Case No: 2302003/2021
2302368/2021
2302706/2022
2303067/2022
2303993/2022
2303712/2022
2301485/2023

EMPLOYMENT TRIBUNALS

Claimant: Ms C Zhao

Respondent: Govia Thameslink Railway Ltd

Heard at: **Croydon (via CVP)** **On: 4, 5, 6, 7, 8, 11 and 12 March 2024**

Before: **Employment Judge Leith**
Mrs C Beckett
Mr K Murphy

Representation
Claimant: In person
Respondent: Mr Caiden (Counsel)

JUDGMENT

1. The complaint of protected disclosure detriment fails and is dismissed.
2. The complaint of victimisation fails and is dismissed.
3. The complaint of automatically unfair dismissal fails and is dismissed.
4. The complaint of unfair dismissal fails and is dismissed.
5. The complaint of unauthorised deduction from wages fails and is dismissed.

REASONS

Claims and issues

1. The Claimant has, in total, brought eight claims against the Respondent. The first was subsequently withdrawn. The remaining seven have been consolidated.

2. The issues had been captured by Employment Judge Burge at a Preliminary Hearing on 12 January 2023. That was prior to the final claim

being issued. At that hearing, the Claimant withdrew her complaints of direct race discrimination and harassment, as well as one specific allegation of victimisation.

3. A further Preliminary Hearing took place before Employment Judge King on 2 October 2023, at which the issues were amended to include claim 8 (which was about the Claimant's dismissal). The Claimant's claims were therefore protected disclosure detriment, automatically unfair dismissal, unfair dismissal, victimisation, and unauthorised deduction from wages.

4. At the start of the hearing, we discussed the list of issues produced by Employment Judge Burge and Employment Judge King with the parties. The Respondent conceded that each of the three disclosures relied upon by the Claimant were protected disclosures within the meaning of the Employment Rights Act 1996. The parties therefore agreed that the issues for this Tribunal were as follows:

> **"1. Protected disclosure**
> 1.1 The Claimant made disclosures on these occasions:
>
> > 1.1.1 On 27 June 2022 the Claimant refused to write safe combinations and put them under the till because her view was that would be a breach of the Southern Cash Regulations 5.9;
> > 1.1.2 The Claimant refused to action an email that required her to email safe combinations "which ever member of staff changes the safe code will then immediately email the new safe code to myself, Giovanni and their colleague at the station". The Claimant alleges this is in breach of the Safeguard Cash Regulations: "safe combinations are issued only to individuals who have an operational need to access safe contents". The Claimant emailed the Area Station Manager on 29 July 2022 whistleblowing the serious breach of Cash Regulations at Waddon station; and
>
> 1.2 If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.
>
> **2. Detriment (Employment Rights Act 1996 section 48)**
>
> 2.1 Did the Respondent do the following things:

2.1.1 Blame the Claimant for the Protected Disclosures she had made;

2.1.2 On 19 May 2022 the Claimant was called by her line manager Ms Yerrell to attend a head office meeting because her colleague Lynn D'Souza had made complaints against her. There was no appointment or acknowledgment letter;

2.1.3 Accuse the Claimant for breaching GDPR (in relation to the reporting the closed gate) because the Claimant had captured an image of the gate being closed from the CCTV;

2.1.4 Label the Claimant a "trouble maker" (colleague Raymond Bayley with a finger pointing at her nose);

2.1.5 Manager Walid emailing the Claimant: "...it is increasingly appearing to look as intimidation towards the management team who are simply trying to run an operation which you are a part of";

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

2.3 If so, was it done on the ground that she made a protected disclosure?

3. Remedy for Protected Disclosure Detriment

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

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

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

3.4 Was the protected disclosure made in good faith?

3.5 If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

4. Victimisation (Equality Act 2010 section 27)

4.1 The Claimant did the protected acts of bringing Tribunal proceedings alleging breach of the Equality Act 2010 on 23 September 2020 (2305390/2020), 6 June 2021 (2302003/2021), 6 July 2021 (2302368/2021), 8 August 2022 (2302706/2022), 30

August 2022 (2303067/2022), 21 October 2022 (2303712/2022), 4 November 2022 (2303993/2022).

4.2 Did the Respondent do the following things:

4.2.1 Refuse the Claimant emergency leave to deal with an overflowing sink when two colleagues were allowed to have a hospital appointment and to obtain a visa;

4.2.2 On 19 May 2022 the Claimant was called by her line manager Ms Yerrell to attend a head office meeting because her colleague Lynn D'Souza had made complaints against her. There was no appointment or acknowledgment letter;

4.2.3 Label the Claimant a "trouble maker" (colleague Raymond Bayley with a finger pointing at her nose);

4.2.4 Manager Walid emailing the Claimant: "...it is increasingly appearing to look as intimidation towards the management team who are simply trying to run an operation which you are a part of";

and

4.2.5 Dismiss the Claimant on 25 January 2023.

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

4.4 If so, was it because the Claimant did a protected act?

5. Remedy for victimisation

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

5.2 What financial losses has the discrimination caused the Claimant?

5.3 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

5.4 Should interest be awarded? How much?

6. Unauthorised deductions

6.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted? The Claimant says that during the period that she had been reinstated but not yet assigned a role she was only paid basic pay and no supplement for

Sunday work and EU leave which she had previously been paid prior to her dismissal.

7. Unfair dismissal (Employment Rights Act 1996 sections 98 and 103A)

7.1 Was the reason or principal reason for dismissal that the claimant made a protected disclosure?
If so, the claimant was unfairly dismissed. If not, the Tribunal need to
consider if this was an ordinary unfair dismissal.

7.2 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct (or some other substantial reason). The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

7.3 If the reason was misconduct (or some other substantial reason), did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular if the dismissal was for misconduct, whether:

> 7.3.1 there were reasonable grounds for that belief;
> 7.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
> 7.3.3 the respondent otherwise acted in a procedurally fair manner;
> 7.3.4 dismissal was within the range of reasonable responses.

7.4 Although technically a remedy issue given the hearing of evidence at liability stage the Tribunal will consider if any reductions need to be made for 'Polkey' or 'contributory fault', which requires consideration of the following:

> 7.4.1 If the claimant was unfairly dismissed, is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?
> 7.4.2. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?"

Procedure, documents and evidence heard

5. We heard evidence from the Claimant.

6. On behalf of the Respondent, we heard from:
   6.1. Raymond Bailey, Gateline operative at Carshalton Beeches station
   6.2. Walid Basma, Area Manager for the High Weald area (which includes Carshalton Beeches station)
   6.3. Mark Robey, Employee Relations Manager
   6.4. Tim Aveline, Area Manager for the Gatwick Express
   6.5. Giovanni Cefaliello, Station Manager for the Epsom area
   6.6. Ramla Abshir-Slevin, Station Manager for the Redhill area at the relevant times
   6.7. Teresa Yerrell, Station Manager for the Sutton Area
   6.8. Sophie Hill, Head of Gatwick Express

7. Each of the witnesses gave their evidence by way of a pre-prepared statement, on which they were cross-examined. The Claimant's witness statement alone was some 293 pages long.

8. We had before us a bundle of 1,256 pages and a supplementary bundle of 417 pages. We also had before us a cast list and chronology, and a skeleton argument prepared by the Claimant. We indicated to the parties at the start of the hearing that we would read all of the witness statements but would only read documents in the bundle to which we were specifically referred.

9. During the hearing, the Claimant referred to some meeting notes having been modified (that is, she suggested that the version in the bundle was different to the bundle she had been sent at time by the Respondent). We reminded her that, if she did hold a copy which was different to the version in the bundle, she was obliged to disclose them. The Claimant indicated that she would search for them. In the event, no alternative versions of the meeting minutes were put before us.

10. At the end of the evidence, we heard submission from Mr Caiden and the Claimant (supplemented in Mr Caiden's case by written submissions).

Factual findings

11. We make the following findings on balance of probabilities. We have not dealt with every area canvassed before us; rather, we have focused on those necessary to reach a conclusion on the issues in the claim.

12. The Respondent is a train operating company. It operates a number of rail franchises, including Thameslink and Southern.

13. We had in evidence before us a number of the Respondent's polices. The Respondent's financial regulations included the following, regarding safes:

> "5.6 Safe combinations must be changed, when staff changes are made through sickness, holiday or cessation of employment. Also, safe combinations must be changed once per month even if no staff changes have occurred or if anyone who is not authorized becomes aware of the combinations.
>
> [...]
>
> 5.9 Under no circumstances should current safe combinations be written down and left on the premises."

14. The Respondent had in place an Anti-Harassment policy (dated 4 Jan 2019). The policy statement said this:

> "The Company considers that harassment is harmful to employees, employers and customers alike. It can impact badly on employee wellbeing, safety, organisational effectiveness and business success"

15. The policy contained examples of harassment, which included the following examples:

> • Spreading malicious rumours, or insulting someone by word or behaviour.
> • Copying memos that are critical about someone to others who do not need to know.
> • Deliberately undermining a competent worker by overloading and constant criticism.
> • Preventing individuals progressing by intentionally blocking promotion or training opportunities.

16. Below the list of examples, it said this:

> "These examples are not exhaustive. Much of this behaviour would be considered to be gross misconduct, the penalty for which is summary dismissal. However, none of the above types of behaviour will be tolerated. All will result in a thorough investigation which may lead to a hearing and may constitute gross misconduct depending upon the circumstances of the case in question."

17. The policy also said this:

> "In addition, any manager who becomes aware of behaviour which breaches this policy, whether or not a complaint has been made, has a responsibility to take action."

18. The Respondent also had in place Rules of Conduct, which provided that failing to comply with obligations under the Respondent's equal opportunities and anti harassment policy would be treated as gross misconduct, for which the normal penalty would be summary dismissal.

19. The Respondent also had in force a disciplinary policy. The policy was agreed with the recognised Trade Unions (ASLEF, RMT and TSSA). Insofar as relevant, the policy provided as follows:

    19.1. Regarding investigations, it said this:

> "It is very important to carry out investigations of potential disciplinary matters without unnecessary delay to establish the facts of the case. In the majority of cases this will require the holding of an investigatory meeting with the employee to establish the facts."

    19.2. The policy did not expressly provide that the employee would be invited to an investigation meeting in writing, or that the allegations would be set out in advance of such a meeting.

    19.3. Under the heading "informing the employee", the policy said this:

> "If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. (See Appendix A). The notification should contain sufficient information about the alleged misconduct to enable the employee to prepare their case for the disciplinary meeting. It is essential therefore, to provide copies of the completed

investigation pack at least 7 days before the disciplinary meeting takes place."

19.4. The policy provided for a right of appeal.

20. The Respondent also had a grievance policy, again agreed with the relevant Trade Unions. It provided that a manager would acknowledge grievance within 7 days, and promptly investigate all aspects of the complaint made. The policy made it clear that the employee submitting the grievance would be invited to a formal meeting to discuss it, with the invitation to that meeting being in writing. It did not expressly specify how other witnesses would be invited to investigation meetings. It was also silent on what, if any feedback would be provided to other parties to a grievance (such as witnesses, or indeed the subject of the grievance). It provided for a right of appeal.

21. The Claimant commenced employment with the Respondent on 12 April 2010. She was employed as a Station Sales Clerk (also known as a Sales Point Assistant).

22. The Claimant's contract of employment incorporated a collective agreement between the Respondent, the Rail Maritime & Transport Workers Union, and the Transport Salaried Staffs Association. Regarding Sunday working arrangements, the agreement provided as follows:

> "3.6.1 Sunday work will be rostered on a fair and equitable basis.
>
> 3.6.2 Whilst outside of the working week, there will be a contractual requirement for employees to work those Sundays shown on the master roster. The only exception to this is where a Sunday falls in the middle of rostered two weeks annual holiday, or an employee is certified sick.
>
> […]
>
> 3.6.4 Where Sunday turns are cancelled with more than 48 hours notice, staff will be booked off and no payment shall be made. Where less than 48 hours notice is given, staff will be used to best advantage.
>
> 3.6.5 Payment for hours actually worked on a Sunday (00.01 to 23.59) will be at the Sunday hourly rate."

