EMPLOYMENT TRIBUNALS

Claimant: **Miss Vivienne Litchfield**

Respondents: **Tui Airways Limited**

Heard at: **Watford Hearing Centre**

On: **29, 30 & 31 January 2024, 1 & 2, February 2024 and 4, 5 and 8 March 2024**

Before: **Employment Judge G Tobin**
Members: **Ms J Hancock**
Mr S Bury

Representation
Claimant: **Mr A Brockley (counsel)**
Respondent: **Mr T Welsh (counsel)**

JUDGMENT

The Unanimous Judgment of the Employment Tribunal is that: -

1. **The claimant made 2 protected disclosures, under s43B Employment Rights Act 1996. The claimant's other alleged whistleblowing disclosure was not a protected disclosure pursuant to s43B Employment Rights Act 1996.**

2. **The claimant was not subject to any of the detriments alleged on the grounds of whistleblowing or protected disclosure, in contravention of s47B Employment Rights Act 1996.**

3. **The respondent did not dismiss the claimant because she had made a protected disclosure, in breach of s103A Employment Rights Act 1996.**

4. **The respondent did not unfairly dismiss the claimant, in breach of section s94 Employment Rights Act 1996.**

JUDGMENT having been given at the hearing and written reasons having been requested by the claimant at the hearing in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, **WRITTEN REASONS** are set out as follows.

The case

1. The claimant claimed that she suffered various detriments for making protected disclosures and unfair dismissal. The case was summarised by Employment Judges McNeill on 8 October 2021 [Hearing Bundle pages 102-111], Alliott on 22 June 2021 [HB112-115] Warren [HB118-123]. .

2. A List of Issues was agreed between the parties prior to the hearing commencing [HB90-93]. At the outset we discussed preliminary matters including clarifying aspects pof the list of issues. On day 2 the claimant with various msatters contained within the list of issues, specifically point 1(c), 1(e), 5(d), 5(h) and 5(i).

The relevant law

Whistleblowing

4. The Public Interest Disclosure Act 1998 ("PIDA") provided for special protection for "whistle-blowers" in defined circumstances. The purpose of the PIDA is to permit individuals to make certain disclosures about the activities of their employers without suffering any penalty for having done so. The PIDA is convoluted at best, but its aim is to give protection to workers (which is wider than employees) who disclose specified forms of information using the procedures laid out in the Act. That protection is achieved through the insertion of relevant sections into the Employment Rights Act 1996 ("ERA") which focuses on providing protection to workers in cases of action short of dismissal which has been taken against them (as well as dismissal itself) following their disclosure of information.

5. Section 47B(1) ERA states 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.

6. In order to gain protection from an alleged unlawful detriment, s43B ERA provides that the protected disclosure in question must be a "qualifying disclosure"; that the claimant must have followed the correct procedure on disclosure; and that the claimant must have suffered the detriment as a result of it.

7. Under s43B(1) ERA a qualifying disclosure means one that, in the reasonable belief of the claimant, is made in the public interest and tends to show one or more of the following:

(a) a criminal offence has been committed or is likely to be so;

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

(c) a miscarriage of justice has occurred or is likely to occur;

(d) the health and safety of any individual has been, is being or is likely to be endangered;

(e) environment has been, is being or is likely to be damaged;

(f) information tending to show any matter falling within any of the above has been, is being or is likely to be deliberately concealed.

In this instance, we are dealing with 43B(1)(b) and s43B(1)(d) and s43B(1)(f) ERA.

8. There must be a *disclosure* of *information* and not just a mere general allegation or an expression of opinion. A disclosure could convey information as part of an allegation and thereby be covered by the act: see *Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325*.

9. The ERA sets out the ways in which a disclosure may be made in order to gain protection. These are:

a. disclosures to the worker's employer or other responsible person: s43C;

b. disclosures made in the course for obtaining legal advice: s43D;

c. disclosures to a Minister of the Crown: s43E; and

d. disclosures to a "prescribed person": s43F. The list of prescribed persons is set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 and includes people such as the Information Commissioner, the Civil Aviation Authority, the Environmental Agency and the Health and Safety Executive.

Where the worker cannot follow the above procedural lines of communication, disclosures that are made are permitted to other people:

e. in "other cases" which fall within the guidelines laid out in s43G. Essentially these are instances where the worker reasonably believes that the employer will subject him to a detriment if he follows the procedure noted in s43C; or where there is no "prescribed person" and the worker reasonably believes that evidence may be concealed or destroyed; or where disclosures have been made to the relevant people before. The reasonableness of the worker's actions are decided by reference to matters such as the seriousness of the relevant failure, whether the disclosure is made in breach of the duty of confidentiality, etc;

f. in cases of "exceptionally serious" breaches: s43H.

