EMPLOYMENT TRIBUNALS

Claimant: Ms P Azimi

Respondent: Health Services Laboratories LLP

Heard at: London Central (by Cloud Video Platform)

On: 28, 29, 30 and 31 May and 3 and 4 June 2024

Before: Employment Judge Joffe
Mr P Madelin
Mr P de Chaumont Rambert

Appearances
For the claimant: Ms L Millin, counsel
For the respondent: Ms S Chan counsel

JUDGMENT

Unfair Dismissal

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimant by 50%.

Harassment

3. The complaints of harassment related to race are not well-founded and are dismissed.

Detriment for making protected disclosures

4. The complaints of being subjected to detriment for making protected disclosures are not well-founded and are dismissed.

Victimisation

5. The complaints of victimisation are not well-founded and are dismissed.

Holiday Pay

6. The complaint in respect of holiday pay is not well-founded and is dismissed.

Wages

7. The complaint of unauthorised deductions from wages is not well-founded and is dismissed.

Notice Pay

8. The complaint of breach of contract in relation to notice pay is well-founded and is upheld, with the sum to be determined.

Direct discrimination

9. The complaint of direct race discrimination is not well-founded and is dismissed.

Automatic unfair dismissal for making a protected disclosure

10. The complaint of automatic unfair dismissal is not well-founded and is dismissed.

REASONS

Claims and issues

1. There was a list of issues which was ultimately an agreed list, although there were some gaps in the list which were only addressed shortly before or during the full merits hearing. There were some errors in the way issues were formulated in the list, which are addressed as they arise

1 Ordinary Unfair Dismissal – section 98 Employment Rights Act 1996

1.1 What was the reason for the Claimant's dismissal?

1.2 Was that reason a potentially fair reason?

1.3 Was dismissal fair in all the circumstances?

1.4 If the Claimant is found to have been unfairly dismissed, did the Claimant's conduct contribute to her dismissal? If so, should there be a *Polkey* reduction to reflect her contributory conduct?

1.5 If the Claimant is found to have been unfairly dismissed, is the Claimant entitled to an uplift for Respondent's failure to follow ACAS Code of Practice?

2 Harassment related to race – s.26 Equality Act 2010

2.1 Did the Respondent engage in unwanted conduct related to the Claimant's race which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile or humiliating environment for the Claimant? The Claimant identifies as Persian.

2.2 The conduct relied upon by the Claimant is:

2.2.1 Pragna Patel, Mahrukh Kerwala and Alan Spratt allegedly denying the Claimant training/opportunities to progress in January 2019 meaning that she was not trained and rotated on other benches/machines beyond processing faeces and urine and MRSA between January 2019 and December 2020. The Claimant's colleagues who were of white or Indian backgrounds were allegedly provided with opportunities to progress.

2.2.2 Marukh Kerwala, after the Claimant raised the issues noted in point 0, allegedly suggesting to the Claimant to reduce her hours in February 2021 and would not have said this to white colleagues. The Claimant allegedly felt humiliated.

3 Whistleblowing Detriment – section 47B(1) Employment Rights Act 1996

3.1 Did the Claimant make the following disclosures?

3.1.1 The Claimant relies on the act of raising grievances on 25 January 2021, 4 May 2021 and 21 February 2019.

3.2 In each case, was it a disclosure of information to the Respondent which, in the Claimant's reasonable belief, was made in the public interest and tended to show information which fell under any of the limbs set out in section 43B(1) Employment Rights Act 1996?

3.3 If so, did the Respondent subject the Claimant to a detriment? The Claimant relies on the following alleged detriments:

3.3.1 The reduction of the Claimant's hours indefinitely in February 2021 by Alan Spratt/HR/Mahrukh Kerwala;

3.3.2 The Claimant's grievances of January and April 2021 not being investigated properly per the Respondent's policy by Mahrukh Kerawala/Alan Spratt/the Respondent's HR team and Stephen Ellam.

3.3.3 The Claimant being subjected to additional allegations by Mahrukh Kerawala in February 2021 and in a meeting held in March 2021 for work related stress;

3.3.4 The Claimant being emailed and contacted by Alan Spratt on her rest days on several occasions and/or by Mahrukh Kerwala in January and February 2021 whilst off sick from the Respondent;

3.3.5 The Claimant complaining that other staff were being awarded bonus payments and promotions and that she was being treated differently by department managers and seniors ie (Mahrukh Kerwalla/Alan Spratt/Pragna Patel) in relation to not receiving Christmas bonuses/appraisals/training opportunities throughout her employment.

3.3.6 The Respondent failing to follow the ACAS process, specifically by:

(a) Failing to follow grievance procedures;

(b) Not paying the Claimant Statutory Sick Pay between 17 August 2020 to 30 November 2020;

(c) Failing to follow provide requested information prior to meetings on April 2021 and 21.5.21;

(d) Failing to be told to bring a friend to a meeting on

(e) Failing to pay enhancements when requested in timely manner, from January -June 2021;

3.3.7 Treating the Claimant differently in relation to timekeeping in May 2021 by being investigated and subjected to a disciplinary hearing whereas other were not getting the same treatment and put closed eyes on, compared with Gemma who released incorrect results in April 2021.

3.3.8 Failure to pay the Claimant's wages on time in May 2021;

3.3.9 Failure to pay the Claimant's notice and holiday pay (see further detail below);

3.3.10 Not upholding the Claimant's appeal against her dismissal; and/or

3.3.11 In April 2021 during a grievance meeting with Steven Ellam, denying the Claimant witness evidence and CCTV footage.

If so, was the Claimant subjected to the alleged detriments because she did the alleged protected acts?

4 Victimisation – section 27 Equality Act 2010

4.1 The alleged protected act relied upon by the Claimant is her grievance complaints of 29 April 2021, 4 May 2021 and 21 February 2019.

4.2 Is the act relied upon by the Claimant a protected act within the meaning of section 27(2) Equality Act 2010?

4.3 If so, did the Respondent subject the Claimant to a detriment by doing any of the following alleged acts:

4.3.1 In April 2021 during a grievance meeting with Steven Ellam, not being provided with CCTV footage or witness statements (e.g. that of Scott Churcher) to review despite requesting it, being '*treated like a criminal rather than a victim',* and being shouted at and told to get out of that meeting.