23. The Claimant's contract of employment said this regarding Sunday working:

> "Whilst outside the working week, there will be a contractual commitment for staff to work their rostered Sundays. Payment for hours worked on Sundays will be at the standard Sunday hourly rate."

24. Regarding rules and regulations, it said this:

> "You are subject to and are required to conform with Southern Rules and Regulations which may for the time being be in force and applicable, and to become thoroughly acquainted with those rules and regulations relevant to your work. The Rules and Regulations of employment are set out in Southern Rules of Conduct.
> Southern's Disciplinary Procedure (which is applicable on completion of the probationary period) includes provision that management may at any time:
>
> (i) dismiss without notice, or
>
> (ii) suspend from duty, and, after enquiry, dismiss without notice, or
>
> (iii) suspend from duty, as a disciplinary measure
>
> an employee for certain offences…"

25. The Claimant was entitled to paid annual leave. Annual leave was paid at the basic rate of pay. However, for the first four weeks of annual leave per holiday year, employees would be paid a supplement referred to as "EU Pay". That took into account additional pay earned in the preceding 13 pay periods.

26. In the first half of 2020, the Claimant was working at East Dulwich station. The Claimant was summarily dismissed on 16 July 2020, over allegations that she had committed timesheet fraud.

27. On 23 September 2020, the Claimant presented a claim form to the Employment Tribunal (claim 1). The claims intimated included unfair dismissal, sex discrimination and race discrimination.

28. The Claimant had also appealed the decision to dismiss her using the Respondent's appeal process. Her appeal was heard by Beth Jacobs, Area On Board Manager, West Coastway. That appeal was successful, in that by a letter dated 6 October 2020 Ms Jacobs wrote to the Claimant indicating that her dismissal was withdrawn and she was reinstated with immediate effect. Ms Jacobs substituted instead a final written warning, which would remain live for a period of two years (although it was not clear when the final written warning would commence or expire).

29. Ms Jacobs noted in her letter that the Claimant had indicated that she would find it difficult to return to the Metro area (the area of the Respondent's business in which she had been working prior to her dismissal). Ms Jacobs therefore agreed to place the Claimant in another area appropriate to her home location and current grade.

30. Within the letter, Ms Jacobs also said this:

> "Despite your assertion to the contrary there is no evidence that the meeting minutes were faked. At Southern, we do not record our meetings; instead we use minute takers who cannot always record each word said as verbatim but do their best to record the meeting as accurately as they can.
>
> Minutes are provided to you after the meetings take place for this reason and if you do not feel that they are an accurate reflection of the meeting then you can contact the appropriate manager with any comments you may have."

31. The Claimant subsequently withdrew claim 1, and a dismissal judgment was entered on 12 August 2021.

32. The Respondent then sought to find a suitable role for the Claimant. During this time, the Claimant was paid her full basic pay. She was not paid any additional payments such as Sunday supplements. The Claimant accepted in evidence that she did not take any annual leave during the period when she was at home on pay, waiting for a role to be assigned to her. She also accepted that she did not work any Sundays during that period (as she did not work at all).

33. On 12 February 2021, Jillian Scott-Fairweather, HR adviser, both emailed and posted a letter to the Claimant to advise her that a role had been located for her at Purley Sales Point. The Claimant did not respond; she apparently did not receive the correspondence. Ms Scott-Fairweather sent a further email on 1 March 2021 (to a different email address), to which again the Claimant did not reply.

34. On 1 April 2021 Ms Scott-Fairweather wrote to the Claimant to tell her that she was being treated as absent without leave, consequently her pay would cease. The Respondent subsequently stopped the Claimant's pay.

35. The Claimant did then get in contact with the Respondent. Her pay was reinstated (in fact, due to an error she was paid twice for a period of time,

which the Respondent did not recover from the Claimant). She then started at Purley.

36. On 6 June 2021, the Claimant presented a second claim against the Respondent, in which she claimed race discrimination.

37. On 6 July 2021, the Claimant presented a third claim against the Respondent, in which she claimed arrears of pay and other payments. She did not tick any boxes indicating that she was bringing a complaint of discrimination.

38. The Claimant subsequently moved to Carshalton Beeches station on 18 July 2021. In that role, she reported to Teresa Yerrell.

39. At that time, Carshalton Beeches had two full-time Sales Point Assistants, who worked opposite shifts. The other full-time Sales Point Assistant at Carshalton Beeches at the time was Lynn D'Souza. There was some discrepancy in the evidence regarding the extent to which their shifts would overlap. This was in part because Ms D'Souza apparently often carried out shifts at other stations immediately before or after her shifts at Carshalton Beeches. The Claimant's evidence evolved somewhat. Initially her evidence was that she would see Ms D'Souza once every three months. Then in response to questions from the panel, she said that would see Ms D'Souza a couple of times a month. We find that the Claimant would see Ms D'Souza occasionally, but no more than a couple of times in an average month and sometimes less frequently than that. The consistent evidence was that their shifts would never overlap for more than 20 or 30 minutes at most.

40. In addition to selling tickets, the Sales Points Assistants were responsible for cleaning part of the station and carrying out various security checks.

41. The ticket office at Carshalton Beeches had a safe, in which cash was stored (including the till float). If a member of ticket staff could not access the safe for any reason, they would be unable to access the float for the till. Consequently, they would be unable to make cash sales (unless the customer could pay with exact change).

42. Carshalton Beeches also had a Gateline member of staff on duty during the day. The role of the Gateline employee was to supervise the operation of the automatic ticket gates. If the Gateline member of staff was going to be away from their post for any reason, they had to leave the ticket gates open. Gateline staff were not permitted to sit in the ticket office during their shift.

43. The Claimant's evidence was that, at some point in February or March 2022, Mr Bailey was sitting in the ticket office, and she asked him to leave. Her evidence was that Mr Bailey stood up, pointed directly at her nose and said something like "you are a troublemaker".

44. The Claimant's evidence regarding the incident was given in that form for the first time in response to questions from the Tribunal. Claims 5 and 6 referred to being labelled as a troublemaker in general terms. However, none of her pleaded claims specifically referred to Mr Bailey, or alleged that he (or anyone else) had pointed a finger in her nose. The first reference to Mr Bailey having allegedly called her a troublemaker came in the List of Issues following the Preliminary Hearing before Employment Judge Burge. That was also the first reference to Mr Bailey pointing his finger at her. There was no date attached to the allegation in the list of issues. The time the Claimant put a date on the incident was in response to questions from the Tribunal, when she said that she thought it was in February or March 2022, but probably March 2022.

45. Mr Bailey denied that the incident occurred, in strenuous terms. His evidence was that he had never pointed a finger at the Claimant – he said, both in his witness statement and in oral evidence, that that was "not normal behaviour". His consistent evidence, both in his witness statement and in his oral evidence, was that he had never called the Claimant a troublemaker, but that she had told him that she was a troublemaker when she first moved to Carshalton Beeches. His oral evidence was that Claimant had appeared proud when she did so, and that she had told him that she would sue Southern Railways for £100,000.

46. We deal with our findings on this in our conclusions.

47. On 16 April 2022, Ms Yerrell received a complaint from Ms D'Souza about the Claimant.

48. On 21 April 2022, the Claimant emailed Mr Basma and Ms Yerrell indicating that she might have to add another accusation on her "current court file". Mr Basma responded on 25 April 2022. Insofar as relevant, he said this:

> "I would just like to reiterate, as I have mentioned to you the last time we met and previously said - please do not send your exhibits or anything ongoing with your current tribunal.
>
> As I have said previously, what is happening with those matters is personal to you and does not necessitate notifying me or my management team unless it is an existing issue which you would like

to raise for resolution - in which case Teresa would be your first point of contact as per process.

Once again - anything to do with your court file and tribunal can be kept personal with you and does not need to be shared with myself or the HW management team or its supports."

49. The Claimant responded that she acknowledged and understood the message. She did indicate that she would directly file a new case if she felt she was being targeted or treated unfairly in future.

50. Ms Yerrell met the Claimant on 19 May 2022 to discuss Ms D'Souza's complaint. The Claimant was not sent a formal invitation to the meeting setting out what the meeting would be about. Julie Thorpe, Team Organiser for the Three Bridges Area, attended the meeting as notetaker.

51. The notes record that Ms Yerrell started the meeting by saying this:

> Thank you for coming in to see me. Please don't worry. First I must say thank you for what you have done at Waddon someone has said how good it was looking.
>
> Please don't worry, because I can't talk and write at the same time, so Julie is going to make some notes for me. Please don't worry. I have some notes here that I have made so will be looking at these.

52. The Claimant then asked "There is no trouble for me?", to which the notes record that Ms Yerrell said "I just want to ask you some questions, so please don't worry."

53. Ms Yerrell then said "We have been working together for some time now, we have a good relationship and you are happy and everything at Carshalton Beeches?", to which the Claimant replied "Yes". Ms Yerrell explained that concerns had been raised, which she was following up. She said "We all know there are two sides to every story so what I want today is to see what you have to say about these comments". A little later, she said "Please don't look worried; everyone has different opinions and I just want to get your side as it has been brought to my attention."

54. Ms Yerrell then discussed the concerns raised by Ms D'Souza. During the discussion, the Claimant made the following comments about Mr Bailey:

    54.1. "I know Raymond is gobby"

54.2. "Raymond is completely the gossip centre, every day he is lying and is really the person who says things, however I get on with it because every day we have to survive like we did with the virus, I deal with him like the virus…"

54.3. "Raymond is a bad person and don't do work, everyday it is gossip you bad, gossip you bad. Everyone is bad, he is the only person who is good, but actually he is the worse person."

54.4. "… you can't deal with the person who is mad, who maybe has mental health problems."

54.5. "I think Lynn is more strong and reasonable person than Raymond, you can't deal with a mad dog."

54.6. "I ordered new tea bags and coffee and, did you notice Raymond's hand and all the skin I thought he had some sort of virus or something, then one day I saw him with his whole hand in the coffee bin. All his neck it is the same, at the beginning I thought it was AIDS, I thought shit I will keep away from this."

We should say, for the avoidance of doubt, that we are simply setting out the comments made by the Claimant. We are not adjudicating on their truth (or otherwise).

55. After the last of those comments, the notes recorded that Ms Yerrell said to the Claimant "You can't say things like that". She then immediately indicated that they would take a short break.

56. Towards the end of the meeting, Ms Yerrell said to the Claimant that she would tell Ms D'Souza that she would invite them both into a meeting. She asked the Claimant not to speak to Ms D'Souza.

57. The notes recorded that the Claimant then said this:

> "If we can sort it out between ourselves it will be best, I am willing to talk and improve, I will speak to Lynn [D'Souza]."

58. Mr Yerrell responded "Please don't do that please let me speak to her first". Then a little later she said again "Please don't speak to Lynn, let me speak to her first."

59. The Claimant concluded the meeting by saying this:

> "No you are a good manager, you are the first manager who works hard, you see me a lot, in the Metro my manager only saw me perhaps twice. I recognize you are a good manager. I don't want any trouble. "

60. Following the meeting, the Claimant attempted that afternoon to speak to Ms D'Souza about the concerns she had raised (notwithstanding Ms Yerrell's express instruction to the contrary).