S43C ERA is the relevant provision in this case.

10. Detriment is not defined in the ERA, however, it is a concept that is familiar in discrimination law. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to him had, in all the circumstances, been to his

detriment. An unjustified sense of grievance cannot amount to a detriment, but it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of: see *Lord Hope in Shamoon v Chief Constable of the RUC* [2003] IRLR 285 per Lord Hope at [34] and [35]. Lord Scott held that the test must be considered from the point of view of the Claimant, thus: "…*if the victim's opinion that the treatment was to his or her detriment was a reasonable one to hold, that ought, in my opinion, to suffice*…" *Shamoon* per Lord Scott at [105].

11. In respect of causation, as is clear from the statutory language of s47B(1) ERA, it must be shown that any detriment was caused by some act or deliberate failure to act by the employer. Further, that there is a causal connection between the act relied on and the protected disclosure, specifically that the act was '…*done on the ground that*…' the claimant had made a protected disclosure. Thus, it is not sufficient for a claimant to show that they have made a protected disclosure and suffered a detriment as a result of an act done by the employer. The question at this stage will be what was the *reason* for the respondent's act or deliberate failure to act? In this context the Tribunal's attention is drawn to *Fecitt v NHS Manchester* [2012] IRLR 64, and in particular paragraphs 43-45, which includes "…*s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*…" *Fecitt* per Elais LJ at [45]. It is for a respondent to show the ground on which any act was done: s.48(2) ERA, such that the respondent must prove on the balance of probabilities that the act complained of was not on the ground that the claimant had made a protected disclosure.

12. S17 Enterprise and Regulatory Reform Act 2013 ("ERRA") introduced the requirement that the disclosure must be in the public interest. The standard is the reasonable belief of the worker, which is not a high obstacle. S18 EERA removed the requirement that the disclosure must be made in good faith; although it amended s49 ERA to allow tribunals to reduce compensation by up to 25% where a protected disclosure was not made in good faith. The burden for showing bad faith rests on the respondent: s48(2) ERA. In any event there must be a clear causative link between the detriment or dismissal alleged and the disclosure before protection is given: see *London Borough of Harrow v Knight [2003] IRLR 140*.

Automatically unfair dismissal

13. Certain reasons for dismissal are deemed automatically unfair. This means that, if a Tribunal finds that the reason for the dismissal was one of these reasons it *must* make a determination that the dismissal was unfair. S103A ERA (as inserted by s2 PIDA) deals with whistleblowing. It states that:

> 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 dismissal is that the employee made a protected disclosure.

Unfair Dismissal

14. The claimant also claims that he was unfairly dismissed in contravention of s94 ERA. S98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

15. The s98(4) test can be broken down to two key questions:
    a. Did the employer utilise a fair procedure?
    b. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

16. Accordingly, so far as the unfair dismissal issue was concerned, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given.

17. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeal procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

18. In judging the reasonableness of the employer's decision to dismiss, an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did in fact chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

The witness evidence

19. We (i.e. the Tribunal) heard from the following witnesses, during 5 days of evidence:

    21.1 The claimant, Miss Vivienne Litchfield, who provided a detailed statement, which she confirmed at the commencement of her evidence.

    21.2 The respondent provided 6 witnesses. 5 attended the hearing and witnesses had previously disclosed written statements, which those in attendance confirmed before they gave their oral evidence. The respondent witnesses were as follows:
        21.2.1 Mr Simon Hills, who provided 2 statements. Mr Hills was the operations Manager and the claimant's line manager.
        21.2.2 Mr Paul Burraway, the respondent's head of Operational Maintenance. Mr Burraway was Mr Hills' line manager, ie the claimant's line manager's line manager.
        21.2.3 Mr Paul Clark, a General Manager. He heard the claimant's grievance.
        21.2.4 Mrs Claire Macan-Lind, a senior human resources adviser.
        21.2.5 Mr Ian Campbell, Director of Customer Delivery and the dismissing officer.

21.2.6 Mrs Emily Morgan. Mrs Morgan was a senior Employment Relations Adviser. She did not attend the hearing. We were provided with a medical report dated 19 January 2024, which explained the circumstances of her non-attendance. We were content to accept her written statement. We gave this evidence less weight on any controversial matters because Mrs Morgan was not available for cross examination so Mr Brockley could not challenge aspect of that evidence which All wtness the claimant contested.