4.3.2 Mahrukh Kerwala sending emails to the Claimant between February and April 2021 and gathering evidence against her whilst she was on sick leave.

4.3.3 Denying the Claimant data swipe entry records for the Halo building on December 2020 when requested in April 2021, May 2021 and June 2021.

4.3.4 Dismissing the Claimant.

4.3.5 Failing to uphold the Claimant's appeal against her dismissal.

4.3.6 Failing to uphold the Claimant's grievance or for the Respondent's management team to discuss it with her.

4.3.7 Failing to move the Claimant to another shift after she raised concerns about threats made by a colleague on January 2021/April 2021.

4.3.8 The training/progression issues listed at 0;

4.3.9 The Claimant and her Trade Union Representative being 'ridiculed' by Alan Spratt in the grievance investigation meeting in April 2021;

4.3.10 Not paying the Claimant Statutory Sick Pay between 17 August 2020 to 30 November 2020.

4.4 If so, was any detriment done because the Claimant did, or the Respondent believed that she did or would do, the alleged protected act?

5 Holiday Pay and Unlawful Deduction from Wages

5.1 Is the Claimant owed holiday pay and/or other wages? The Claimant claims that she is entitled to the following:

5.1.1 Statutory sick pay between 17 August 2020 to 30 November 2020 in the sum of £4,680.

5.1.2 Holiday pay between 2020 and 2021 in the sum of £3,974.53 based on a calculation of 312 hours.

6 Wrongful dismissal: failure to pay notice pay

6.1 Is the Claimant entitled to recover damages for wrongful dismissal (notice pay)?

7 Race Discrimination: section 13 Equality Act 2010

7.1 Did the Respondent treat the Claimant less favourably than it would treat a person in materially the same position as the Claimant save that the person is not of her race, by the alleged acts in 00 and/or 0 above?

8. Automatic unfair dismissal for making a protected disclosure: section 103A Employment Rights Act 1996

8.1 Was the sole or principal reason for C's dismissal that she had made a protected disclosure?

2. The following further particulars were provided by counsel for the claimant on 28 May 2024:

3.3.6(d) Failing to bring a friend to a meeting on 4th May 2021, the investigatory meeting December 2020 and the March grievance hearing. Also the Appeal hearing

3.3.7 Names of people treated differently, Punima, Razalia, Krupa and Safiyo.

Findings of fact

<u>The hearing</u>

2. We were provided with a hearing bundle of 528 pages and a separate index. Ms Millin, who had only recently been instructed on a direct access basis, told us that the claimant informed her that some of her documents had not been included by the respondent in the bundle. We were not asked by the parties to resolve issues as to whether there had been failures by either side in relation to disclosure and on a pragmatic basis we were provided with a further

bundle of documents from the claimant. This appeared to contain many documents we had already been provided with and ultimately little use was made of it by the parties.

3. We had witness statements from the claimant and the following witnesses on her behalf:

   Ms F Mohammed;

   Ms K P Aguiar Soares.

4. We also had an email containing evidence from a Ms G Abbott. Neither Ms Aguiar Soares nor Ms Abbott attended to give evidence and, insofar as these documents /statements contained relevant evidence, we were unable to give them any significant weight as there was no opportunity for the evidence to be tested.

5. For the respondent, we received witness statements and heard live evidence from the following:

   Ms A Kerawala, lead biomedical scientist;

   Mr A Spratt, head of infection sciences;

   Mr S Ellam, lead biomedical scientist;

   Mr O Joseph, operations manager.

6. It appeared from earlier case management hearings that there had been difficulties finalising the list of issues, particularly in terms of the claimant providing the missing information which had been identified; this was ultimately provided in the run up to and during this hearing. We note that the claimant was generally unrepresented between hearings. It appeared once the evidence began that some aspects of the list of issues were incorrect, for example the dates on which the claimant says she did not receive Statutory Sick Pay were wrong by a year. There was no application on the claimant's behalf to adjust the list of issues and we decided the claims on the basis of that list.

Facts in the claims

7. The respondent describes itself as a 'clinically led provider of pathology and diagnostic services. It is a partnership between The Doctors Laboratory Limited and two hospitals: The Royal Free London NHS Foundation Trust and University College London Hospitals NHS Foundation Trust, and its purpose is to deliver medically-led diagnostics, innovation, value and long-term investment in healthcare.' In practice the respondent carries out a lot of bulk testing, including testing of urine. faeces, blood, semen, tissue etc.

8. In the infection sciences department there were at relevant times 157 FTE employees, a total of 169 people.

9. There are approximately 2500 employees altogether in the respondent organisation. The bulk of the employees in infection sciences are medical laboratory assistants ('MLAs'). They work physically on two levels of a building: level 3 and level 4. The work is divided up into 'benches', which are the responsibility of lead biomedical scientists. Mr Ellam was in charge of tissues and fluids on level 3. Mrs Kerawala was responsible for urine and MRSA. Ms P Patel was responsible for enterics. There was a further lead biomedical scientist.

10. The four lead scientists would manage the employees assigned to their sections but they also all had responsibility for all of the MLAs. It appeared that individual MLAs were assigned to particular lead biomedical scientists for the purpose of what might be called HR processes such as managing sickness absence. The evidence we received on these matters was sparse and not altogether clear.

11. The infection sciences department runs 24 hours a day, seven days per week on early, core and late shifts.

12. Within each bench there are different roles or stations requiring different skills. What was called manual testing was carried out on level 4, where we were told the benches included: urine, MRSA, enterics, mycology and TB. On level 3 there was automated testing, including a system called Kiestra, and tissues and fluids. Mr Spratt told us that urine and enterics were two of the biggest sections in any microbiology lab.

13. We were told that MLAs are rotated around different sections with a view to them obtaining competence in a range of sections so they can be moved flexibly as required. How quickly a member of staff becomes competent on a particular section depends on various factors. One of these is the availability of training, which takes place on the job. There are levels of competence to be achieved on each bench, graded from 1 – 5, which we understood to reflect levels of competence from the ability to do a task through to ability to train others on that task. 1 is ability to do a task with supervision and 3 is the ability to do it unsupervised. Staff generally aspired to be level 3 and able to work unsupervised.

14. We were told that data about what competences individual staff had were collated in a spreadsheet which was stored centrally. We were not provided with any such spreadsheet or other training record.