61. On 28 May 2022, the Claimant emailed Ms Yerrell as follows (the email was headed "6th June Monday Early Shift"):

> "I got an appointment from Water company to access my flat between 12-4pm for turn off stopover to investigate pipe leaking issues. I requested engineer to call me before arriving, from CSB to my flat is 5 minutes' drive. I work early from 6-1, in case they call me early, can I leave half hour to open door for them? Though they likely visit after my shift end.
>
> I don't want any issues, so ask you whether it will be okay or not, if not, May I book 6th June One day Annual Leave please.
>
> Thank you! I understand you read this email when on duty next week, will appreciate if you could sort it out for me and let me know."

62. Ms Yerrell and the Claimant had a conversation about the request. On 30 May 2022, Ms Yerrell emailed the Claimant as follows:

> "Hi
> I will book this as a days annual leave.
> Hope all goes okay
> Take care
> Teresa"

63. On 31 May 2022, the Claimant emailed Ms Yerrell as follows:

> "I would like you explain me that why Lynn went to hospital appointment for 2 hours during her shift is permitted? Why Sunju left for 2 hours permitted? But you have to offer me 1-day Annual Leave instead?"

64. It was common ground that this was a reference to two occasions when colleagues of the Claimant had been given emergency leave for part of a shift (that is, paid leave which did not count as annual leave). The colleagues in question were Ms D'Souza and Mr Mani, a Gateline operative who at that time occasionally worked shifts at Carshalton Beeches.

65. Ms Yerrell's evidence was as follows:

65.1. In respect of Ms D'Souza, that Ms D'Souza had told her that she had received a request to attend the hospital that day, and that this was further to a health issue that Ms D'Souza had already discussed with her, so she authorised Ms D'Souza to take emergency leave to attend the appointment.

65.2. In respect of Mr Mani, that Mr Mani had informed her that his visa was expiring imminently, and that he had managed to obtain an appointment with the UKVIA service, which he had to attend as he required to visa in order to have the right work in the UK. Her evidence was that she understood that he had found out about the appointment on either the day or the previous day, so once again she authorised emergency leave so he could attend it. Her evidence was that she had not probed Mr Mani about why he had only requested the visa at very short notice. Ms Yerrell referred to an email she had received from the Respondent's Employee Relations department informing her that Mr Mani's visa would shortly run out, but that email was not in evidence before us.

66. The Claimant's evidence was that Mr Mani told her that he was getting a dependent's visa, and that by asking for paid leave he got paid leave. Her evidence was that she understood that Ms D'Souza's situation was not an emergency either and that the appointment had been booked a long time previously.

67. Ms Yerrell's evidence was that since the Claimant's request was not for an emergency plumbing situation, she could take it as annual leave but not as emergency leave.

68. We find that:

68.1. In respect of Ms D'Souza, Ms Yerrell believed what she had been told by Ms D'Souza regarding the short-notice nature of the hospital appointment.

68.2. In respect of Mr Mani, while Ms Yerrell was profoundly (and surprisingly) uncurious about what had led to the situation where Mr Mani's visa was on the verge of expiring, we accept that she took at face value what she was told by Mr Mani, which was that his visa was expiring imminently, that he required it to continue to work, and that that was the earliest appointment he had been able to get in order to renew it.

69. On Saturday 25 June 2022, the Claimant changed the safe code at Carshalton Beeches. She emailed Ms Yerrell to inform her of the new safe

code. She did not pass the safe code on to Ms D'Souza. Ms D'Souza did not email or message the Claimant to request the code.

70. On Monday 27 June 2022, Ms D'Souza was on the early shift. She was unable to access the safe, which meant that she did not have a float. She was consequently unable to take cash payments during the shift.

71. Ms D'Souza was still at work when the Claimant arrived to work the late shift. There was an altercation between Ms D'Souza, the Claimant, and Ms Yerrell.

72. It was common ground that during the incident Ms Yerrell asked the Claimant, when she changed the safe code, to write the new code down on a piece of paper and leave it under the till drawer to avoid the same thing occurring in future. It was common ground that that would have been a breach of the Respondent's cash handling procedures. It was common ground also that voices were raised, although there was some dispute about whose voice was raised first.

73. The Claimant's evidence was that the incident started with Ms Yerrell asking her to write the safe code down. Her evidence was that Ms D'Souza shouted at her first, then she raised her voice in response and Ms Yerrell joined in. That was consistent with the evidence she gave to Miss Abshir-Slevin during the internal investigation (which we will deal with later on in our judgment).

74. Ms Yerrell's evidence was that she heard raised voices between the Claimant and Ms D'Souza (although she did not specify whose voice was raised first). Her evidence was that she then made the suggestion regarding the safe code, and that after that the Claimant raised her voice more, started waving her arms around and behaving in a threatening manner towards Ms D'Souza. That was slightly stronger than the evidence she gave to Miss Abshir-Slevin during internal investigation, where she described the claimant waving her hands but said "she is expressive anyway".

75. The Claimant relied upon her refusal to write the safe combinations and put them under the till as her first protected disclosure. The Respondent accepted that this was a protected disclosure.

76. Later that afternoon, the Claimant emailed Mr Basma to recount her version of the events leading to the incident. She headed the email "Investigation required by outside area manager!".

77. On the following day, Ms Yerrell emailed Mr Basma regarding the incident on 27 June 2022. Ms D'Souza also emailed Mr Basma that morning regarding the incident. Her email was entitled "Unprofessional behaviour by Chun".

78. Later the same morning, the Claimant emailed Mr Basma again. Her email said this:

> "I would like to take grievances against my online manager Teresa who treat a member of staff above another member of staff, discriminate, bully, intimidating and threatening me. She was also in breach of ACAS code of handling staff complaints, it should be handled by outside area manager to void bias, but I was called for investigation without any acknowledgement with her and meeting minutes was modified without my signature.
>
> Thank you for pass to HR for further investigation by an outside area manager. I refuse any further investigation held by Teresa as she should be investigated for her own behaviour in yesterday events at CSB [Carshalton Beeches]."

79. Mr Basma appointed Miss Abshir-Slevin to investigate the incident on 27 June 2022. At that time, Miss Abshir-Slevin was the station manager of another station in Mr Basma's area.

80. On 3 July 2022, the Claimant emailed Miss Abshir-Slevin as follows:

> "I nearly completed draft tribunal case and going to file next week, regardless results from any investigation.
>
> Very simple, I believe I could not survive with Teresa and Lynn; therefore, I don't want lost the best opportunity to file at right time now. I have nothing to lose anyway.
>
> I do trust you in person, but I never trust HR and Management, Honestly, I don't want to drag you down as I am blacklisted. I will file court case each time they trying to remove me, It is my second job now, ha..ha..just kidding."

81. On 9 July 2022, the Claimant emailed Christopher Gibbs a query regarding the ticket office roster at Carshalton Beeches. Two days later, on 11 July 2022, the Claimant emailed Mr Gibbs and Mr Moore, the Respondent's Resource Planning and Strategy Manager for Stations. She said this:

> "Good afternoon! While I am still waiting for Chris's reply, I guess he got no clue.
>
> I heard a rumour that Violet Lule – previous Roster Clerk received a bribe of silver bracelet from Lynn D'Souza at Carshalton Beeches to alter ticket office roster in favour of Lynn.
>
> I heard this rumour, thinking of my roster which does reflect unfairness, I noticed Lynn always have RD on Monday, Wednesday, and Friday 3 days in rotation, while mine never be on Monday or Friday, instead of on Thursday or Wednesday only, normally ticket office two people in a fair rotation from Monday to Saturday, I would like you investigate and let me know why the original roster changed patterns and in favour of one member of staff over another one? Maybe the rumour is truth?
>
> Please note this is simply an inquiry to clear my doubts, no finger pointing or making a false accusation, guess better to clear those rumours.
>
> Thank you for your understanding and attention, looking forward to hearing from you ASAP."

82. The Claimant was taken to her email to Mr Moore in the course of cross-examination. Her evidence was that English is her second language and she may not have used the word "bribe" correctly. We consider that there was no linguistic difficulty at all. The substance of what the Claimant was describing in the email was consistent with her use of the word bribe. She was describing the Roster Clerk receiving something from Ms D'Souza in return for changing the rota to benefit Ms D'Souza. It was not a question of the Claimant attaching the wrong label. Even if the Claimant had not used the word bribe, that would have been the clear substance of the accusation she was making.

83. The Claimant's evidence was that she did not consider that she was making an accusation. We disagree. The email was clear on its face that she was making an allegation. The fact she said "this is just an inquiry", and referred to it as a "rumour", did not make the substance of her email any less accusatory.

84. Mr Moore forwarded the email to Mr Basma, saying this:

> "As a matter of urgency please deal with Chun, I will not accept emails of this nature being sent to members of my team, we have already sent one to Teresa.
>
> These are frankly unacceptable."

85. On 12 July 2022 Teresa Yerrell sent her grievance outcome to Lynn D'Souza. Within that, she said the following regarding arrangements for the safe code:

> "To confirm the arrangements for notifying each other when the safe code is changed. Whichever member of staff changes the safe code will text their colleague as soon as it has been changed and before they leave the workplace to their colleagues work mobile phone only."

86. That letter was (understandably) never sent to the Claimant. Nor was the Claimant ever informed of what Ms Yerrell had told Ms D'Souza about how to deal with the safe code going forward. Ms Yerrell's evidence was that that was because the Claimant had raised a grievance about her in the interim, and it was considered inappropriate for her to communicate with the Claimant about Ms D'Souza's grievance outcome while that grievance process was ongoing. The result was that the Claimant was not made aware of the arrangements set out in Ms Yerrell's email to Ms D'Souza.

87. On 13 July 2022, the Claimant emailed Dave Rudman of the Respondent's HR department, as follows:

> "Dear Dave Rudman,
>
> Good afternoon!
>
> I noticed that Carshalton Beeches Gate line have vacancy advertised, I got concerns and would like to talk to recruitment team or who is managing our station gate line recruitment. If you could help to pass my concerns:
>
> Carshalton Beeches is my home station, and I am ticket office. I am really concerned one of applicants who possibly applied Gate line job: Sunju Varkey Mani who is Sutton gate line part time staff, if he successfully gets the job in Carshalton Beeches, I will imagine he will form cliques with another member of staff, both come from India, because he was gossip and created problems in our station already. Please see investigation meeting Minutes attached.

He might be more suitable to Wallington station; I will be highly appreciated if you could pass my concerns.

Thanks, and best regards!"

88. The Claimant attached an extract from her investigation meeting minutes with Ms Yerrell.

89. The Claimant's evidence to the Tribunal regarding the Dave Rudman email was as follows:

89.1. She did not consider that it was racist, in that her concern was that Mr Mani would form a clique with Ms D'Souza rather than specifically about Mr Mani's race.
89.2. She considered that people who came from a similar culture or with similar beliefs would naturally form cliques, and that saying so was not racist. Her evidence was that if you go to a pub, you will see people sitting in different groups – she referred (by way of example) to Muslims sitting with other Muslims and English people sitting with other English people.
89.3. She had less than a 1% chance of being able to influence the outcome of the recruitment process, so it didn't matter what she said.
89.4. She was "expressing her concern" rather than trying to block Mr Mani being appointed.
89.5. There was (in essence) no harm done as Mr Mani did not see her email.
89.6. She had knowledge of the Respondent's anti-harassment policy before she sent the email.
89.7. She would send the same email again in the same situation, and she did not think she had done anything wrong. She told the Tribunal that her email was not racist, and that she considered that the meaning of her email would be clear to a primary school pupil. She also told the Tribunal that she considered that if her email was racist, then England does not have free speech.

90. On 13 July 2022, the Claimant emailed Miss Abshir-Slevin regarding the fact that they had been unable to speak that day. At the end of the email, she said this "I forwarded my file to Tribunal yesterday for your information only". Within the same email, she forwarded to Miss Abshir-Slevin an email she had sent to the Employment Tribunal in advance of a hearing listed on 21 July 2022. She had already sent that email to the Respondent's solicitors.