20. We also considered a joint final hearing bundle of 2 large lever-arch files, containing 1,557 pages of documents.

21. All witnesses who attended the hearing were cross-examined by the respective representatives. The Tribunal asked questions for clarification at various points. The Tribunal provided for each attending witness to be asked further questions by their representative (i.e. re-examination) at the end of their evidence. Having heard the totality of the evidence we concluded that there was no significant dispute between the parties on key

Our findings of facts

22. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not decided upon all of the points of dispute between the parties, merely those that we regard as relevant to determining the central issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

23. The claimant commenced working with the respondent on 22 May 1991. At all material times the claimant was employed as an Operational Maintenance Planning Manager.

24. The claimant raised a grievance on 8 September 2019 [HB500-503]. This was a grievance about the breakdown in her relations with her managers. This was not a grievance about her protected disclosures.

25. The claimant's grievance was heard on 27 September 2019. The grievance was heard by Paul Clark, who provided the outcome ion 18 October 2019 [HB584-592].

26. The claimant appealed the grievance outcome on 25 October 2019 [HB612-613]. The appeal was heard by Rosanna Turnham (Public Affairs Manager, Legal) on 7 November 2019.

27. On 31 January 2019 Ms Turnham provided her grievance appeal outcome [HB850-858].

28. By the time of her dismissal the claimant had been absent from work as follows [see HB474]:

- 14 March 2017 to 24 March 2017
- 5 February 2018 to 9 February 2018
- 18 June 2018 to 22 June 2018
- 27 November 2018 to 27 November 2018

- 11 February 2019 to 15 February 2018
- From 1 April 2019 onwards.

29. The claimant was dismissed by Ian Campbell (director of Customer Delivery) with effect from 19 August 2021 [HB1033-1035]. The dismissal letter addressed alternative work as said that this had been explored with Emily Morgan. There had been no suitable alternatives roles identified within the business and the dismissal letter referred to the claimant being free to apply for any vacancy which had been advertised internally. The claim had not identified to us any vacancy that she could do and which the respondent had failed to consider her for. The dismissal letter said:

> … It is clear to me that you feel unable to return to your role while these [previous safety] issues have not been resolved to your satisfaction.
>
> It has also been demonstrated via our recent discussions and the failed mediation session that your relationship with your line manager, Simon, has broken down irretrievably and you are not willing to continue to work with Simon. Despite efforts being made to resolve this situation, I see no further opportunities for this to be repaired to facilitate an effective return to your role. This effectively means that you are unable to work in your role and there is no foreseeable end to this situation.
>
> TUI has been able to cover the responsibilities in your role as Operational Planning Manager on a temporary basis. The situation has been ongoing for a significant period of time and since your absence from work began in April 2019. Operationally, we cannot continue to cover your role in this way as it is causing a disruption to the business and your team…
>
> I regretfully therefore conclude that your employment with TUI is terminated. The reason for the dismissal is that, despite every effort being made by TUI to enable you to return to work, you are currently unable to carry out your role and there is no foreseeable point at which this situation may change.

30. The claimant did not appeal the decision to dismiss her.

Our determination

Whistleblowing disclosures

Disclosure 1(a) or Event 1

31. This disclosure concerned some maintenance which needed to be done on a particular aircraft with a 7-day period. The claimant's team were responsible for scheduling this maintenance. The maintenance had been scheduled for the 24 October 2018, the work to be done was in respect of the cockpit voice recorder which needed to be checked, we believe, on a weekly basis. The maintenance was not performed on 24 October 2018 due to a failure to print off the work schedule and this was highlighted on the morning of 25 October 2018 as being overdue.

32. The claimant was concerned that the aeroplane arrived at Hurghada Airport and was then allowed to depart to Arlanda Airport that same day before the maintenance was done. The maintenance was then done at Arlanda later that day, i.e. on 25 October 2018. As it subsequently transpired that the maintenance could be done on 25 October 2018 there was no safety breach. However, the claimant believed, genuinely so at this time that the work needed to be done by 24 October 2018. Ian Johnston, who was the head of engineering and

TUI Fly Nordic nominated person for continuing airworthiness allowed the aircraft to pass through Hurghada onto Arlanda because the maintenance could not be done at Hurghada. Mr Johnston reported this matter to the Swedish CAA, unnecessarily as it transpired. The claimant and Mr Johnston had a fractious exchange about the aircraft's overrun and the claimant was concerned that her team was seemingly blamed.

33. We recognise it was part of the claimant's job for her or her team to organise such maintenance. nevertheless, this remains a health and safety issue. The cockpit voice recording system is an essential safety device, which although not being able to assist the plane in question on a safety issue, is vital to understanding mishaps, which will make future aircrafts safer. So, we are satisfied that notwithstanding it was part of the claimant's job to organize this safety maintenance, it still met the threshold of s43B(1)(d) ERA. We are not at all persuaded that anyone was attempting to conceal this information. If anything, the respondent's officials were unnecessarily transparent as Mr Johnston had thought an error had occurred where there was none. The fact that the plane was able to make a journey when they thought the maintenance had overrun suggests that the respondent was not hiding anything by the report to the Swedish Civil Aviation Authority.