15. The process for promotion, we were told, involved tests and possibly interviews. It was not necessary to have worked on all of the benches to be promoted to BMS level.

16. Ms Kerawala told us that it is more difficult to provide training at weekends when there is only skeleton staffing and also on Mondays. Other factors affecting the speed with which training is provided to individual MLAs include trainer availability and the demands of the work.

17. We were told that three months was a typical amount of time to become competent on a particular bench but that there was considerable variation. Ms Kerawala told is that there were various factors affecting how long an individual spent on a bench including their aptitude for the work, the availability of training and the needs of the service.

18. We did not have any evidence as to how long any particular individual apart from the claimant spent on particular benches or any statistical materials about the MLA population as a whole.

19. Above the MLAs in the hierarchy are associate practitioners, then biomedical scientists ('BMSes'), then senior biomedical scientists, then lead biomedical scientists. We understood that the lead BMSes would not be present on the night shifts but there would be a senior BMS; although in the absence of a senior BMS, a BMS could act up. An MLA could report to any BMS on a night shift if necessary. Mrs Kerawala said that something called the lead BMS phone would always be held by someone.

20. Ms Kerawala told us that staff were aware of the hierarchy and who the senior BMSes were so that they would know who to report to on a night shift.

21. The claimant's educational background includes a degree in biomedical science. She told us that her ambition is to become a biomedical scientist. She is Persian.

22. On 9 April 2018, the claimant began employment with the respondent as medical laboratory assistant on a six month fixed term contract working 40 hours per week.

23. On 4 June 2018 her employment was made permanent.

24. An important issue in the proceedings was the extent to which the claimant was rotated around different sections and received the appropriate training. The respondent did not seem to keep records of what sections each employee worked on; or if it did, we were not provided with any such records. The evidence we received from both parties was inexact and somewhat impressionistic.

25. By early 2019 the claimant was working on enterics, which was under the management of Ms Patel. She told us that she was still inoculating faecal matter, which was an enterics task, by May 2019. She returned to enterics after an extended absence due to a car accident in November 2019. She was moved to urine under Ms Kerawala after that, where she said that her main role was to pour urine, and spent some time in tissue and fluids and blood cultures. She gave evidence that on an unspecified date she was working on tissue and fluid but was told to go back to enterics. She was moved to level 3 at some point and was working on Kiestra in January 2019.

Appraisals

26. We were told that appraisals should have been done yearly for each member of staff. Mr Spratt told us that the system was that an individual would prepare some kind of self-assessment document and send it to the BMS assigned to do his or her appraisal and arrange a date to meet. We note that most similar processes would require a member of staff to be reminded to carry out that task at the appropriate time of year.

27. The claimant had never had an appraisal whilst working for the respondent. The respondent's witnesses said that it was overlooked in 2019; Mr Spratt said the claimant did not herself do the preliminary work for the appraisal, that 2020, because of Covid, was a tumultuous year and that is why the claimant's appraisal did not happen and that in 2021 she left well before the appraisal would have been due in December 2021.

28. We had no evidence at all as to whether other employees received appraisals. We had no documentation in the bundle about appraisals, either from the respondent or from the claimant asking about appraisals. We were told that the turnover of staff in the MLA role was high which seems to have been a partial explanation for the laxity about appraisals.

Bonuses

29. The claimant was not paid any form of bonus, including a Christmas bonus. Her contract made no provision for bonuses. She was told by another employee that he received a Christmas bonus. The respondent's evidence was that some employees who had been transferred to the respondent under TUPE from another organisation, the Doctor's Laboratory, had terms and conditions including a Christmas bonus. Those staff retained that term of their contracts and so continued to receive a Christmas bonus.

Enhancements

30. MLAs were entitled to enhancements to their hourly pay rates for working unsocial hours.

Procedures

32. We saw the respondent's disciplinary procedure which included the following relevant section:

2.5.3.2 Examples of Gross Misconduct warranting summary dismissal

There may be occasions where an offence, even if it is the first of its kind, is of such a serious nature that the Company is justified in no longer continuing the employee's employment. Such cases may warrant summary dismissal (i.e. dismissal without notice). The following list details those offences, if proven to have occurred without any form of reasonable justification or mitigating circumstances, could result in immediate dismissal. Again, this list is for guidance only, and is NOT exhaustive.

(l) Serious incompetence or negligence in the performance of work; …

(n) Serious breach of the Company's policies; professional rules of conduct or legislative requirements;

33. On 31 January 2019, the claimant was notified by Ms Patel:

On 31.01.19 you failed to complete the task set, leaving it incomplete when going for a tea break which resulted in a delay to the service and patient's samples being processed.

- *Refusing a reasonable management request: refusing to complete stool separation between 28.01.19 - 30.01.19.*
- *Wilfully delaying the processing of stool samples on 31.01.19*

34. She was invited to an investigatory meeting which was rescheduled a number of times at the claimant's request.

35. On 21 February 2019, the claimant raised a grievance about Ms Patel. For the purposes of these proceedings, this was said to be both a public interest disclosure and a protected act.

36. The grievance was about being 'treated badly' by Ms Patel.

37. The claimant said in the grievance that her first full week in enterics was from 28 January 2019. The claimant said that she was not trained in advance and found it difficult. Ms Patel was telling her to hurry up although she was still training.

38. The claimant described an incident where she said Ms Patel came up to her in a break she had taken as she was not feeling well. Ms Patel shouted at her that she should finish her rack. The claimant told Ms Patel that she was harassing her and that she was going to complain. Ms Patel then sent her a letter for 'an investigatory'. She said that she felt 'humiliated, bullied and targeted' by Ms Patel and that Ms Patel was using the investigation 'to torment me because of a personal dislike'.

39. She said that she had been in enterics for four weeks but was still on the same section without rotation although a colleague who had started at the same time had done all of the sections. She had asked to move but Ms Patel had said she was too slow although she timed her and she was faster than required. She said that this was bullying. She was being watched by Ms Patel by proxy as people were reporting the claimant's movements to her. The claimant said that she had not been inducted into the section and she felt her safety was being compromised

40. HR put the disciplinary investigation on hold whilst the claimant's grievance was pursued.

41. On 26 February 2019, there was a grievance hearing in front of Mr Spratt. The claimant attended with her trade union representative, Ms B Wallace.