91. On 14 July 2022, the Claimant emailed Jillian Scott-Fairwearther of the Respondent's HR department, indicating that she wished to raise a grievance against Mr Basma.

92. Also on 14 July 2022, Mr Basma responded to the Claimant's email to Justin Moore. He dealt with the substantive query the Claimant had raised regarding the roster pattern. He then said this:

> "I would also like to bring to your attention the inappropriate nature and tone of the contents, and allegations, within this email. You are essentially accusing another employee of receiving bribes whilst carrying out their duties. You are also basing this from rumours, with no real proof, aside from a roster pattern that you deem unfair. As has been discussed previously with your line manager, please raise any queries or concerns in a constructive manner with your line manager so your queries can be answered."

93. The Claimant responded as follows:

> "Please note in my original email sent to Justin quote:
>
> "Please note this is simply an inquiry to clear my doubts, no finger pointing or making a false accusation, guess better to clear those rumours."
>
> Your email making a false accusation regarding my inquiry. I was told it is 6 weeks rotation from Monday to Friday that time, that is why I made these inquiries.
>
> Also, you send email to confirm that Osei called me to report to Sutton Supervisor every shift was merely carrying his care duties, I totally disagree with you.
>
> I have right to make inquiries, I did not complain any overtime at all, I feel you are finger pointing at me!"

94. On 15 July 2022, the Claimant and Miss Abshir-Slevin exchanged emails regarding the process for passing on the safe code between ticket office staff at Carshalton Beeches station. The exchange concluded with Miss Abshir-Slevin saying this:

> "As I told you I will send an email out to Lynn and you to follow the correct process which is person working after code has changed

need to request the new code via their work email from the person who has completed the end of Period."

95. There was no evidence that Miss Abshir-Slevin did, in fact, pass that message on to Ms D'Souza.

96. Howard Clear, the station manager of Brighton Station, was appointed to hear the Claimant's grievance regarding Ms Yerrell. While the Claimant's various grievances were being investigated, Giovanni Cefaliello was put in place as a temporary support for the Claimant.

97. On 25 July 2022, Ms Yerrell emailed the email address for the Sales Point at Carshalton Beeches station (which would be read by both the Claimant and Ms D'Souza). She said this:

> "Due to ongoing issue with notifying colleagues with the new safe code when it has been changed please follow the following procedure.
> Which ever member of staff changes the safe code will then immediately email the new safe code to myself, Giovanni and their colleague at the station.
> This will commence with immediate effect."

98. This was, on the face of it, contrary to the arrangement put in place by Miss Abshir-Slevin 10 days earlier. Ms Yerrell's evidence during cross-examination was, slightly surprisingly, that she did not consider that she was overriding the arrangement put in place by Miss Abshir-Slevin (although she accepted that the Claimant had showed her Miss Abshir-Slevin's email). Her explanation was that this was because Miss Abshir-Slevin's email had never been forwarded to Lynn D'Souza. That did not, on the face of it, answer the question (although it was put to her several times).

99. We consider that, by her email on 25 July 2022, Ms Yerrell did change the process put in place by Miss Abshir-Slevin. The fact that Miss Abshir-Slevin had not communicated the process to Ms D'Souza was non-sequitur, in the sense that that was not a reason to change the process. Ms Yerrell's apparent inability to acknowledge that in evidence was surprising.

100. Neither process was, on the face of it, in breach of the cash regulations put in evidence before us, which did not prescribe a specific process for passing on safe codes. Ms Yerrell was the station manager for Carshalton Beeches, and Miss Abshir-Slevin was another station manager at the same level. In that regard, we consider that it is more likely that Ms Yerrell would have expected to have had the last word over what happened

at the station. We note also that she had put a process in place prior to that put in place by Miss Abshir-Slevin, albeit that she had not communicated her process to the Claimant.

101. On 27 July 2022 the Claimant prepared a further draft to send to ACAS. She sent it to Mr Basma, Ms Cubbitt (HR), and all of the area management team for the High Weald area.

102. On 29 July 2022, the Claimant emailed Mr Basma and Mr Cefaliello as follows:

> "Good morning! This is a whistle blowing to report a breach in cash regulations for Waddon Station: this morning I found that the safe combination was not changed in end of period 2023/P03 and 2023/P04 and same code was used over 2 months. I don't want to my name mentioned on this report to Teresa, I feel already being grilled and don't want any more toast after this report.
>
> Cash Regulations Safe 5.6 :" safe combinations must be changed once per month even if no staff changes have occurred or if anyone who is not authorised becomes aware of the combinations"
>
> Thank you for your attention and hope my report is confidential and I will not be subject to winding up because I report something wrong."

103. That was the second protected disclosure relied upon by the Claimant – once again, the Respondent accepted that this was as protected disclosure.

104. Mr Cefaliello responded on 1 August 2022. He said this:

> "Thank you for your email,
> Did you change the safe code at Waddon after you spotted this?
> From my small understanding of Waddon there are not any resident staff,
> So when things like this are spotted they should take action in changing the code and then an email sent to Sutton supervisor and the line manager saying the code has been changed,
> Or the end of period account have been completed or anything that has not been done."

105. The Claimant replied that she had not changed the safe code and that she did not have the authority to it as far as she knew. There was no further correspondence before us regarding the matter.

106. On 6 August 2022, the Claimant emailed Ms Yerrell and Mr Cefaliello as follows:

> "Please kindly advise that the gateline staff leave 1 gate open if he went to toilet or on the phone please!
>
> I got 2 ladies with suitcase and their oyster was not able to open the gate, they were rush to catch the trains, when I trying to open the gate for them, Sunju turned up and still talking on his mobile phone...the customer were shouting at me for not opening the gate...
>
> Can either of you have a words with Sunju, he must leave 1 gate open if he will be away from the gate to void customer complaints.
>
> I took a photo from monitor.....just as evidence to cover myself when opening gate."

107. She attached a photograph of the ticket barriers, apparently taken from the CCTV monitor, which clearly showed a customer's face. The Gateline employee in question was Mr Mani.

108. Later that day the Claimant emailed Ms Cubbitt, Mr Basma and Ms Yerrell with a more detailed complaint about Mr Mani.

109. On 8 August 2022, the Claimant submitted a further claim against the Respondent (claim 4). She indicated that she was claiming race discrimination.

110. On 8 August 2022, Mr Cefallielo emailed the Claimant. He indicated that he would ask for a report regarding the Gateline incident, and asked the Claimant for the time and date that it occurred (somewhat surprisingly, given that the time and date were in the subject line of the Claimant's original email). He concluded his email by saying this "Also because of GDPR can you please delete the picture of the lady from all phones and email".

111. The Claimant responded on 13 August 2022. Regarding the photograph issue, she said this:

> "Please note because of GDPR is why after email sent CONFIDENCIAL and IMMEDIATELY deleted from the devices!"

112. Mr Cefallielo spoke to Mr Mani. There was some discrepancy between what Mr Mani told Mr Cefallielo about what he had been doing while he was away from the Gateline, and the Claimant's evidence regarding what she observed. We do not need to resolve that disrepancy. It was common ground that Mr Mani had left the immediate vicinity of the Gateline, leaving all of the gates shut, which he should not have done. Mr Cefallielo reminded Mr Mani of the importance of leaving gates open if he was away from the Gateline, which he considered resolved the matter.

113. On 18 August 2022, Mr Cefallielo emailed the Claimant as follows:

> "Good morning Chun,
> This is an operational issue that has been addressed,
>
> You should not be taking pictures of customers. As this is a breach of GDPR.
>
> In this particular instance you could of spoken to the person or persons at the Gateline to say he would bee back shortly as he was assisting another passenger."

114. The Claimant responded the same day. Her email included the following:

> "I was one of parties involved in the incident, as customers shouting at me, the law permit I took a photo to prove if customer attacks as evidence or if they hurt while forcing gate opening, please note I took photo from CCTV monitor, if you want, I could simply file to court as you making a false accusation against me."

115. Mr Cefaliello responded. He attached a security briefing from the Respondent's Sharepoint regarding the use of mobile phones by staff. The briefing urged staff not to use mobile phones to either picture or film individuals. The rationale given for that advice was to avoid staff being put at risk of repercussions from customers.

116. The email exchange continued, with the Claimant again threatening to bring proceedings against Mr Cefaliello.

117. Ms Cubbitt, who had been copied into the emails, emailed the Claimant saying this:

> "Please note these are all work placed operational issues and need to be resolved with the relevant station manager/s.
>
> As previously discussed whatever issues you want to raise with Employment Tribunal, is between you and them and for your information, this should not be used as an alternative to working through workplace concerns with line managers."

118. Later on in the same exchange of emails, the Claimant said this:

> "I have emailed you Gateline Safety Regulations under ORR (Office of Rail Regulations), you explained the Gateline staff might be in assisting VIP or help others. **Extraordinary and Shocking!!!**
>
> You finger pointing at me as you believe I was done something wrong.
>
> We draw a line here; I don't want any further emails for this issue!"

119. The Claimant relied upon this as her third protected disclosure. Once again, it was accepted by the Respondent that this was a protected disclosure.

120. Notwithstanding the final sentence of the Claimant's email, the email exchange continued. On 20 August 2022, the Claimant emailed Mr Cefaliello. She attached what she described as "related GDPR regulations". This was an attachment which she had apparently created herself. It included a Q&A regarding the GDPR. The document did not cite the source of the information. The Q&A noted that the GDPR does not apply to data processing carried out by individuals purely for personal activities. It continued in a similar vein. We note, of course, that the Claimant was not acting as an individual carrying out purely personal activities. She was acting in the course of her employment with the Respondent (who would, on the face of it, have be vicariously liable for her actions).

121. On 30 August 2022, the Claimant presented a further claim (claim 5). Once again, she indicated that she was complaining of race discrimination (as well as whistleblowing).

122. Miss Abshir-Slevin concluded her investigation and produced a report setting out her findings. In the course of her investigation, Miss Abshir-Slevin interviewed the Claimant on 29 June 2022 and again on 15 July 2022. During the investigation, Miss Abshir-Slevin was provided within

copies of the Claimant's email to Mr Rudman, and the email to Mr Moore. At the second of her interviews with the Claimant she discussed the email the Claimant had sent to Mr Rudman. She did not discuss the email the Claimant had sent to Mr Moore. Miss Abshir-Slevin also interviewed Ms D'Souza and Ms Yerrell as part of her investigation.

123. Miss Abshir-Slevin's report set out her conclusions. In summary, she concluded as follows:

123.1. In respect of the original incident on 27 June 2022, both the Claimant and Ms D'Souza should have a re-briefing on acceptable conduct and cash regulations, plus remaining professional in the workplace, but that no formal action should be taken against either. This was on the basis that there were conflicting accounts of what happened on the day, and no CCTV footage available.

123.2. Formal disciplinary action should be taken against the Claimant in respect of:

123.2.1. Emails the Claimant had sent unnecessarily copying individuals into grievance-related documents

123.2.2. The email to Mr Rudman

123.2.3. The email to Mr Moore

In each case, the allegation was that the emails in question had breached the Respondent's Anti-Harassment policy. It was also alleged that the Claimant had ignored reasonable management instructions.

124. The way that the allegations were expressed in Miss Abshir-Slevin's report was not a model of clarity. The allegations were addressed by reference to the policy said to have been breached rather than the factual allegations being levelled at the claimant in each case, and inconsistencies in the way the appendices to Miss Abshir-Slevin's report had been numbered contributed to the confusing layout of the allegations.