34. We are not persuaded that any legal obligation had been infringed by the respondent, under s43B(1)(b) because as Mr Welch contends, we did not have any details about the legal obligation which might have been breached. It is not good enough merely to say that the Civil Aviation Authority obligations would have been affected without giving some clear indication of such breach. However, nothing really turns on this purported breach of a legal obligation. This overlay does not add anything to the claim nor does it really detract from matters significantly.

35. According to the email chains which we read from page 1116-1113 of the hearing bundle, the claimant became aware or ought to have become aware that the aircraft maintenance had not overrun sometime shortly after 11:36 on 25 October 2018. So, when she spoke to her line manager, Mr Hills, earlier, i.e. between 11.00-11:30 she was concerned that the aircraft should not have flown after 24 October 2018, and we were convinced that she was genuine in this concern. But in any event the claimant was concerned and remained concerned that the scheduled work in respect of the cockpit voice recorder was missed from the worksheet of 24 October 2018.

36. According to the claimant the respondent was never able to satisfactorily address how or why the maintenance task of 24 October 2018 did not address the cockpit voice recorder. However, the respondent did in fact pursue this, particularly Mr Johnston, because we have seen an email of 2 November 2018 where he rejects the closure report and complained that the matter had not been investigated thoroughly [HB1137-1139]. Although the claimant may not have known that at the time.

37. Disclosures 1(b), 1(c) and 1(d) were therefore more about an overrun of the scheduled work rather than an overrun of the deadline for work. In respect of disclosure 1(c), the claimant's complaint to human resources was less about a health and safety disclosure and more about the perceived unacceptable behaviour of Mr Johnston. So, this clearly was not a protected disclosure.

Disclosure 1(b) or Event 2 - Oxygen Bottles

38. There was an issue identified during a routine aircraft integrity check on the 4 May 2018, that incorrect oxygen bottles had been fitted, this affected 4 different aircrafts. The oxygen bottles therefore needed to be replaced. Alex Windsor, Technical Support Engineer, was pressing the claimant's team to get this done quickly because he said there is a *potential safety issue*, according to his email of 24 May 2018 [HB226]. He was explicit about this.

39. The claimant had difficulties sourcing the correct oxygen bottles and she brought that to Mr Hills attention. Mr Hills accepted that the claimant flagged it with him and the email that the claimant subsequently sent complains about not being able to get the oxygen, states that it was a safety issue and high priority and said that it needed to be addressed immediately. This is entirely consistent with the claimant responding to Mr Windsor's email of earlier that day. So, when he was asked to assist with searching for oxygen bottles, it was not credible for Mr Hills to subsequently say that this was not a health and safety matter. It was and it amounted to a protective disclosure under s43B(1)(d) ERA.

Disclosure 1(d) or event 4

40. There isn't a great deal of documents about this disclosure, which confirms our view that it was not a significant issue or particularly contentious at the time.

41. The claimant contended that some parts of routine maintenance were done outside of a hangar when they should have been done inside the hangar. We take this difference to be relatively important so as to insure more crucial maintenance is undertaken in a more conducive environment and therefore performed in a more reliable manner. We accepted the evidence of Mr Hills where he said that some maintenance tasks must be performed inside a hangar, but some were preferably hangar jobs, although they could be completed outside of a hangar. Perhaps these subtleties had more relevance in Swedish airports during winter when the days are shorter and the weather less conducive to working outside. However, the respondent were aware of this.

42. The claimant pointed out that some tasks were done outside when they ought to have been done inside the hangar and that seemed to be addressed by the respondent. The matter was recorded as a near overrun, Mr Livancic (Engineering Safety Analyst) recorded the severity as "minor" and the recurrence probability as "unlikely". He made some suggestions to pick up these tests in more routine maintenance which the claimant may have perceived as a criticism of her/her team (this was like some of the other disclosures so we were aware that there was a theme here), but we fail to see how this is a safety issue and where the protected disclosure was made. The correspondence drawn to our attention appears to deal with routine maintenance matters with one near missed deadline for the maintenance.

Public interest test

43. So far as the public interest is concerned, the test requires a genuine belief that the disclosure was made in the public interest and that such belief is objectively reasonable from the whistleblower's perspective. Motive is different from belief; the claimant does not need to be motivated by health and safety concerns. Indeed, in this case the claimant was largely doing her job and that was her motivation. But doing her job in a safety critical environment does not negate a health and safety disclosure. The disclosures were made to the claimant's employer or other responsible persons, pursuant to Section 43C ERA.