42. On 22 March 2019, a grievance outcome decision was sent to the claimant by Mr Spratt. He made the following relevant findings:

- Rotations: The claimant had found it challenging to work with stool samples. Emphasis was therefore placed on allowing her to get used to dealing with such samples before rotating her onto different functions. The total actual time in that section was four weeks which included periods of sickness and annual leave. The week commencing 18 February was her first full week in the department. The colleague who had been rotated earlier had been signed off his competences whilst the claimant had not yet been signed off. It was the senior on shift and not Ms Patel who responsible for signing the claimant off. This complaint was not upheld but Mr Spratt made a recommendation for additional support so the claimant could achieve the competences.
- Not being inducted and health and safety risk: Mr Spratt found that the claimant had had an induction ('I also find through investigations that there is a competency assessment performed for working in cabinets Class 2 which you have been trained in including undertaking ventilations. I therefore find that there is no substantive evidence to support this point of your grievance as there is evidence that demonstrates you have been inducted to the

appropriate level in the section you are working on. I do not uphold this point of your grievance') and that she had been trained in the relevant competences. These complaints were not upheld but Mr Spratt recommended that the claimant be inducted again with that section so she felt safe and confident.

- Ms Patel watching the claimant by proxy: Mr Spratt found that there were occasions when Ms Patel had addressed with the claimant issues raised by the BMSes on shift. There were occasions when the cabinet was not cleared by the claimant which were escalated to Ms Patel when there was not a senior on the shift.
- As to the specific incident: 'During the Meeting, you mentioned an episode where you felt humiliated when Pragna had come to see you in the canteen and asked you "loudly" to leave your break and go back and finish your work. I have further investigated this and find that Pragna had approached you in the canteen as you had left your work station with samples incomplete which meant that the other MLAs were unable to use the cabinet and carry out their tasks. In investigations with Pragna, she states that when she approached you, she asked you to return to your work station to complete your work as there were other MLAs who were unable to complete their tasks due to the cabinet not being empty which resulted in you telling her in a loud manner that you were on your break and that someone else could pick the work up. You have described it as an "altercation" where Pragna came up to you whilst you were in the canteen and angrily asked what you were doing in the canteen. You stated that you explained to her that you were not feeling well and needed a break and that you asked your [colleagues] if they could finish inoculating the samples to which Pragna responded by shouting 'no you should go back upstairs and finish your rack right now!' You stated that she carried on shouting which is when you told her that she's [sic] was harassing you in front of everybody in the canteen and that I was going to complain. From investigations I find that both you and Pragna have a different account of the conversation that took place between you whilst you were in the canteen. Unfortunately you both have been unable to put forward any additional witnesses for me to carry out investigations with. From the conflicting statements in regards to this point of your grievance, I find that whilst there is no substantive evidence to support this point of your grievance. I therefore do not uphold this point of your grievance.'

43. Mr Spratt concluded that there had been a breakdown of the relationship and recommended mediation between the claimant and Ms Patel.

44. On 26 April 2019, something called a 'communication form' was distributed by a Mr A Lyons. This was directed at infection sciences staff and said, amongst other things:

Late attendance:

- *All staff should notify the laboratory / duty officer if they are to be expected late for shift attendance beyond 30mins*
- *On arrival the staff member should confirm attendance with the duty officer and ensure the paper rota records are accurate*
- *The lost working hours must be made up*
- *Repeat / patterns of late attendance must be addressed with the appropriate Band 8 lead and targets of improvement set.*

45. We did not hear any clear evidence about the status of this document.

46. On 2 December 2019, the claimant returned to work following a 70 day absence due to car accident injuries.

47. On 5 December 2019, the claimant made a flexible working request. She wished to change from working Monday – Thursday and one in four Saturdays to working longer hours Sunday, Monday and Tuesday (8:30 – 21:30) and six hours on one in four Wednesdays The purpose of the working pattern was so that she could help care for a disabled brother.

48. On 25 February 2020, the claimant was issued with a first written warning for unsatisfactory attendance after a stage 2 meeting (for unsatisfactory attendance in the prior 12 months). The absences were various short term absences as well as the longer car accident absence. The claimant raised at the meeting to discuss her attendance the facts that she was stressed about home-life commitments and that her flexible working request had not been addressed by Mr Spratt yet.

49. On 5 March 2020, the claimant attended a disciplinary hearing chaired by Mr Spratt on a charge of failure to maintain contact whilst on long time sick leave. She was subsequently (17 March 2020) issued with a first written warning for misconduct. The investigation had been carried out by Ms Kerawala. The claimant said that she was not psychologically well at the time of the absence. She did not appeal this warning.

50. On 6 March 2020, Ms Spratt had a meeting with the claimant about her flexible working request. Mr Spratt expressed concern about the request given the long hours involved, which he considered might exacerbate the claimant's injuries. He was also concerned that she was not up to date with her competences. The claimant said that her GP was OK with her working those shifts. It was not possible at this point for the respondent to get an occupational health assessment of the claimant due to the pandemic.

51. Ms Wallace suggested an alternative: *As a possible alternative to the submitted flex work request, Parisa would like you to consider; Sunday to Tuesday and make up the shortfall 1 Wednesday per 4 weeks 2 til 8pm.*

52. Between 16 March 2020 and 5 July 2020, the claimant was on leave and furlough.

53. On 30 March 2020, Mr Spratt approved the alternative flexible working request:

This will result in the following temporary changes to your Terms and Conditions of Employment:

• Your total working hours will remain unchanged- 37.5 hours per week.

• Your working hours will be between Sunday to Tuesday 08:30 — 21:30 and 1 in 4 Wednesdays 14:00 to 20:00. The longer Sunday to Tuesday shifts will include one hour unpaid lunch breaks. The shorter 1:4 Wednesday shift does not include a lunch break.

54. The pattern was to be reviewed by 15 December 2020.

55. It appears the claimant was not informed about this decision at the time and on 18 June 2020, Mr Spratt wrote to the claimant after the claimant chased:

Please see attached FWR outcome letter approving the amended FWR hours submitted in March 2020. Sorry this process has taken so long, I'm afraid in addition to the renegotiation of the FWR proposal things have been all the more drawn out by Covid 19 and subsequent furlough arrangements.

I have agreed to the FWR for an initial period of 6 months, when it will be reviewed.

Re: extension of furlough throughout July. I intend to review the current furlough/workload situation early next week and will be in touch then to let you know.