125. On 12 October 2022, Ms Abshir Slevin wrote to the Claimant indicating that she was be required to attend a disciplinary hearing. The invitation letter informed the Claimant that one possible outcome may be dismissal. She was informed that she was entitled to be represented at the meeting. The letter set out the allegations in the same form they were set out in the investigation report, as follows:

"*Chunxiu made many different accusations outside department organisation. Chunxiu has acted on few occasions outside her remit.*

<u>Chunxiu breached the following policies:</u>

- Appendix 8, Appendix 9 and Appendix 10 breach the Anti-harassment policy section
4.
- Copying memos that are critical about someone to others who do not need to know
- Appendix 11 breaches Anti-harassment section 3 and 4
The Company considers that harassment is harmful to employees, employers and customers alike. It can impact badly on employee wellbeing, safety, organisational effectiveness and business success

Preventing individuals progressing by intentionally blocking promotion or training opportunities.
Copying memos that are critical about someone to others who do not need to know

- Appendix 12 breaches Anti-harassment section 4
Spreading malicious rumours, or insulting someone by word or behaviour

- Appendix 14 breaches Anti-harassment section 4.
Deliberately undermining a competent worker by overloading and constant criticism

- Rules of conduct section 19
You fail to comply with your obligations under the company's equal opportunity and
anti-harassment policy*

Chunxiu ignored reasonable management instruction on more than one occasion."

126. On 12 October 2022, the Claimant emailed her sixth Employment Tribunal claim in draft to Mr Basma (and others). On the same day, she emailed Ms Cubbit. She referred to her fourth, fifth and (prospective) sixth ET claim. She also indicated that's he was considering filing a seventh ET claim for "HR manipulating". She said this:

> "Can you give me a name in HR who is responsible for above so I can proceed accordingly? Maybe it is your boss? Or Mark ?"

127. Later the same she emailed Mr Cefaliello and Ms Cubitt as follows:

> "Please don't come to visit me about below Boo Cubitt's email, simply, No Trust between! Also, there is no need I have to file another court case against you.
>
> Thank you for your understanding!"

128. On 13 October 2022, the Claimant emailed Ms Cubbit. She copied her email to others including Mr Basma and Ms Yerrell. The subject line of the email was "2302706/2022 Teresa". It read as follows:

> > "Good morning! Court requests a reply by 22/09/22, so far, no reply yet. Next public hearing dated on 12th January 2023, two months to go. It is likely all active cases will be heard together to save company barrister's cost.
> >
> > Not sure what happened, because if no reply, company will lose in default !
> >
> > Thank you for your attention."

129. On 13 October 2022, Ms Cubbitt emailed the Claimant. Within the email, she said this:

> > "I am an ER advisor, I support managers/employees with ER cases (ie live investigation, disciplinaries, grievances etc.) this is what we are here to support. Once you take an ET claim, this goes outside to solicitors and employment courts to decide.
> >
> > As explained to you before, the courts will look at your claims and make their decisions this is your prerogative to do, but we will not get involved with this and will be supported by Mark Robey. However the court will not look at operational issues that should be addressed in the workplace…"

130. On the same day, Mr Basma emailed the Claimant as follows:

> > "Regarding your emails, I will refer back to previous points throughout the year. I have said this before, however I will say it again. Please stop sharing your tribunal details and claims against GTR with me and the management team. I have said before, this is your right to raise these, but these are dealt with centrally by GTR and not handled by me or my team. Hence the reason why we do not

require such information. It is sensitive and should stay between relevant parties, and as you have said countless times, it is to be heard in court, not over emails. This is a reasonable request, and I do urge you to stop sharing this information, as it is increasingly appearing to look as intimidation towards the management team who are simply trying to run an operation which you are a part of.

If you have issues with this there are policies and steps to raise these, which you are already using at the moment. If you do not agree with this that is your choice, and again you have different avenues to pursue in that case. I believe this is a reasonable management instruction. Also, Giovanni was appointed as your direct contact, ad will remain so, unless the situation changes. My expectation is he is there to support but also to provide reasonable management instruction as well."

131. The Claimant responded as follows:

"I do not need any additional support and don't understand why you must force Giovanni to "support" me?

This obviously another Single me out by you! Typical abusing power! I will add to grievances against you.

To: Boo, can you forward me details who will be investigating my grievances against Walid filed on 22 September 2022? I have not filed claims but will do today, seems no other way!"

132. On 21 October 2022, the Claimant brought a further claim against the Respondent (claim 6). Once again, the Claimant indicated that she was complaining of race discrimination as well as whistleblowing.

133. On 31 October 2022, the Claimant raised a grievance about Mr Cefallielo.

134. On 4 November 2021, the Claimant presented a further claim (claim 7). The claimant did not indicate on the face of the form that she was complaining of discrimination – she indicated that the claim was one of whistleblowing.

135. In the interim, there continued to be problems in sharing safe codes between the Claimant and Ms D'Souza. On 4 November 2022, the Claimant met with Mr Cefaliello and Ms Yerrell. They agreed that the person who had

not changed the safe code would request the new code from the person who had changed it.

136. On 9 November 2022 Mr Cefallielo emailed the Claimant and Ms D'Souza as follows:

> "It is the end of period this Saturday,
>
> Please can Lynn request the safe code from Chun, It will be changed on Saturday, as it is end of period.
>
> Either call the station work phone on Saturday or Sunday. Or email Chun's work email from your work email, from Friday and once the code is changed she will reply to the email with the new code.
>
> I have spoken with Chun and she is happy for this to happen."

137. Ms D'Souza responded indicating that she would not comply. The reason she gave was that she had not been party to the discussions regarding the arrangements.

138. On 14 November 2022, the Claimant raised a grievance regarding Ms D'Souza.

139. Karl McCormack was appointed to hear the Claimant's grievances against Mr Basma, Miss Abshir-Slevin, and Ms D'Souza. We do not need to say any more about that grievance.

140. Mr Clear wrote to the Claimant on 14 November 2022 with the outcome of her grievance against Ms Yerrell. Mr Clear did not uphold the Claimant's grievance. He did, however, note that Ms Yerrell had made a mistake regarding the cash regulations by asking the Claimant to write the safe code on a piece of paper and leave it under the till. He recommended that Ms Yerrell re-read the Cash Regulations. Mr Clear informed the Claimant that she had the right to a review of his decision. The Claimant appealed Mr Clear's decision.

141. On 22 November 2022, Mr Cefaliello emailed the Claimant, Ms D'Souza and Mr Bailey a document setting out what needed to take place at Carshalton Beeches station. Regarding the safe code, it said this:

> "Safe code change:
> Once the Code has been changed for the safe, the person who changes the code will email the other resident staff member with the

code. This will be from the individuals work email address going to the other resident staff members work email. This needs to happen every time the code is changed."

142. Tim Aveline was appointed to conduct the Claimant's disciplinary hearing. The disciplinary hearing took place on 24 November 2022. Jayne Byne attended to take notes of the meeting.

143. The notes recorded that there was a discussion of both the email to Mr Rudman and the email to Mr Moore (as well as the other allegations). Mr Aveline then indicated that he would take some time to look further into the matters discussed. The hearing was adjourned.

144. The hearing was reconvened on 25 January 2023. On 18 January 2023, the Claimant asked that it take place by video. She also said this:

> "I made very clear in last meeting; I would appeal if any unfair punishment announced, the case already in Tribunal which judge located 8 days final hearing on 12 January last week.
>
> I withdrawal 3 cases which were repeating the event and some of issues solved now. Basically, 5 days located to 2 old cases, and 3 days final hearing for the case you are handling right now. Any unfair punishment could lead millions penalty after appeal.
>
> I understand your conclusion is independent."

145. On 22 January 2023, the Claimant emailed Mr Aveline as follows:

> "Good afternoon! After reconsideration, I send you this email in making my best efforts to get the best possible outcome for all. Of course, I understand you are independent. I am not trying pervert your justice but merely express my wish and position.
>
> First, I will not accept any punishment, if you put any will leading the case to be appealed and court final hearing to go ahead.
>
> Second, All what I want is continuing to work at Carshalton Beeches, and Lynn to be moved to Sutton/Waddon/Hackbridge or any other station. If this happens, I will withdraw this court case which judge ordered 3 day's final hearing on 12 January 23. If it goes ahead, I guess company will get millions of penalties, this excludes compensation and company barrister cost.

Therefore, moving Lynn to other station will be the best option, if this is happen, I will not appeal and will withdraw this case for peace to all. Anyway, this case purely caused by Lynn.

Thank you for your consideration."

146. On 23 January 2023, the Claimant sent Mr Aveline a copy of the Case Management Orders in these proceedings. She pointed out that the case was listed for a 1-day preliminary hearing and an 8 day final hearing. She noted that the Respondent had already incurred the cost of attending two hearings.

147. The reconvened meeting took place on 25 January 2023. Mr Aveline announced his decision to the Claimant. His decision was that two allegations were substantiated, namely that:

147.1. By the email to Mr Rudman, the Claimant sought to block another member of staff from progression, and this would not have happened but for Mr Mani's race.

147.2. By the email to Mr Moore, the Claimant started a rumour she knew to be untrue regarding Ms D'Souza and the roster pattern.

148. Mr Aveline concluded that the remaining allegations were not substantiated. He indicated that he considered that the appropriate sanction was summary dismissal.

149. That same afternoon, the Claimant indicated her intention to appeal her dismissal.

150. Mr Aveline confirmed the Claimant's dismissal in a letter dated 26 January 2023. He explained that the Mr Moore email on its own would only have justified a final written warning, and that the Mr Rudman email on its own justified summary dismissal.

151. Mr Aveline emailed the dismissal letter to the Claimant, along with a copy of the notes of the meeting. In the covering email sending the dismissal letter to the Claimant, Mr Aveline said this:

"Please also review the notes attached and let me know if you want to dispute any of the content in the next 7 days."

152. The Claimant did not provide the Respondent with any comments regarding the draft meeting minutes. Her evidence to the Tribunal was that she disagreed with the notes (indeed she went so far as to refer to Mr

Aveline on several occasions during the hearing as a "liar"). She referred to the notes being set out in written language rather than capturing what she described as "oral language". Her evidence was that she did not agree with any meeting minutes she had not signed. However, in her evidence she was not specific about which parts of the notes were said to be substantively inaccurate. The Claimant's evidence was that she did not challenge the notes at the time because she was focusing on her appeal and also on providing for her family.

153. During the Claimant's cross-examination of Mr Aveline, she took him to the following specific extract in the minutes:

> "TA asked if they have company mobile phones and Chun replied that, at that time, they didn't. They received their company phones in April/May of this year. TA pointed out that this happened in June."

154. Mr Aveline's evidence was that when he said "this happened in June" he was referring to the incident on 27 June 2022, not correcting the Claimant's comment about when she received a company mobile phone.

155. The Claimant also took Mr Aveline to the following sentence:

> "Chun explained that they don't know each other's mobile phone numbers, only the manager knows."

156. Mr Aveline's evidence was that this was an accurate record of the meeting. He stressed in evidence that he could not say whether the comments made by the Claimant in the meeting were objectively true; merely that the minutes were an accurate record of what she said during the meeting.

157. Mr Aveline's evidence was that the notes were an accurate record of the meeting.

158. We find that the minutes were a broadly accurate account of the meeting. We reach that finding for the following reasons:

158.1. The Claimant did not challenge them at the time, despite having been made aware previously that it was important that she challenge minutes she disagreed with.

158.2. The Claimant was not slow to challenge matters she disagreed with during the course of her employment with the Respondent.

158.3. Mr Aveline's evidence was clear and consistent. By contrast, the Claimant's evidence regarding why she did not challenge the minutes at the time was vague and deflectionary, and when she had the opportunity to take Mr Aveline to points in the minutes she disagreed with she only took him to two short extracts, neither of which were significant points, and (tellingly) neither of which even related to the allegations for which she was dismissed.