Summary on protected disclosures

44. In respect of Issue 2 there was a protected disclosure for events 1 and 2 as health and safety disclosures but not for event 4. The contention that event 3 was a protected disclosure was withdrawn on day-2.

45. The claimant should not be denied statutory protection for making a whistleblowing or public interest disclosure because that was her job. However, the fact that he job engages events that could subsequently be described as whistleblowing disclosures is taken into account in our analyses of causation.

Whistleblowing detriments

Issue or detriment 5(a)

46. The allegation here is in respect of the grievance appeal outcome dated 31 January 2020 which upheld the grievance outcome, and this allegation is made against Ms Rosana Turnham. The respondent did not call Ms Turnham to give evidence. Mr Welch informed us that she was no longer employed by the Respondent and that she was unable to make the hearing, we were not presented with any information which might have assisted us in identifying what efforts the respondents had made to call Ms Turnham, we see from the Tribunal file that the Respondent had not ask for a witness order.

47. That said, the allegation dated between 1 year 8½ months and 1 year 3 months from the protected disclosures. This is after a considerable elapse of time. Ms Turnham was not involved in the protective disclosure i.e. no protective disclosure was made to her nor was she copied in to any correspondence either contended to be a protective disclosure or correspondence referring to any protective disclosure. She was largely a disinterested spectator. Mr Welch contended that as a matter of causation, we have no evidence that Ms Turnham could have been aware of the protective disclosures. So it is difficult for us to come to any conclusion on how she could be significantly influenced by such disclosures.

48. The Tribunal does not look through the prism of whether Ms Turnham's conclusions for the grievance appeal were correct or justified. Our task was to determine both detriment and then causation. We accept that not upholding someone's grievance appeal is a detriment. The claimant brought a grievance and was unsuccessful in her complaint, she was justified in bringing her grievance because she felt strongly about these matters, and she asked her employer to resolve her complaint. To that extent, the claimant's sense of grievance had some justification. Ms Turnham did address the claimant's complaints and the grievance also addressed the safety concerns [see HB855-856].

49. We have carefully read the grievance appeal outcome. The outcome letter is detailed and it accords with the earlier grievance outcome of Mr Clark and the investigations undertaken so there is a degree of consistency in how Ms Turnham approached her task. The contemporaneous evidence demonstrates that Ms Turnham addressed the claimant's appeal points and she interviewed five individuals as part of her investigations. She specifically investigated the issues of management's approach to maintenance overruns. She agreed that the claimant had the right to raise her concerns and to escalate these to a senior level. We can see no evidence that Ms Turnham drew any adverse inference or took against the claimant because she raised the protected disclosures that we have found. Under the circumstances, we are satisfied that the claimant's disclosures in no sense whatsoever influenced the outcome of the grievance appeal.

Issue 5(b)

50. This incident occurred one year after the last protected disclosure we have found. We note that the claimant commenced long term sick leave following a return-to-work meeting with Mr Hills on 9 April 2019. This allegation relates primarily to Ms Davey's (Senior HR Advisor) notes of Mr Clark's (grievance officer) interview with Mr Hills on 7 October 2019. Ms Davey recorded the notes.

51. The claimant's statement expanded upon this allegation to incorporate the grievance appeal hearing notes. Whilst we considered the evidence contained in the grievance appeal hearing notes, the allegation is limited to that recorded in the list of issues and specifically relates to the meeting of 7 October 2019. We agree with Mr Welch that this allegation lacks specifics so it is difficult to discern the detriment alleged. The claimant contended at the hearing that Mr Hills was not sympathetic in her return-to-work meeting of 9 April 2019. It is difficult for us to see the detrimental treatment the claimant alleges that she was upset about in the subsequent record of this meeting. We note that the claimant did not complain about Mr Hills' conduct in the aftermath of 9 April meeting itself.

52. The claimant contends that because of her protected disclosures (end of October/ early November 2018 and mid to latish May 2018 that Mr Hills behaved badly towards her as recorded in the notes of 7 October 2019 grievance meeting. Yet the claimant did not complain about Mr Hills' treatment of her in the aftermath of 9 April 2019.

53. The claimant refers to the grievance investigation meeting notes of Mr Hills for this allegation [HB542-552]. As far as we can see there is nothing untoward in the behaviour of the claimant's line manager as recorded in these notes. At the hearing the claimant said that Mr Hills did not treat her with appropriate sensitivity; Mr Hills said he did. The claimant said that she left in tears, Mr Hills acknowledged that she was upset but said that she did not leave crying. One of her colleagues saw her after she left the meeting and said that she was close to tears. We are not persuaded that the claimant was crying in the meeting. Mr Hills appears to have conducted the meeting in a businesslike manner, he asked the claimant about her return to work and pressed her on her medical condition. So far as we can tell this was not intended to, nor could it reasonably be predicted to, cause offence; the claimant's line manager was doing his job.