56. Mr Spratt said the delay was due to agreeing an alternative pattern initially and then there being disruption due to the pandemic and furlough.

57. On 16 August 2020, the claimant was late for her shift by 50 minutes. On 26 August 2020, Ms Kerawala emailed the claimant to remind her to do her contracted hours, and to follow the respondent's policy. She said that further lateness could lead to a formal investigation or a formal review of the claimant's agreed flexible working pattern.

58. Over the course of September 2020, the claimant was recorded as arriving late or leaving early on the following occasions:

6.9.20	Claimant left early by 20 minutes
7.9.20	Claimant was late by 10 minutes and left 25 minutes early
8.9.20	Claimant left 15 minutes early
13.9.20	Claimant left 25 minutes early

14.9.20	Claimant was late by 10 minutes and left 25 minutes early
15.9.20	Claimant was late by 10 minutes and left 15 minutes early
20.9.20	Claimant left shift 30 minutes early. Ms Kerawala became aware that the claimant had left when she telephoned the lab at 21.03. Ms Kerawala then emailed the claimant at 21.32 as set out below and texted the claimant for an explanation. The claimant did not respond. *Can you please explain todays early departure.* *I rung up at 09:03pm tonight and I was told you had just left. Your time is 08:30 to 21:30.* *As I am not in on next two days, I have copied Pragna – Please speak to her/email too*
21.9.20	The claimant started her shift 30 minutes early at 8 am, earlier than her contracted start time, although she did not discuss this arrangement with any manager. She left 15 minutes early.
22.9.20	The claimant was15 minutes late and left 15 minutes early

59. On 23 September 2020, Ms Kerawala pursued the claimant for an explanation of why she had left early on 20 September 2020, saying that she had previously had 'silence from you and no response to my text on 20/9 or email…although this is only half an hour, I am not happy about this event and technically half an hour is unauthorised absence'.

60. On 26 September 2020, the claimant apologised, explaining that she had had to leave early due to family emergency and would speak to a senior in future.

61. On 1 October 2020, Ms Kerawala responded to the claimant: *I emailed and texted you on the day… and you've responded 6 days later…. If the seniors are not around, it is a common courtesy to let team/colleagues night BSMs know… You turned up to work on Monday morning but this has to be discussed as we may not want you to do your owed hours on a day where it does not suit the needs of the department. Leaving early without permission is technically unauthorised absence, even though it is only ½ an hour. I had sent a friendly email on 26.8.20 reminding you to do your contractual agreed hours, be on time etc… As I am concerned about timekeeping, I will set up an informal one to one meeting next week with yourself.*

62. On 4 and 5 October 2020, the claimant again left work 15 minutes early. She left twenty minutes early on 6 October 2020.

63. On 18 October 2020, Ms Kerawala held a one-to-one meeting with the claimant to discuss the requirement for the claimant to agree any early departures from work.

64. On 29 October 2020, the claimant was sent a "letter of concern" by Ms Kerawala regarding her unauthorised absence on 20 September 2020. This was treated as a one-off and no formal action was to be taken, however the claimant was told that she could not just decide when she wanted to make up missed time. Any repetition of the missed working time would be dealt with formally and might lead to disciplinary action. Ms Kerawala said that she was planning an audit of access data for ID cards to ensure there were no recurrent issues. The explanation given by the claimant was that she had had to return home as she had the house keys and her brother had to leave for an appointment.

65. Ms Kerawala wrote further:

If working on the request flexi hours is an issue, a review with alternative options of working must be sought in conjunction with the management; this may be requesting to reduce the working hours further, to change working pattern or any alternative arrangement that may suit your and department needs.

Recommendations and reminders are stated below:

o Please be mindful of taking time off for negligible events such as this as it does not classify as a serious domestic emergency/crises which had to be resolved immediately.

o Ignoring messages sent by a manager is not an acceptable behavior and shows lack of respect. A basic etiquette, good manners and a correct attitude to communicate well must be practiced at all times.

o Despite you claiming that you only left early by half an hour and it did not impact on the work, I disagree and corrected your misconception that the attendance at work and timings had to be adhered to at all times.

o Clarifications were made regarding contacting the manager and notifying the absence via Lead phone for each absence. On occasions, especially during out of hours, the phone is manned by a senior or other BMS, so specific details and the reason of absence should be clearly notified. For any reason if you are unable to get through, you must endeavour to try again. The Lead BMS contact number is 07855285353

o If there is no senior or a Lead BMS on either floor, you should speak to any other BMS who is working on that shift. If you were unable to speak to a Lead BMS on the day of your absence, you should get in touch with the Lead BMS at the next opportunity to justify your absence. It is your responsibility to notify

us of the absence promptly. In absence of a senior or a Lead BMS, it is also a common courtesy to let the team or colleagues know of your absence if you had to leave early or your start time to work was delayed due to unpredictable circumstances.

66. On 10 November 2020, the claimant was 30 minutes late for work.

67. Some time during November 2020, the respondent conducted an audit of access card data for September to November 2020 which showed the claimant being late and/or leaving early on 17 out of 27 shifts. Initially it appeared (as recorded in the respondent's chronology) that this audit had been department wide. However, Mr Spratt's evidence was that he conducted an audit of approximately 15 employees who worked long shifts until 8:30 pm because there had been complaints relating to this particular group. The complaints were mostly from other MLAs as they had had to pick up the extra work, Mr Spratt said that the claimant and two others were found to have been leaving early. One of the others was the individual identified by the claimant as Safiyo. Both of the other employees were Asian. Of the others investigated. Mr Spratt believed most if not all were from an ethnic minority.

68. Mr Spratt said that he requested the card data. There was then an assessment of the in and out times of the individuals. He could not remember if he looked at all of the data himself or that work was shared between the leads and himself. He passed on the three cases to three different leads to manage.

69. Mr Spratt said the impact of employees leaving early was that samples were left and turnaround times for testing might not be met. In the case of MRSA swabs, for example, such failures could lead to operations having to be cancelled; similarly C. difficile results needed to be timely for clinical reasons.

70. Prior to Mr Spratt's evidence, Ms Kerawala had been asked in evidence about the audit. She said that she carried out some of it and other managers carried out the rest; she could not remember who the others were. She said that the audit was distributed and she looked at some of the individuals and some were looked at by others. She could not recall the basis on which individuals were selected to be audited but said that it might have been based on complaints.