159. Sophie Hill was appointed to hear the Claimant's appeal. An appeal hearing was arranged for 28 February 2023.

160. The appeal hearing took place on 28 February 2023. After hearing from the Claimant, Ms Hill indicated that she would consider and send her an outcome in writing.

161. On 2 March 2023, during the time when Ms Hill was considering her decision, the Claimant emailed Ms Hill as follows:

> "Good morning! I sent this email in a genuine kindness in consideration of you are a very young lady, surely you are high intelligent but possibly with little experience for Tribunal case.
>
> Disciplinary manager was excluded from any responsibilities. In most cases, when individual win the case, the appeal manager will be asked to leave as scapegoat. [REDACTED] I file this dismissal case, who will win is obviously.
>
> All I want is to be reinstated back to Carshalton Beeches Station: my original job. Any other way I will continue pursue in Tribunal because I was the only party unfairly punished in the incident on 27 June 22 which itself belong to whistle blowing case and leading my dismissal.
>
> Please note I am in a genuine kindness to remind you: many people after my job vacancy and I am just a tiny dust - ticket office staff."

162. It was put to the Claimant in cross-examination that this was threatening, age discriminatory and sex discriminatory. The Claimant denied that. Somewhat surprisingly, her evidence was that the reference to Ms Hill's age was common politeness, in the way that someone may say to another person something along the lines of "you have had your hair cut; it makes you look younger".

163. The Claimant took Miss Hill to the email in cross-examination. She asked Ms Hill to explain how the term "young lady" had been linked to age

and sex discrimination by her (that is, by Ms Hill). Ms Hill's initial evidence was that she had not believed that it was linked to discrimination by herself. When pressed, Miss Hill's evidence was then that she did believe that the comment made by the Claimant was ageist and sexist, as well as being irrelevant to the appeal.

164. The Claimant submitted that Ms Hill's evidence had evolved. We disagree. We consider that Ms Hill misunderstood the Claimant's initial question to be suggesting that the comment was linked to age and sex discrimination by Miss Hill herself – that is, that the Claimant was accusing Miss Hill of age and sex discrimination. That is, of course, not what the Claimant was doing. Miss Hill's initial answer was to deny that there had been any age and sex discrimination on her own part. We understood Miss Hill's evidence as a whole to be that she considered the comment by the Claimant to be both ageist and sexist.

165. On 31 March 2023, Miss Hill wrote to the Claimant with the outcome of her appeal. Miss Hill went through the Claimant's grounds of appeal in some detail. Miss Hill concluded that the Justin Moore email should not have been taken into account at the disciplinary hearing, as it had not been covered in Miss Abshir-Slevin's email. She considered that it was appropriate to take the Dave Rudman email into account, and that the email constituted gross misconduct. She noted the Claimant's lack of understanding of the seriousness of the allegation, and lack of remorse. She concluded that summary dismissal was the correct outcome.

166. The Claimant presented a further claim to the Tribunal on 4 April 2023 (claim 8). The only box the claimant ticked was that for unfair dismissal.

Law

Victimisation

167. Section 27 of the Equality Act 2010 provides as follows:

> "27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

168. The claimant must have done a protected act (or the employer must believe that the claimant has done, or may do, a protected act).

169. A detriment means being put under a disadvantage. In order to be subjected to a detriment, an employee must reasonably understand that they have been disadvantaged. An unjustified sense of grievance will not constitute a detriment (*Shamoon v Royal Ulster Constabulary* [2003] UKHL 11). It is not, however, necessary to establish any physical or economic consequence (*Warburton v Chief Constable of Northamptonshire Police* [2022] ICR 925).

170. The test in terms of causation is "reason why", rather than "but for". That requires the Tribunal to consider the alleged victimiser's reasons (whether conscious or subconscious) for acting as he or she did.

171. It is not necessary for the protected act to the main motivation for the detriment, as long as it was a significant factor (*Pathan v South London Islamic Centre* [2014] 5 WLUK 441).

172. Self-evidently, the reason for the conduct must be that the claimant had made a complaint which was a protected act for the purposes of section 27 of the 2010 Act; not merely that a complaint had been made in general terms.

173. The method of making the complaint may be properly separable from the fact that a complaint has been made (*Martin v Devonshires Solicitors* [2010] 12 WLUK 305).

Burden of proof

174. Section 136 of the Equality Act 2010 deals with the burden of proof:

> "(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene that provision"

175. The provision prescribes a two-stage process. At the first stage, there must be primary facts from which the tribunal could decide, in the absence of any other explanation, the discrimination took place. All that is required to shift the burden of proof is at primary facts from which "a reasonable tribunal could properly conclude" on balance of probabilities that there was discrimination. It must, however, be something more than merely a difference in protected characteristic and the difference in treatment (*Madarassy v Nomura International PLC* [2007] EWCA Civ 33).

176. The burden of proof at that stage is on the Claimant (*Royal Mail Group v Efobi* [2021] UKSC 22). The employer's explanation is disregarded. If the claimant satisfies that initial burden, the burden shifts to the employer at stage two to prove one balance of probabilities that the treatment was in no sense for the prescribed reason.

177. The Court of Appeal gave guidance to tribunals the application of the burden of proof provisions in the case of *Igen v Wong* [2005] EWCA Civ 142. That guidance was given in the context of the Sex Discrimination Act, but subsequent authorities have confirmed that it remains good law.

178. The Tribunal may legitimately move straight to the second stage of the process (see, for example, *Gould v St John's Downshire Hill* [2021] ICR 1).

Public Interest Disclosures

179. As the respondent accepted that all three of the disclosures relied upon were protected, we do not need to remind ourselves of the relevant law in terms of what constitutes a protected disclosure.

Detriment

180. Section 47B(1) of the Employment Right Act 1996 provides that 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.

181. The term "detriment" is broadly construed; it has the same meaning as in the Equality Act 2010. There is no test of seriousness or severity.

182. Section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Therefore, the burden of showing that she was subjected to a detriment rests with the claimant. If that burden is met, the burden of showing the reason for the treatment is on the respondent.

183. That does not mean, however, that if the Respondent does meet that burden the claim automatically succeeds (*Ibekwe v Sussex Partnership NHS Foundation Trust* [2014] 11 WLUK 593).

184. The Tribunal may draw inferences from the primary facts found. The correct approach to the drawing of inferences in detriment claims as set out by the EAT in *International Petroleum Ltd v Osipov* UKEAT/0058/17:

184.1. the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made;
184.2. by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) — see London Borough of Harrow v Knight 2003 IRLR 140, EAT;
184.3. however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

185. The causal test is not a "but for" test. Rather, the test is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower (*Fecitt and ors v NHS Manchester* [2011] EWCA Civ 1190*)*.

186. The detriment test is not a comparative one, so there is no need for a comparator, although consideration of a comparator may be of assistance in some cases *(Patel v Surrey County Council* EAT 0178/16).

187. A whistleblower's conduct in the way that he makes a disclosure may be properly separable from the fact of the making of the disclosure *(Bolton School v Evans* [2006] EWCA Civ 1653).

Automatically unfair dismissal

188. Section 103A of the Employment Rights Act 1996 provides as follows:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

189. The reason for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to dismiss, or which motivates them to do so (*The Co-operative Group v Baddeley* [2017] EWCA Civ 658).

190. In *Kuzel v Roche Products Limited* [2008] ICR 799, the Court of Appeal said Tribunals should adopt a three-stage approach to deciding the reason for dismissal:

190.1. First, the employee must prove that he or she made a protected disclosure and produce some evidence to suggest that they have been dismissed for the principal reason they have made a protected disclosure, rather than the potentially fair reason advanced by the employer;

190.2. Secondly, having heard the evidence of both sides, it will then be for the employment tribunal to consider the evidence as a whole and to make primary findings of fact on the basis of direct evidence or reasonable inferences; and

190.3. Thirdly, the tribunal must decide what was the reason or principal reason for the dismissal, on the basis that it was for the employer to show what the reason was. If the employer does not show to the Tribunal's satisfaction that it was its asserted reason, then it is open to the Tribunal to find that the reason was as asserted by the employee. However, the Tribunal is not bound to accept the reason alleged by the employee. The true reason for dismissal may be one not advanced by either side.

Unfair dismissal

191. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95.

192. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Misconduct is a potentially fair reason for dismissal under section 98(2).

193. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the dismissal was unfair. At that stage there is no burden on either party. Section 98(4) provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

194. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

195. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563)

<u>Unauthorised deduction from wages</u>

196. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by

him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. Section 13(3) provides that where the total amount of wages paid on any occasion aby an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion, the amount of the deficiency shall be treated for the purposes of that part of the 1996 Act as a deduction.

197. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

198. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

Conclusions

199. We turn first to the complaints of protected disclosure detriment. The Respondent accepts that the three disclosures the Claimant relies upon are protected.

200. The Claimant relies on five alleged detriments. We deal with them in a slightly different order to that set out in the list of issues, because the first alleged detriment in the list of issues is more conveniently left to be dealt with last (as it is something of a catch-all).

On 19 May 2022 the Claimant was called by her line manager Ms Yerrell to attend a head office meeting because her colleague Lynn D'Souza had made complaints against her. There was no appointment or acknowledgment letter

201. We have found as fact that this did happen.

202. We then turn to consider whether it constituted a detriment to the Claimant.

203. The Respondent's grievance policy did not provide that Claimant would be provided with an appointment or acknowledgement letter. The Claimant knew that the meeting would happen, otherwise she would not have been able to attend. So, the means of inviting the Claimant to meeting was in line with the Respondent's policy. The Respondent's grievance policy provided that, where a grievance was raised, it would be investigated. Ms D'Souza had raised a grievance, about the Claimant. The Claimant would self-evidently have relevant evidence to give regarding the grievance.

204. We therefore consider that, in asking the Claimant to attend a meeting to discuss Ms D'Souza's grievance, and inviting her informally (that is, without a formal invitation or acknowledgement letter), the Respondent could not have been said to have subjected the Claimant to a detriment. It was merely operating its own grievance policy.

205. In any event, this claim would necessarily have failed, because the meeting took place on 19 May 2022, and the Claimant did not make her first protected disclosure until 27 June 2022.

206. It follows that this allegation fails.

<u>Accuse the Claimant for breaching GDPR (in relation to the reporting the closed gate) because the Claimant had captured an image of the gate being closed from the CCTV;</u>

207. Mr Cefallielo pointed out to the Claimant that, in taking a photograph of the gate in which a customer's face could clearly be seen, she was potentially in breach of the GDPR and the Respondent's own guidance on use of mobile phones. The Claimant made it clear, in the contemporaneous correspondence, that she regarded Mr Cefallielo's comments as accusatory.

208. We accept that Mr Cefallielo's intention was not to level an accusation at the Claimant, but rather to prevent her from repeating what he regarded (rightly or wrongly) as a breach of both the GDPR and the Respondent's own policy. We consider that the word "accuse" is too strong in the circumstances. We do, however, consider that the sting of the allegation is made out on the facts.

209. We then consider whether what Mr Cefallielo did constituted a detriment to the Claimant. We do not consider that it did, because:

209.1. Mr Cefallielo's first email simply asked the Claimant to delete the photograph– that was, in the circumstances, an entirely properly

request and cannot have been said to have been accusatory in tone or substance.

209.2. While his tone did harden a little thereafter, we consider that his correspondence as a whole was not about seeking to stigmatise or criticise the Claimant. Rather, we find that his clear intention was to prevent her from doing a thing that he considered would be a breach of the Respondent's policies and the GDPR (namely taking a photo of a customer on her personal mobile phone). That was a position the Respondent was entitled to take.

209.3. No formal action was taken against the Claimant, or even intimated. Nor was there even a direct threat that a repeat of the incident would lead to a sanction or formal disciplinary action.