54. Notwithstanding the fact that we struggled to see a detriment there was no causal link between the protected disclosures and these events.

Issue 5(c)

55. This is a similar allegation directed towards Mr Hills's line manager, Mr Burraway. The meeting notes are at page 624-629 of the hearing bundle. Again it is difficult for us to know what to make of this allegation when the claimant is far from clear. First, we cannot detect any animosity directed at the claimant from Mr Burraway. In the meeting notes he is asked a number of questions, for which he gives answers. The claimant may not like those answers, but we see nothing insulting or untoward or designed to put the claimant in a difficult position. We determine he gave responses which we see as consistent with the interaction between all the key protagonists. If there was a detriment because the claimant became upset at the candour of Mr Burraway's answers, then this is entirely unrelated to the protected disclosures. This allegation of a detriment similarly fails.

Issue or detriment 5(e)

56. So far as this allegation is concerned the claimant does not identify in the list of issues who in HR subjected her to the whistleblowing detriment and when this occurred. During discussions at the outset of the hearing, the claimant identified the document at page 1119. This related to her exchange with Mr Johnston on 25 October 2018. On that day she emailed Claire Macan-Lind to discuss issues both her team and herself were having with a senior manager [HB432-433]. This was in respect of interpersonal issues with Mr Johnston. The claimant chased this up the next day.

57. So this exchanged occurred before or at the same time off the protected disclosures so, causally, this cannot be a detriment because of the protected disclosures.

58. In her statement the claimant refers to events over 1 year and 3 months later, after her grievance outcome and that allegation is directed towards Emily Morgan but there is no contemporaneous correspondence where she requests discussions about these safety issues.

59. The claimant proceeded to raise these concerns in her grievance appeal and those matters were dealt with by Mr Turnham in her grievance appeal and grievance appeal outcome. So first, we cannot see where Ms Morgan can be criticised because there is no contemporaneous request for her to facilitate some form of dialogue. Second, we cannot see how this can be related to her protected disclosure. The claimant had raised the issues with her managers; as far as HR were concerned this was an operational matter that should be, and was, resolved at a local level. When the matter was subsequently resurrected by the claimant it was addressed by Ms Turnham. This allegation fails.

Issue 5(f)

60. We considered 6 Occupational Health reports produced by the respondent's Occupational Health Service AXA PPP Healthcare. These reports were as follows:

- 2 July 2019 [HB1075-1078]
- 20 April 2020 [HB1079-1081]
- 17 September 2020 [HB1082 – 1084]
- 23 September 2020 [HB1085-1087]
- 9 November 2020 [HB1092]
- 17 December 2020 [HB1096]

61. The occupational health reports seem unremarkable or uncontroversial in themselves. The reports were compiled by Occupational Health Advisors with varying degrees of qualification. There was some continuity because Ms Gallagher saw the claimant 3 times and she was the most qualified occupational health practitioner, although she was not a medic (in the sense that a medic is a qualified doctor). The reports seemed to follow a reasonably standard process, a referral was made by the respondent, the claimant was interviewed by the Occupational Health Advisor and advice was provided to both claimant and respondent. Occupational health also received information from the claimant's GP.

62. The claimant did not raise any dispute about the content of her occupational health reports, her complaint in this regard is that 2 occupational health reports, i.e. 23 September

2020 and 17 December 2020, and her GP's report of 11 December 2020 were not discussed with her by the respondent.

63. The claimants GP report of 11 December 2020 was not included in the hearing bundle. The contents of the report was set out on 'key medical updates' in the occupational health report of 17 December 2020 and the Occupational Health Advisor was seen to consider this and confirmed that her advice remained unchanged.

64. Essentially the advice in respect of the 2 occupational health reports, conducted by 2 separate Occupational Health Advisors, was that the claimant was unfit to work and was not likely to improve until her work issues were resolved. Both advisors opined that the claimant should be able to participate in procedural meetings in order to resolve the work-related issues. So, these reports were entirely consistent with each other and with all of the other occupational and other evidence.