71. The timing of the audit was very unclear and most of the evidence about it only emerged in response to questions from the Tribunal, which was unsatisfactory.

72. The letter to Safiyo which was produced showed that an investigatory meeting had been held with him in September 2020, well before we were told the audit was carried out. Safiyo had been investigated for other matters, including claiming enhancements for shifts not worked but resigned before a disciplinary hearing could be held.

73. We were told the other employee who was found to have been leaving early was investigated and received a final written warning. We had no other detail or documents for that employee.

74. Ultimately we concluded that the discrepancies between the different accounts of the audit arose from the lapse of time, poor memory and lack of record keeping. It appeared that there were complaints and Mr Spratt asked for data to be produced. Either Mr Spratt or Mr Spratt and the leads looked at the data. Ms Kerawala used the word 'audit' to describe her involvement, but we did not consider that she was seeking to mislead us as to the extent of her role. We bore in mind the lapse of over three years from the events. As to the timing, it seemed to us that either the audit had taken place over a longer period, or, contrary to Mr Spratt's recollection, Safiyo had been investigated somewhat earlier.

75. Although the claimant told the Tribunal that there were other employees leaving early, she provided no examples and Mr Spratt denied that there were others or that there was a more widespread practice. We could see that those working the longer shifts would have more opportunities to leave early undetected than those working fixed day shifts.

76. On 26 November 2020, the claimant was invited to an investigation meeting on 15 December 2020 to consider an allegation of persistent failure to complete full shifts. The access card data was contained in the letter, with dates and times. The claimant was advised she could have a work colleague or trade union representative accompany her. The hearing was subsequently delayed to a date when Ms Wallace was available.

77. On 23 December 2020, the claimant, accompanied by Ms Wallace, attended a disciplinary investigation meeting with Ms Kerawala. The claimant said at the meeting that she was aware of internal documents which said that staff did not need to report lateness of 20 minutes or less and only needed to make up lost time of more than 30 minutes.

78. She said with respect to her missed time:

Yes, I think another time I did get approval. You know I have other caring responsibilities at home, and that doesn't always go to plan and I need to take emergency leave.

79. She suggested that she came in early to make up time that she had missed. She said that she had caring responsibilities at home and that her uncle had passed away in August which had a big impact on her family.

80. Ms Wallace said that there was not always a senior for the claimant to report that she was leaving early to. The claimant said that she had informed a senior but could not remember whom as it was a long time ago. Ms Kerawala said that she needed to email and make an agreement about making up time. The claimant apologised and said that emergencies had happened but she thought that she had improved over the past couple of weeks.

81. On 18 January 2021, there was an incident in the laboratory between the claimant and another MLA, Ms T Boateng.

82. Another employee, Kumar, gave this account of the incident:

I was on my night shift on (18/01/21) around (8:30pm to 09:00pm) I heard some argument out in the level 3 kiestra put up area 2 . Mary and Perisa were shouting at each other. I went to enquire and resolve the situation but resolved themselves and went back to work. Later on I heard some arguments again in kiestra put up area 1 but this time Tracy and perisa were shouting each other very aggressively , As the situation getting out of control, I had a thought of reaching out to security. Yinga [sic] was trying to the girls make calm down their behaviour and voice. But soon the girls resolved themselves and went back to work.

83. Yinka, also an MLA, wrote this account:

Tracey B called our attention to Perisa who was sitting on station 1.1 track 2 with half a rack of swabs on the bench and she said that it is a common practice for her to do this and then leave the swabs for the night shift at the end of her shift.

Mary M walked up to Perisa (at this time she was sitted with one leg folded on the chair) and asked if she was on her break. Perisa replied with a loud voice saying things in the line of "who are you", "why are you coming to me", "don't talk to me", "move away from me", "shush". And she said these words repeatedly. In the midst of all her words,

Mary kept saying "Pragna will check the camera tomorrow", Mary also said that a couple of times. At this point, I walked to my station 2.4 track 1. I did not intervene between the two of them. I just observed.

Some minutes later, I was standing at work station 2.4 track 1 printing maldi stickers when I saw Perisa walk up to Tracey who was at station 1.1 track 1 and said loudly something in the line of, "if you have issues with me..." Tracey responded but her response was inaudible to me from my station. Then I heard Perisa shouting, "shut up, shut up".

At this point stopped what I was doing and was looking to their direction hoping it all calms down but Perisa and Tracey were talking at each other with Perisa raising her voice each time she spoke. I couldn't hear what Tracey was saying but when I heard Perisa shout, "I will slap you", I quickly walked towards them (by the lab entrance) and I was shouting "stop, stop, that's enough".

They were moving close to each other so I stepped in the middle and spread my arms to separate them. Dela was holding Tracey back. It was then I heard Tracey said something in the line of, "this is what you always do and get the night staff into trouble" but Perisa kept shouting so I moved her by her shoulder and turned her back towards her section.

Tracey wanted to follow her but Dela held her back, I also said to Tracey, "that's enough" and stopped her with my hand. I escorted Perisa back to her work station but she turned to specimen reception area and continued shouting.

So I said firmly something like "you need to keep your voice down now or you will have to leave". She said Tracey is shouting too. I said she has stopped shouting so you have to stop too or you have to leave, then she kept quiet and I walked back to my station.

After about 20 minutes or so, I heard Perisa's voice again shouting at Tracey. When I lifted up my head, I saw Perisa by the Trichomonas incubator and Tracey had just wheeled a trolley from Tissues and Fluids past Perisa to the specimen reception area. I don't know what transpired between them but I only heard Perisa's voice again shouting, "shut up". Perisa walked to the reception area. I heard Dela's voice speaking but do not know what she was saying, then Perisa shouted again, "I'm not one of you", she also said a few things that were not audible to me then walked to her station.

84. On 20 January 2021, Ms Kerawala advised the claimant that she was investigating the incident of 18 January 2021 and, pending the investigation, there would be a temporary change to working hours for the claimant and Ms Boateng to separate them. On 24 and 25 January 2021, the claimant was to work an 8:30 - 20:00 shift. There was no change to her pay.

85. On 25 January 2021, the claimant submitted a grievance about the incident with Ms Boateng which she alleged was a public interest disclosure.