209.4. While Mr Cefallielo did repeat the point on a number of occasions, that was because the Claimant simply appeared not to accept the clear direction she was being given.

209.5. The final email from Mr Cefallielo on 18 August 2022 stressed that he was setting out the respondent's policy, as he did not want staff getting into trouble. Properly analysed, we consider that it was not a detriment to the Claimant – it was to her benefit in seeking to avoid her being put in a situation where she may find herself being disciplined for conduct which the Respondent clearly found unacceptable.

209.6. Insofar as the Claimant did see Mr Cefallielo's comments as accusatory and detrimental, we consider that that was not a reasonable interpretation of them.

210. Therefore, this element of the claim fails.

<u>Label the Claimant a "trouble maker" (colleague Raymond Bayley with a finger pointing at her nose)</u>

211. We must first consider whether this happened. In that regard, we bear in mind the following:

211.1. The Claimant raised formal complaints regularly. She never raised a formal complaint regarding Mr Bailey, or regarding an allegation that a diner was pointed at her nose and that she was called a "trouble maker".

211.2. Nor did she mention it in the meeting with Ms Yerrell on 19 May 2022, despite the fact that she made a number of other criticisms of Mr Bailey in that meeting.

211.3. The Claimant had to be pressed to put a date on the incident – she only put even an approximate date to it for the first time in her oral evidence to the Tribunal.

211.4. The Claimant regularly referred to "finger-pointing" in her correspondence to the Respondent. Indeed the Tribunal regularly observed her pointing her finger at the camera during the course of the hearing.

211.5. The Claimant was quick to share details of her disputes with the Respondent with other colleagues – despite being asked on more than one occasion not to do so. That gives a ring of credibility to Mr Bailey's evidence that it was the Claimant who described herself as a "troublemaker", and that she told him that she was suing the Respondent.

211.6. If the incident had happened as the Claimant described, we consider that it is inherently unlikely that Mr Bailey would have used the word "troublemaker". On her own account what the Claimant was doing was asking Mr Bailey to leave the ticket office so as to abide by the rules. That is the very opposite of being a troublemaker.

212. For all of those reasons, we find that the incident, as described by the Claimant, did not occur. We prefer Mr Bailey's evidence in that regard.

213. For completeness, we should say that even if we had found that the incident occurred, it could not have been done on the ground that the Claimant had made a protected disclosure, because it predated her first protected disclosure by some three months.

214. It follows that this element of the claim fails.

<u>Manager Walid emailing the Claimant: "...it is increasingly appearing to look as intimidation towards the management team who are simply trying to run an operation which you are a part of"</u>

215. This did happen, in that Mr Basma made that remark to the Claimant in his email of 13 October 2022.

216. We therefore consider whether it constituted a detriment to the Claimant. The email has to be seen in context. In that regard:

216.1. On 25 April 2022, Mr Basma had told the Claimant not to send anything to do with her tribunal litigation, as anything to do with it was personal to her and did not need to be shared with Mr Basma or the High Weald Management Team. His email implied that this was not the first time he had told the Claimant to refrain from doing so.

216.2. On 18 August 2022, Ms Cubbit had told the Claimant that whatever issues she wanted to raise with the Tribunal was between her and them.

216.3. Notwithstanding that, on at least eight further occasions after Mr Basma's email of 25 April 2022 the Claimant referred to either her ongoing Tribunal litigation, or the possibility that she may raise further claims against the Respondent. By way of example:

216.3.1. The Claimant's email to Miss Abshir-Slevin, at an early stage of the investigation, in which she said that she would issue a further claim which she would issue regardless of the outcome of the investigation, and that she didn't want to "drag [Miss Abshir-Slevin] down". Within that email, she also referred to issuing Tribunal proceedings as her "second job".

216.3.2. The Claimant's email of 12 October 2022 to Ms Cubbitt, which we consider had a distinctly threatening undertone given the reference to Ms Cubbitt's boss (in the context of accusing HR of manipulating the situation).

216.4. In light of that, we can entirely see why Mr Basma was concerned that the Claimant's approach was beginning to appear intimidatory.

216.5. Mr Basma's email acknowledged the Claimant's right to bring claims in the tribunal. It also explained why she was being asked not to share them with the management team, as they were dealt with by a separate department. The email reminded her of her right to raise issues internally.

216.6. We consider that it is also relevant to consider how the Claimant acted after receipt of Mr Basma's email:

216.6.1. The same day, she responded to Mr Basma telling him that she would file another claim.

216.6.2. Prior to her disciplinary hearing being reconvened, she emailed Mr Aveline reminding him about the Tribunal proceedings, and telling him that any unfair punishment could lead to a penalty of millions against the Respondent.

216.6.3. She later sent Mr Aveline a copy of the Tribunal's Case Management Orders.

216.6.4. Most egregious of all was her email to Miss Hill. That email could not in our judgment be read as anything other than threatening. Playing on what she perceived as Miss Hill's inexperience, the Claimant sought to browbeat her into upholding the appeal by telling her, without any apparent evidential basis, that when an employer loses an Employment Tribunal claim, in most cases the appeal manager is asked to leave as a scapegoat.

216.7. It is apparent from all of that that the Claimant was not cowed by Mr Basma's email; if anything, the tone of her correspondence became more threatening.

217. Looked at in the round, we do not consider that Mr Basma's comments constituted a detriment to the Claimant. He was simply making an entirely reasonable request that she desist from emailing managers about her Employment Tribunal claims. The reference to the Claimant appearing intimidatory was clearly warranted given the tone and frequency of her correspondence regarding the Tribunal litigation.

218. It follows that the allegation fails.

Blame the Claimant for the protected disclosures she had made

219. When asked in evidence, the only concrete example the Claimant gave of being blamed was the GDPR allegation. The Claimant then said that she would put specific allegations regarding blame to the Respondent's witnesses. She did not do so. We have already expressed our conclusion on the GDPR issue.

220. In respect of the way the Respondent reacted to the Claimant's disclosures generally:

220.1. The Respondent accepted that Ms Yerrell had made a mistake regarding the cash handling regulations, in asking the Claimant to write the safe code down on a piece of paper. Mr Clear acknowledged that in the Claimant's grievance outcome, and recommended that Ms Yerrell should re-read the Cash Regulations to avoid any future breach. There was no suggestion that the Respondent considered that the Claimant had acted inappropriately by raising the issue, and the Claimant was never told to write down the safe code on a piece of paper again.

220.2. In respect of the question of changing the safe code, both the Claimant and Ms D'Souza raised, at various points, that they were unhappy with the process for changing the safe code. The Claimant's view was that the code had to be requested from the person who changed it. The alternative process was that the person who changed the code would automatically provide it to the other member of staff. We have found as fact that neither of the processes advocated for by either the Claimant or Ms D'Souza was inherently in breach of the cash regulations. The process put in place at Carshalton Beaches by managers changed regularly after the 27 June incident. It appeared to change in response to advocacy from either the Claimant or Ms D'Souza. That is, when the Claimant made representations, the process would be changed in the way that she wanted it to be, and when Ms D'Souza made representations, the process would be changed back to the way she wanted it to be. It was not one way traffic – it was not the case that mangers simply

accepted what Ms D'Souza wanted or rejected the Claimant's requests out of hand. Therefore, there is nothing in that which inherently suggested to us that the Respondent was blaming the Claimant for raising issues about the way the safe code was passed between her and MS D'Souza.

220.3. In respect of the Waddon issue, Mr Cefliello asked the Claimant if she had changed the safe code and noted that his understanding was that any member of staff spotting an issue like that should change the code (although he acknowledged that he had limited knowledge of Waddon, as it was not a station he managed). The Claimant responded that she had not done so, because she did not consider that she had the authority to do so. Mr Cefaliello did not respond further or say anything to suggest that he disagreed with the Claimant or was critical of the disclosure she had made.

220.4. In respect of the Gateline issue, Mr Cefaliello's immediate response was to indicate that he would look into the matter. He did that by talking to Mr Mani, the Gateline member of staff. He advised Mr Mani that he should leave the gates open if they were unattended. Having done so, he then informed the Claimant that it was an operational issue, and that it had been dealt with. The Claimant was not entitled to know the details of what had been discussed between Mr Mani and Mr Cefallielo. What she was entitled to know was that the matter had been taken seriously and had been dealt with. That is what she was told. When she subsequently threatened to raise the matter to the Office of Rail Regulation, it was because she was unhappy about being given counselling about her inappropriate use of the mobile phone to take a picture of a customer. That was a completely separate issue. The Claimant could perfectly well have raised the issue without taking a picture of a customer, and the photo did not add anything to her report. There was nothing in the way the disclosure was responded to by the respondent which was suggestive that the Claimant was being blamed for raising it.

221. We therefore find that the allegation that the Claimant was blamed for making protected disclosures is not made out on the facts.

222. It follows that this aspect of the claim fails.

<u>Victimisation</u>

223. Once again, it is common ground that each of the claims presented by the Claimant was a protected act for the purposes of section 27 of the Equality Act 2010.

224. The claimant against relies upon five factual allegations. We take each in turn.

Refuse the Claimant emergency leave to deal with an overflowing sink when two colleagues were allowed to have a hospital appointment and to obtain a visa

225. Mr Caiden made the point in submissions that the Claimant did not request emergency leave. That is correct in the sense that the Claimant requested either to be able to leave half an hour early or to take annual leave – and she was permitted to take annual leave. But we do not consider that goes to the heart of the allegation.

226. The sting of the allegation was that the Claimant was not permitted emergency paid leave and was required to take annual leave in order to be at home for the plumber's visit. While the Claimant did not initially ask for emergency leave in terms, it is clear from her email of 31 May 2022 that she was suggesting that she ought to have some form of paid leave. That was not allowed by Ms Yerrell.

227. We should say also that the plumber's visit was not for an issue in the Claimant's property which required an immediate response. The appointment was booked over a week in advance.

228. We therefore have to consider whether, in not allowing her paid leave, Ms Yerrell subjected her to a detriment. While a detriment claim is not a comparative exercise, the comparison raised by the Claimant with Ms D'Souza and Mr Mani was illustrative. We do not need to make findings about, objectively, why Ms D'Souza and Mr Mani requested time off. Rather, what we are concerned with is what Ms Yerrell believed about their circumstances (and those of the Claimant). In the eyes of Ms Yerrell, the position was as follows:

228.1. Ms D'Souza required time off for a medical appointment, for a medical condition Ms Yerrell was already aware of. She became aware of the appointment on the day that the leave was required.

228.2. Mr Mani required time off to attend a meeting in order to renew his visa. He became aware of the meeting either on the day of the meeting or the day before the day before. If his visa was not renewed, it would expire within days, meaning that he would be unable to continue working for the Respondent. He had limited opportunity to reschedule the meeting for a non-working day.

229. There was no emergency leave policy in evidence before us. But in principle, we can see why each of those circumstances would have qualified for emergency leave.

230. By contrast, the Claimant wanted time off for a pre-booked plumber's appointment, which she was aware of over a week in advance. That could not, in our view, be characterised as an emergency situation. The Claimant knew her roster; she did not suggest that she would have been unable to book the appointment on a non-working day, or outside her working hours. She asked Ms Yerrell for annual leave; annual leave was granted. Objectively, we cannot say that the Claimant was subjected to a detriment by being granted annual leave rather than emergency leave in the circumstances.

231. Therefore, this allegation fails.

<u>On 19 May 2022 the Claimant was called by her line manager Ms Yerrell to attend a head office meeting because her colleague Lynn D'Souza had made complaints against her. There was no appointment or acknowledgment letter;</u>

232. We have already found that this did not constitute a detriment. It follows that this aspect of the claim cannot succeed.