65. We, the Tribunal, were puzzled as to what the detriment the claimant sought to raise, and we thought this might be related to the mediation. From as early as November 2019 (during the claimant's grievance) mediation was floated [HB631]. This was explored further, and a dialogue went on for months between the claimant and the respondent. By August 2020 the claimant was upset because she did not regard the mediator as being sufficiently independent and she wanted to pursue mediation through an external mediator. When disputes like this arise prior to mediation occurring, it is obvious to the Tribunal that mediation is unlikely to succeed, hence when the mediation finally took place, unsurprisingly, it failed. We determine that the claimant fundamentally misunderstood that mediation was supposed to be an informal mechanism to try to bring the parties together. It was not a mechanism to determine who was right and, in contrast, who was wrong.

66. In respect of possible resolution, there was an ongoing formal grievance and then the grievance appeal. So, the claimant did engage with the respondent and the respondent had engaged with the claimant against the background of the claimant's sickness absence. So, to return to the issue, whilst the respondent, Mrs Morgan or the claimants line manager did not appear to discuss these two occupational health reports and perhaps the GP report with the claimant, we cannot see how this would have possibly made any perceivable difference.

67. If there was a detriment, and there may well be there was, albeit not significant to the chain of events or, more importantly, for our analyses; such possible slight detriment had no relevance at all to the protected disclosures made a year or so earlier. Mrs Morgan was not on the receiving end of the protective disclosures. We think Mrs Morgan was aware of these at that time but we are not convinced at all that his could be possibly linked with organizing a discussion with her and/or the claimants line manager. This allegation fails.

Issue 5 (g)

68. In her statement the claimant raised five jobs that she said that she had the experience and capability to undertake. These jobs arose between mid-January 2021 to mid-February 2021. The claimant confirmed that she neither applied for nor pursued any of these jobs; she merely identified these jobs, after the event, as offering suitable alternative employment.

69. As early as 4 November 2020 Mrs Morgan had mooted possible redeployment to other work but said that she could not find any suitable roles from the current list of vacancies [HB896]. She raised this again on 24 November 2020 and referred the claimant to the

vacancy list available to all colleagues on SMILE. By 4 March 2021 Ms Morgan discussed again with the claimant possible internal vacancies and again referred her to the vacancy list available on SMILE. Finally, by 25 August 2021 Mr Campbell (the dismissing officer) referred to Mrs Morgan undertaking searches for alternative roles and commented that no like-for-like role had arisen.

70. The claimant confirmed in evidence that she had never looked on the internal job vacancy site. So, the claimant was wrong to say that respondent did not consider her for alternative roles because we are satisfied that some efforts was made for the respondent to consider this. Mrs Morgan referred the claimant to the list of vacancies which demonstrated to us that the respondent was not resistant to any possible redeployment. The claimant made little or no effort to help herself in this regard, so her criticism of the respondent is hollow and shrill. This allegation has no merit.

Issue 6. Automatic unfair dismissal under s104 ERA and ordinary unfair dismissal under s94 ERA

Automatically unfair dismissal

71. Mr Campbell was very focused in his approach at the final hearing. He did not read any documents in advance of the hearing; the history of the case was explained to him verbally by Kirsty Hastings and Amy Tarrant of Human Resources. He told us in evidence that he did not look at the previous OH reports, only the most recent. This is surprising and may well be problematic in a less clear-cut case. He set out his position in respect of outstanding safety concerns in the dismissal letter:

> **Outstanding safety concerns**
>
> As I explained from the outset, my role in this part of the process is not to revisit historical and closed matters. I am aware these have been fully investigated and managed in accordance with our internal processes, which I have full trust in. As such I will not be taking any further action relating to this point…
>
> **Conclusion**
>
> It is apparent to me that from our conversations that the subject of the previous safety issues remain a key areas of discontent for you, despite these being managed comprehensively through the standard internal process and to TUI's satisfaction. The process that took place in respect of these issues have been closed and will not be reopened. As such it is clear from this process that there are no further steps that TUI can realistically take that you would consider satisfactory to address your concerns in this respect. It is clear that you feel unable to return to your role while these issues have not been resolved to your satisfaction.

72. In cross-examination Mr Campbell said that he did not know what a protected disclosure was prior to this case. This was surprising given the nature of his role and his seniority in the company and his experience with disciplinary matters. However, we believed him.

73. For automatic unfair dismissal for a protected disclosure, we need to be satisfied that the dismissing officer dismissed the claimant for the reason, or the principal reason, of her whistleblowing disclosures. Surprisingly this is a higher threshold than the detriments dismissal.

74. However, Mr Campbell was very clear at the meetings and in his dismissal letter. He was concerned about the claimant's absence, which was extraordinarily high. He aimed to get the claimant to return to work. The claimant wanted to resurrect previous safety issues in her dispute with her managers. Mediation had been tried and failed and Mr Campbell was determined to avoid being drawn into this long-running dispute. He needed to bring matters to a head. The claimant was not willing or able to return to work so Mr Campbell determined that there was nothing further he could do other than dismissed her. He could not or would not let this impasse continue. Therefore, the claimant was dismissed for a reason unrelated to her whistleblowing disclosures.