86. On 28 January 2021, the claimant made a flexible working application to reduce her hours to 8.30 to 19.30 Sunday to Tuesday as she felt uncomfortable working with night shift staff. It was not clear to the Tribunal why she also sought to remove her Wednesday working.

87. The claimant's oral evidence was that she was 'made' to reduce her hours and that she had been told that this was necessary for HR and the payroll system. She said it was supposed to be temporary until her grievance was resolved. The request itself did not say it was temporary although the form had a question the claimant could have filled in about whether the request was temporary. The claimant said in evidence that she had spoken with Mr Spratt about it being temporary, but ultimately she did not explain why the temporary nature of the change did not form part of the request.

88. Ms Boateng had resigned on or around 25 January 2021 and the claimant was aware that she was leaving. She said that her concern was also about Dela.

89. It was pointed out to the claimant that the document granting the request said that the arrangement would be reviewed in a year's time. The claimant signed that document although she maintained that the arrangement was intended to last only a couple of weeks.

90. The claimant did not explain to the Tribunal how she said Ms Kerawala had forced her to change her hours and no clear allegation was put to Ms Kerawala in cross examination. Ms Kerawala said she only suggested that the claimant and Ms Boateng change their hours for the few days after the incident with no effect on pay. She did not otherwise suggest the claimant change her hours. Mr Spratt also denied forcing the claimant to change her hours. The claimant had come to him with a request and he had signed off on it. The period for flexible working requests was a year because shorter periods would make the organisation of the lab impossible. If the claimant had wanted to increase her hours again, she could have come to Mr Spratt and the matter would have been discussed.

91. Ultimately the claimant did not provide any coherent account to the Tribunal about how she had been forced to reduce her hours.

92. On 9 February 2021, the claimant's flexible working request was granted, with a corresponding reduction in salary for a 30 hour week. The arrangement was to be reviewed on 31 January 2022. The claimant signed that she understood the new arrangement on 31 January 2021.

93. Also on 9 February 2021, Ms Kerawala wrote to the claimant saying that further concerns about her conduct had arisen; it was alleged that she was failing to follow management instructions by using her mobile phone in the lab, not doing assigned tasks and failing to follow instructions. A further investigation meeting was arranged for 16 February 2021.

94. From 12 February until 5 April 2021, the claimant was on sickness absence due to stress. She advised on 13 February 2021 that she was not well enough to attend the further investigation meeting and asked for it to be postponed. Ms Kerawala wrote to the claimant on 15 February 2021, agreeing to the postponement of the disciplinary investigation meeting and suggesting an alternative approach of having the investigation in writing. She mentioned various resources offered by the respondent, such as the Employee Assistance Programme, and other support for mental health. The claimant subsequently said she was not able to attend an investigation meeting in any format and the respondent agreed to postpone the investigation. This investigation was never ultimately held.

95. On 25 February 2021, Ms Kerawala concluded her investigation report into the claimant's unworked time. She considered that information in staff communications that lateness of less than 30 minutes did not need to be reported formed some mitigation; however the fact that the claimant had not told the respondent on 13 occasions meant the respondent was unable to have the claimant make up the time. She considered that there was a case to answer for persistent failure to complete shifts and recommended disciplinary action.

96. On 3 March 2021, the claimant was invited to a Stage 1 long term absence meeting which was then postponed on occupational health advice. On 23

March 2021, there was an occupational health report which said amongst other things:

As you are aware, Ms Azima is currently absent from work suffering with stress, anxiety and depression as advised by her GP.

She reports feeling low, anxious and has been experiencing sleep disturbance.

She attributes her symptoms to work related factors. She alleges lack of management support in regards to a recent work incidence involving violence at work. She reports difficult relationships with certain colleagues. I understand there is ongoing formal investigations which she reports has been a source of worry and stress.

She is currently monitored by her GP and is receiving treatment to help manage her symptoms.

97. On 30 March 2021, it was agreed that the claimant would have a phased return on reduced hours and would not work with anyone who had given a statement about the 18 January 2021 incident until the investigation into that incident was complete. The claimant agreed she was now able to attend a grievance meeting. The claimant was subsequently invited to a grievance meeting which was rescheduled to 20 April 2021 at her request.

98. The claimant told the respondent around this time that her GP was facilitating talking therapy for her and that she was being assisted by antidepressants. The respondent put the disciplinary process on hold until the claimant was well.

99. On 20 April 2021, Mr Ellam chaired a meeting about the claimant's grievance about the Ms Boateng incident. The claimant said that she was unhappy with working with night staff and unhappy that she had to reduce her hours to avoid working with the individuals.

100. The claimant gave evidence that when she and her trade union representative turned up to the meeting at the time arranged and then entered the room, Mr Ellam shouted at them to get out.

101. Mr Ellam in evidence said that the claimant and her representative had walked in without being invited to do so: 'That does not happen'. He was not ready to start the meeting. He might have raised his voice. He was not sure exactly what he had said. The claimant and her representatives did not raise this matter at the hearing or afterwards. He denied an (unparticularised) allegation that he treated the claimant 'like a criminal'.

102. The Tribunal concluded that Mr Ellam was somewhat annoyed by the claimant and her representative entering the room without an invitation and that he may have come across as somewhat brusque. We did not conclude that he had shouted or that he had intended to come across as brusque.

103. The Tribunal could see nothing in the notes of the meeting which suggested that the claimant had been treated 'like a criminal' . Mr Ellam in the transcript

comes across as polite and helpful, offering to find statements and show the claimant and her representative CCTV footage.

104. On the subject of the CCTV footage we noted these exchanges from the transcript:

BW [the claimant's representative] When can we arrange to view CCTV?

SE [Mr Ellam] When do you want?

BW I'm not in next Monday and Tuesday, then there is a bank holiday, so after.

SE Do you still feel threatened?

PA [the claimant] Of course. She was going to attack me physically if Dela didn't stop her.

BW Has Tracy left?

SE Yes

BW But Dela still there on the same pattern?

SE Yes, I believe so

BW So if PA came back to the normal pattern she would be in contact with Dela?

SE Not necessarily. I'm still collecting information to find out.

PA I don't feel comfortable with any of them, they were ganging up against me. Therefore if there are statements, they could be against me that I started because they are sticking together.

SE I'll have a look at them with conjunction with CCTV. What outcome would you like to see?

…

Regarding CCTV, is there any way to expedite this?