233. For completeness, during that meeting the Claimant made a number of comments about her colleague, Mr Bailey, which on the face of it breached the Respondent's harassment policy in clear (and entirely objectionable) terms. The policy put an onus on managers to deal with such comments. If the Respondent had intended to "punish" the Claimant or had been looking for an opportunity to do so, Ms Yerrell would surely have used the opportunity to treat the comments as a disciplinary matter. For the avoidance of doubt, we should say that she would have been well entitled to do by the Respondent's policy. Instead, Ms Yerrell took what was on the face of it an extremely generous attitude to the Claimant's comments, by simply telling her that she should not be making such comments. That is in our judgment wholly inconsistent with a manger who was looking for an opportunity to victimise or punish an employee.

234. It follows that this allegation fails.

<u>Label the Claimant a "trouble maker" (colleague Raymond Bayley with a finger pointing at her nose);</u>

235. We have already found that this did not happen.

236. It follows that this allegation fails.

Manager Walid emailing the Claimant: "...it is increasingly appearing to look as intimidation towards the management team who are simply trying to run an operation which you are a part of";

237. We have already found that, while this did happen, it did not constitute a detriment to the Claimant.

238. It follows that this allegation fails.

Dismiss the Claimant on 25 January 2023

239. It is common ground that the Claimant was dismissed, and the Respondent accepted that the dismissal was a detriment for the purposes of section 27 of the Equality Act 2010.

240. The question is therefore the whether the reason for the detriment was that the Claimant had done a protected act. We consider that this is a case where it is appropriate to move straight to considering the Respondent's reasons for acting as it did. In that regard:

240.1. The reason given by the Respondent for the dismissal was misconduct. At first instance Mr Aveline relied upon two emails, the Mr Rudman email and the Mr Moore email (although he would have dismissed for the Mr Rudman email alone, and given a final written warning for the Mr Moore email). By the time of the appeal, the Miss Hill only relied upon the Mr Rudman email. The operative reason for the Claimant's dismissal was therefore the email to Mr Rudman only.

240.2. Both Mr Aveline and Ms Hill were, at the very least, aware of the Claimant's Employment Tribunal claims. Their evidence was that they were not influenced by them.

240.3. We have carefully considered the Mr Rudman email. We consider that the email was, on its face, a clear breach of the Respondent's harassment policy. The Claimant was advocating for Mr Mani not to be appointed to Carshalton Beeches station. On a plain reading of the email, her reason was because (taken at its best) she was concerned that he would form a "clique" with Lynn D'Souza. The reason she was concerned he would form a clique was because of his race (and that of Ms D'Souza). We find that it was because of a pre-conception that she had about people from cultures other than her own, specifically in the context of those of Indian heritage.

240.4. Importantly, as both Mr Aveline and Ms Hill noted, the Claimant showed no insight into the fact that her email was a breach of the Respondent's policy, or that it could be construed as racist. Indeed, the Claimant told Mr Aveline that she would repeat the behaviour. She gave the same evidence to the Tribunal. Flowing from that, both Mr Aveline and Ms Hill took into account the fact that the Claimant showed no remorse. It is perhaps conceptually understandable that she showed no remorse, given that she did not consider that she had done anything wrong.

240.5. On the face of it, we find that the Mr Rudman email on its own gave the Respondent ample grounds to dismiss the Claimant. For the purposes of considering causation, we are of course not considering what this Tribunal would have done in response to the email; however, we consider that dismissing the Claimant for the email was not an inherently unreasonable or inexplicable approach, such as to suggest that there was some other underlying reason for the dismissal. On the contrary, it was a decision which was explicitly in line with the Respondent's policies, which made it clear that breach of the harassment policy would be treated as gross misconduct, for which the usual sanction would be summary dismissal.

240.6. The Claimant suggested in her evidence, and in her cross-examination of the Respondent's witnesses, that she believed that Mr Basma was the guiding hand behind her dismissal. Mr Basma denied that, as did Mr Aveline. Mr Aveline gave his evidence in a clear and straightforward manner; it was apparent from both his outcome letter and his evidence to the Tribunal that he had engaged with the factual material before him in reaching his decision to dismiss the Claimant. We see no suggestion that he was in any way influenced by Mr Basma, or indeed anyone else, in reaching the decision that he did. The same holds true for Miss Hill.

240.7. Taking a step back, we are entirely satisfied that the reason the Respondent gave for dismissing the Claimant, namely her misconduct in sending the Mr Rudman email (and in the case of Mr Avelin's original decision, both the Mr Rudman email and the Mr Moore email), was the true reason for the dismissal. We conclude that it was not in any way influenced by the fact that the Claimant had brought Employment Tribunal proceedings alleging discrimination.

241. It follows that this aspect of the claim fails.

<u>Unfair dismissal</u>

242. The Claimant claims automatically unfair dismissal on the basis that she made a protected disclosure.

243. We do not repeat what we have said above regarding the decision-making process undertaken by Mr Aveline and Miss Hill.

244. We observe, of course, that the disciplinary process initially started because of the incident on 27 June 2022. We might have had some difficulty separating the way the Claimant reacted on 27 June from the fact of her disclosure – her reaction was to being asked, by her manager, to do something in breach of the Respondent's cash regulations. But that was not why she was not dismissed. That allegation did not even proceed to the disciplinary hearing, as Miss Abshir-Slevin discounted it in the investigation. And it could not sensibly be suggested that, had there not already been an investigation into the 27 June incident, the Mr Moore and Mr Rudman emails would not have been investigated. Both emails post-dated 27 June (and indeed post-dated the start of Miss Abshir-Slevin's investigation), so it was not the case that they were added retrospectively to "bolster" the allegation regarding 27 June.

245. We are therefore entirely satisfied that the reason the Respondent gave for dismissing the Claimant, namely her misconduct in sending the Mr Rudman email (and in the case of Mr Aveline's original decision, both the Mr Rudman email and the Mr Moore email), was the true reason for the dismissal. Once again, it was not in any way influenced by the fact that the Claimant had made protected disclosures.

<u>Ordinary Unfair Dismissal</u>

246. It follows from what we have already said that we find that the reason for the dismissal was conduct. Mr Aveline (and Ms Hill) genuinely believed the Claimant had committed misconduct. There was no dispute about the underlying facts, in terms of the emails she had sent. The meaning that Mr Aveline and Ms Hill imputed to those emails was an entirely reasonable one.

247. We turn then to consider the fairness of the dismissal. Bearing in mind the remainder of the *Burchell* test:

247.1. It is implicit in what we have already said that Mr Aveline and Ms Hill had reasonable grounds for the belief that they had formed. They had seen the email; they had heard the Claimant's explanation; they had formed what was, on the face of it, and entirely reasonable view about what the email meant and consequently the fact that it was a breach of the Harassment policy.

247.2. In respect of the Dave Rudman email, we consider that the Respondent had carried out a reasonable investigation. Miss Abshir Slevin had discussed the email with the Claimant had some length. We cannot see what more could have been done to investigate the email – the content of the email spoke for itself.

247.3. In respect of the Mr Moore email, we consider that Miss Abshir-Slevin should have discussed it at the second investigation meeting. If she had been unable to do for any reason, she should have convened a third investigation meeting to do so, or at the very least asked the Claimant for comments in writing. But we consider that that failure was cured by Mr Aveline discussing the allegation with her at the disciplinary hearing (which the notes recorded that he did at some length). It was not a complex issue or allegation – it simply turned on one email. The Claimant knew the email would be in issue, because it was referred to in Miss Abshir-Slevin's investigation report. She had the opportunity to respond to the allegation. So overall, we consider that the Mr Moore email was properly investigated before Mr Aveline took his decision. Of course, Mr Aveline would not have dismissed for the Mr Moore email – he expressly indicated that he dismissed for the Mr Rudman email, and would have given a Final Written Warning for the Mr Moore email. And in any event, the Mr Moore email was entirely disregarded by Miss Hill at appeal. So even if we had considered that there was any latent unfairness in Miss Abshir-Slevin failing to discuss the email with the claimant, that would have been cured by the appeal.

248. In terms of procedural fairness:

248.1. The Claimant was invited to a disciplinary meeting. She was given the opportunity to be accompanied.

248.2. She was sent the evidence against her in advance of that meeting.

248.3. She was given the opportunity to address the allegations in the disciplinary meeting.

248.4. She was then given the outcome in writing, in sufficient detail to understand why she had been dismissed.

248.5. She was given the opportunity to appeal.

248.6. Her appeal was heard by a more senior manager, and she was again given the right to be accompanied.

248.7. She was given the opportunity to expand on her grounds of appeal.

249. That is not to say that the process was a counsel of perfection. It was not. We have already dealt with Miss Abshir-Slevin's failure to discuss the Mr Moore email with the Claimant. In addition, the allegations as set out by

Miss Abshir Slevin in the investigation report and disciplinary investigation meeting were troublingly vaguely expressed. The cross-references to the documents appended to her report were inconsistent.

250. However, we are not assessing whether the process was a perfect one. What we must assess is whether it fell within the range of reasonable responses open to a reasonable employer. While the allegations were poorly expressed, Miss Abshir-Slevin's report as a whole did allow the Claimant to understand the misconduct of which she was accused. Putting it another way, she could not be said to have been in any real doubt about the sting of the allegations against her. So, notwithstanding the issues we have identified, we find that the process as a whole did fall within the range of reasonable responses.

251. We turn then to consider whether the dismissal itself fell within the range of reasonable responses. We are not assessing what we would have done in the Respondent's place. Rather, we are considering whether the action taken by the Respondent fell outside the range of reasonable responses open to a reasonable employer. In that regard:

251.1. The Respondent (reasonably) considered that the Claimant had breached the anti-harassment policy, by sending an email it characterised as racist.
251.2. The Respondent's policy made it abundantly clear that breaches of the policy would be viewed as a gross misconduct and were likely to lead to summary dismissal.
251.3. The Claimant had shown no insight or remorse – indeed she said to Mr Aveline that she would do the same thing again.
251.4. The Respondent is a customer service organisation. The Claimant worked alone, in a customer facing role. The Respondent therefore had to place a significant degree of trust in her.

252. In all of the circumstances, we therefore consider that the dismissal of the Claimant fell squarely within the range of reasonable responses.

253. It follows that the complaint of unfair dismissal fails.

<u>Unauthorised deduction from wages</u>

254. In respect of the complaint of unauthorised deduction from wages, the starting point is whether the Claimant was paid less than the sums properly payable to her during the relevant period. The relevant period is the period between her re-engagement, and her starting at Purley Sales Point. The Claimant's case was that she was underpaid in two respects:

254.1. EU Pay; and
254.2. Sunday supplement.

255. The Claimant's case appeared to rest on a misunderstanding regarding the application of the reinstatement order provisions in the Employment Rights Act 1996. After her first dismissal, she was not reinstated by way of a reinstatement order. She was reinstated by the Respondent on appeal and withdrew her Employment Tribunal claim. So, the reinstatement and reengagement provisions in the Employment Rights Act 1996 had no application.

256. In respect of EU pay, the evidence, as the Claimant accepted, was that the EU pay supplement was only paid when an employee took annual leave. The Claimant took no annual leave during that period. There was no reason for her to do so – she was paid but was not required to work. So, no EU pay supplement was payable.

257. In respect of Sunday supplements, the Claimant's contract provided that she would be paid a Sunday supplement if she worked on a Sunday, and only if she worked on a Sunday. Indeed, her contract allowed for rostered Sundays to be cancelled by the Respondent at 48 hours notice, without the Sunday supplement being paid. She worked no Sundays during the period in question. She therefore had no entitlement to be paid the Sunday pay supplement.

258. It follows that the complaint of unauthorised deduction from wages fails.

Employment Judge Leith
9 April 2024

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/