Unfair Dismissal

75. So far as the unfair dismissal issue was concerned, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. as set out in Mr Campbell's letter.

76. The claimant's relationship with her line manager, Mr Hills, in particular had broken down irreparably. The claimant had been absent from work for well over 2 years. All of the occupational health evidence indicated that the claimant would not return to work in the foreseeable future. The claimant's dismissal could fit into either a *capability* dismissal, under s98(3)(a) ERA, or a *dismissal for some other substantial reason* under, s98(1)(b) ERA. So the respondent had potentially fair reasons for dismissing the claimant.

Issue 7. The fairness of the dismissal

77. The dismissal letter sets out very clearly the reason for the claimant's dismissal at page 1033-1035. We have read through the contemporaneous notes of the hearing and the information presented at that hearing and the reasons given for dismissal is consistent with those. Mr Campbell set out his thought process in his conclusion, which is stated above.

78. The appellant courts tell us that Employment Tribunals should not necessarily become hung up on the label attached to the dismissal. Indeed, it is permissible (possibly brave) for a respondent to argue more than one potentially fair reason and it is permissible for the Tribunal to relabel the dismissal if this has been sufficiently aired by the Tribunal. So, it is really the substance of the decision that matters and not necessarily the label we give it.

79. It was clear to us that the dismissing officer concluded that the claimant would not or could not move on beyond her dispute with her line manager. She had raised her safety concerns and then re-raised these and effectively became fixated on these issues to the extent that she would not budge. One member of the Tribunal felt that this may be akin to a psychological reaction, as the claimant could not move on. The Tribunal's majority (i.e. the other 2 members) felt that the claimant was more wilful, in that she would not move on and felt there was not sufficient evidence to ascribe this to a psychological condition. However, as we state above, the label is largely secondary.

80. So, in respect of process we considered carefully *did the employer investigate sufficiently the reasons for the impasse?*' i.e. the claimant's refusal or inability to return to work. We unanimously conclude that the respondent did all that was reasonable to do (and probably much more). The respondent had referred the claimant to occupational health six times and there was extensive occupational health evidence. The respondent had heard the

claimant's grievance and the grievance appeal. The respondent followed the recommendation that the claimant and Mr Hills engage in workplace mediation [HB592]. The respondent went to painstaking efforts to facilitate mediation over a prolonged period of time, including seeking to change the mediator. When the claimant did engage in mediation she did so "under protest" [HB973] and eventually walked out of the mediation [HB996]. Notably, the claimant said: "I think we've exhausted everything after 2 and a half years" [HB1031]. So, the claimant had made her position quite clear and that position was not disputed by the respondent.

81. Mr Campbell was clear that the safety concerns had been dealt with, that they would not be reopened and indeed there was no mechanism available to him to reopen these issues. The claimant could say little or nothing to convince him that she was either willing or able to return to work under those conditions, i.e. she could not draw a line under matters.

82. The overarching test for the Tribunal is whether the decision of the respondent fell within the *range of reasonable responses*. The range of reasonable responses test applies both to the reasons for the dismissal and to the process followed. It was within the range of reasonable responses for the employer to dismiss the claimant for the reasons given. Specifically, as articulated by Mr Campbell, despite every effort being made by the respondent to enable the claimant to return to work, she was unable or unwilling to carry out her role and there was no foreseeable point at which that situation could be seen to change.

83. In effect there was an irreparable breakdown in the relationship between the claimant and the respondent. The claimant's grievance and mediation were not able to resolve these issues, the respondent had explored suitable alternative employment. We find that there was nothing else the respondent could do to resolve the impasse, given that the claimant's grievance was not resolved in her favour. Under the circumstances, the process adopted by the respondent was also within a range of reasonable responses open to an employer of this type and size with such administrative resources available. We lean towards a some other substantial reason dismissal but if it was not that category then it would have been a capability dismissal.

84. Finally, as stated above *West Midlands Cooperative Society Limited v Tipton* determined that the appeal procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original process. The claimant said that she did not appeal because she was exhausted by the process. That is not good enough, because considering what would happen at the appeal is important. It is not so crucial a consideration now, because the claimant did not succeed, but if she did win on unfair dismissal this would have been taken into account, and a substantial deduction to any compensation would have been made at remedy.

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Employment Judge Tobin

Date: 24 June 2024

JUDGMENT SENT TO THE PARTIES ON 26 June 2024

FOR THE TRIBUNAL OFFICE

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