of direct age discrimination, but the first is now withdrawn. This was that the respondent sat the claimant on a different table

whilst at a managers' meeting in September 2021. This allegation is no longer pursued as an allegation of direct age discrimination.

140. The second allegation is that the respondent failed to acknowledge the claimant's shop was the third highest performing shop both on 6 October 2021 and/or subsequently at a meeting on 12 April 2022.

141. We have accepted Mr Badcoe's evidence that his decision not to recognise the claimant's shop as the third highest performing in each case was in no way connected to the claimant's age. We accept his evidence that he and/or Mrs Maciol made these decisions which were normal and sensible decisions in the context of running a business with a large number of charitable shops, and in trying to recognise and encourage different shops at different meetings.

142. The third allegation is that the respondent failed to provide the claimant with additional staff in the period July 2021 to October 2021, and from December 2021 to May 2022.

143. We have accepted Mr Badcoe's evidence that his decisions with regard to recruitment, and the amount of staff support provided for the Falmouth shop, had nothing to do with the claimant's age. In any event, as a matter of fact, Mr Badcoe had taken steps to provide additional staff to support the claimant. This allegation to the effect that the claimant had deliberately not been supported, and that she therefore been treated less favourably because of her age, is also therefore rejected.

144. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.

145. In any event we would also have dismissed this age discrimination claim as having been presented out of time for the reasons set out below.

146. Detriment and Discrimination Claims Out of Time:

147. For the claims for detriment for public interest disclosures and the flexible working request, the relevant statute is the Employment Rights Act 1996 ("the Act"). Section 48(3) of the Act provides that: "(3) An employment tribunal shall not consider a complaint under this section unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

148. Section 48(4) provides: "For the purposes of subsection (3) – (a) where an act extends over a period, the "date of the act" means the last day of that period, and (b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act was to be done."

149. For the claim of direct age discrimination section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

150. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. Section 207B of the Act and section 140B EqA set out the relevant law relating to Early Conciliation and Early Conciliation certificates, and the jurisdiction of the Employment Tribunal to hear relevant proceedings.

151. We have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; London International College v Sen [1993] IRLR 333 CA; Asda Stores Ltd v Kauser UKEAT/0165/07; Schultz v Esso Petroleum Ltd [1999] IRLR 488 CA; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; Cygnet Behavioural Health Ltd v Britton [2022] IRLR 906 EAT; Royal Mail Group v Jhuti (UKEAT/0020/16/RN); British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

152. The Normal Time Limit:

153. In this case the claimant commenced the Early Conciliation process with ACAS on 14 October 2022 ("Day A"). ACAS issued the Early Conciliation Certificate on 25 November 2022 ("Day B"). The claim form was presented on 15 January 2023. Accordingly, any acts or omissions relied upon which took place before 5 September 2022 (which allows for an extension of 42 days under the "stop the clock" Early Conciliation provisions) are potentially out of time.

154. Detriment Claims

155. The last act of detriment relied upon relating to alleged public interest disclosures was in May 2022, and no later than 26 May 2022. The last act of detriment relied upon relating to the flexible working request was on 26 May 2022. There is no allegation of any continuing acts nor any course of conduct thereafter. The normal time limit of three months expired three months after 26 May 2022 on 25 August 2022. The time limit had therefore expired before the claimant commenced the Early Conciliation process with ACAS on 14 October 2022 ("Day A").

156. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are not entirely clear. When the claimant was made aware during the case management process that her claims might have been presented out of time, she made contact with ACAS in January 2023 and received an email to the effect that her claims were potentially in time because of a continuing act. However, that email is well after the events in question. During her evidence the claimant conceded that she had obtained advice from ACAS, from the CAB, and from an employment solicitor. She also suggested (in May 2022 in connection with her appeal against the flexible working request refusal) that the parties might participate in an ACAS Arbitration Scheme. She now says that she was unaware of her rights and/or unaware of any time limits for tribunal claims.

157. The question of whether or not it was reasonably practicable for the claimant to have presented the claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).

158. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a

postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases, the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

159. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

160. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

161. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

162. The Employment Tribunal must make clear findings about why the claimant failed to present his originating application in time, and then assess whether he has demonstrated that it was not reasonably practicable to have presented it in time (London International College v Sen.

163. If the claimant professes ignorance of his right to make a claim and/or the legal regime in respect of time limits, the overarching question for the tribunal is whether that state of mind (that is the ignorance or the mistake) was itself reasonable. It is not likely to be reasonable if it arises from a failure to make such enquiries as ought to have been made in all the circumstances (Wall's Meat Co Ltd v Khan).

164. In Cygnet Behavioural Health Ltd v Britton, the EAT reviewed the authorities from which it derived the following principles: (i) the test is a strict one (paragraphs 19 to 20, 27); (ii) the onus of proving that presentation of the claim in time was not reasonably practicable rests with the claimant; (iii) where the claimant relies on ignorance of his or her rights or the time limits, the Tribunal needs to be satisfied both of the truth of the assertion and that the ignorance was reasonable on an objective enquiry (paragraph 23); and (iv) the person considering bringing the claim is expected to appraise themselves of the time limits that apply; it is their responsibility to do so (paragraph 53).

165. Any application for extension of time must be supported by evidence. An employee seeking to avoid the application of the primary time limit must put the relevant material before the Tribunal (see Royal Mail Group v Jhuti)

166. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

167. In the circumstances of this case, and given the advice and assistance to which the claimant had access during the relevant time limits, whether to ACAS, the CAB, or her employment solicitor, we are not satisfied that the claimant was ignorant of her rights or of the relevant time limits. It was the claimant's responsibility to appraise herself of the relevant time limits that applied. In our judgment there was nothing which precluded her from issuing her claims for detriment within the relevant time limit.

168. We conclude that it was reasonably practicable for the claimant to have issued proceedings within the initial time limit of three months. In addition, even if it had not been reasonably practicable, the claimant has not given any evidence as to why it was reasonable for her then to wait until January 2023 before doing so, and she did not therefore issue these proceedings within such further time as was reasonable.

169. For these reasons the detriment claims are dismissed because they were presented out of time.

170. Age Discrimination Claim

171. The last act of age discrimination relied upon was in May 2022. There is no allegation of any continuing acts nor any course of conduct thereafter. The normal time limit of three months must have expired no later than three months after 31 May 2022 on 30 August 2022. The time limit had therefore expired before the claimant commenced the Early Conciliation process with ACAS on 14 October 2022 ("Day A").

172. The grounds relied upon by the claimant for not having issue these proceedings earlier are set out above. However, despite this matter being one of the Agreed List of Issues, the claimant has given no evidence to explain that it would be just and equitable to extend the time limit, and if so when.

173. We have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.

174. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … "The length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

175. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] … It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section

33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

176. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

177. This strictness of approach was approved by the Court of Appeal in Adedeji, a case in which the Court approved a refusal to extend time where the originating application was presented just three days out of time. Underhill LJ approved the assertion that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals.

178. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

179. In exercising its discretion, the Tribunal should consider all the factors in the particular case that it considers relevant on the facts before it, including, in particular, the length of, and the reasons for, the delay in bringing proceedings: see Adedeji per Underhill LJ (at paragraph 37).

180. In this case, and applying the above case law, the claimant has not convinced us that it would be just and equitable to extend the time limit. Accordingly, we dismiss the claimant's claim for age discrimination because it was presented out of time.

Employment Judge N J Roper
Dated 1st February 2024
Judgment sent to Parties on
12th February 2024

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