BW The viewing? It's not going to be this week. Unfortunately next week Monday is my rest day.

SE Is there anyone else that can be with PA instead of you to view CCTV earlier? There doesn't have to be union representative in the viewing

BW Depending on what happens next, PA may want my support. We may be able to view it separately?

PA No, I want to be together.

AK How about watching it today?

BW I can't do it today. Tuesday 4th May would be the earliest.

SE OK, if this is the earliest you can do.

105. The claimant was invited to a disciplinary hearing on 27 April 2021, which was then delayed until 4 May 2021 at the claimant's request.

106. We heard some evidence about the extent to which Ms Kerawala and Mr Spratt discussed the disciplinary. Ms Kerawala said in cross examination that she did discuss the matter with Mr Spratt; she said that she told him that she had a report and gave him the background as to what the report was.

107. Mr Spratt did not remember any such conversation but accepted that Ms Kerawala may have spoken to him about the background if she remembered doing so. It seemed to us that the conversation had not been very extensive or memorable.

108. The disciplinary invitation to the claimant told her:

The outcome of the investigation is that the following allegations should be considered at a Disciplinary Hearing:

- *1. Persistent failure to complete full contractual shifts*
- *2. Breach of contract*

109. She was notified of her right to be accompanied by a trade union representative or colleague. As to possible outcomes, the letter said:

You should bear in mind that the decision made by me will be based only on the evidence (whether written or oral) that is presented at the Disciplinary Hearing. The outcome of the hearing could be to (i) take no further action (ii) make recommendations (iii) take formal action by issuing you with a formal sanction up to and including dismissal.

110. On 24 April 2021, the claimant raised a raised a further grievance against Ms Kerawala and others including Ms Patel. The complaints about Ms Patel were similar to those in the claimant's earlier grievance.

111. She said that:

Some of my colleagues who were in the same position and even worse with regards to time were told not to do it again. Night shift staff had a whole meeting where they were told to not do it again, but they're still trying to bring disciplinary action against me as well as the added allegations. I feel like the management only apply rules and policy where it suits them, this is a form of injustice and abuse of position. I feel in the ideal world everyone should be treated the same but unfortunately micro if far from equality and fairness when it comes to their staff, and this is the reason many of its staff are leaving the department. Poor management, abuse of power as well as bullying and harassment are the major problems within micro department. Being it injustice of equal opportunity for staff, training etc. I feel very disappointed that the department has failed to support and protect me and rather seems to be 'trawling' for reasons to bring a disciplinary action against me. This seems to have been presented to the respondent on about 29 April 2021. The claimant said that this was a protected act

112. On 4 May 2021,Ms Wallace advised that the claimant wished a conversation between herself and Ms Kerawala on 2 May 2021 to be considered as part of her ongoing grievance. Ms Kerawala was said to have approached the

claimant to speak about her sickness absence in a public area with other staff present, despite the claimant requesting her to desist:

You chose to ignore my request and continued to share personal information openly, i.e., talk about my LTS review and the outcome of the royal free occupational health report and their recommended hours. How many weeks I had been on phase return, and that I should feel better by now and therefore should increase the hours.

113. This was said to be a protected act and a public interest disclosure.

114. Also on 4 May 2021**,** Mr Spratt chaired a disciplinary hearing. The claimant attended with Ms Wallace. Ms Kerawala also attended. Mr Spratt asked the claimant why she was late/left early 18 times.

115. At the Tribunal hearing, the claimant suggested that the data was incorrect and only a few of the occasions of time being missed by her recorded by the respondent were correct. However there was no clear or consistent challenge to the data and we noted that she had not suggested that there were fewer than *ten* occasions in the internal proceedings (that being her position at the appeal hearing); at the disciplinary hearing when confronted with the data, she suggested that on 13 occasions she had left early due to emergencies.

116. In the absence of any credible challenge to the data produced by the respondent, we did not accept the claimant's evidence that the data was incorrect.

117. We noted that at the disciplinary hearing the claimant did not explain what the emergencies were and nor did she accept responsibility for the situation.

118. We note that 4 May 2021 was also the date when the claimant was to view the CCTV footage. It did not appear that she pursed the opportunity. We could see no evidence that the respondent was resistant to her viewing the footage.

119. On 7 May 2021, the claimant was dismissed summarily for failing to complete her full contractual shifts, which was said to be in breach of her contract of employment.

During the course of the hearing I considered details put forward by you and the investigating manager concerning the allegations outlined above. The management case presented evidence showing that you had been repeatedly late for your contractual shift or left early on a number of occasions throughout the period 6th September to 10th November. You responded to these findings by stating that you had frequently left your shift early owing to a need to attend to emergencies concerning your brother as well as other urgent matters, the nature of which you were not willing to divulge.

Upon reviewing the evidence both prior to and during the hearing I am of the opinion that there was a clear and consistent pattern of late attendance and, more frequently, early departure from your contractual shifts. The pattern of early departure in particular was evident throughout September, where you

had failed to adhere to your contractual hours on all bar two occasions, and it continued sporadically in October 2020.

This consistent failure to adhere to contractual hours continued despite repeated informal communications from management stressing your contractual requirement to do so. Emails from management were sent to you on 26th August, 20th September, 23rd September and again on 1st October, you were also contacted by phone and text throughout this period. In the emails it is repeatedly stipulated that you abide by your contractual hours, it is also stated that if you are required to leave early you should let colleagues know if there is no senior available. In one email response from yourself dated 26th September you state that you will make sure 'this doesn't happen again' only to then leave early again on 4,5, and 6 October – three days after receiving a further email from management, again setting out your contractual requirements.

…

In addition to you not abiding to contractual requirements or adhering to managerial warnings I consider you to have been unremorseful with regards these actions and this lack of remorse was also apparent throughout the duration of the hearing.

I do not consider the mitigating circumstance put forward at the investigation meeting regarding an internal communication issued in November 2020 to be of any relevance in justifying your repeated early departures. The mitigating circumstance raised at the hearing that you are required to care for your brother and this may lead to occasions where you need to leave early bears some credence. However, even if required to leave early for this purpose you still failed to inform colleagues or BMS staff of your early departure, despite being instructed to do so. You also stated at the hearing that there were other reasons for you having to leave early but did not wish to divulge information as to what they were.

120. On 13 May 2021, the claimant appealed the dismissal decision.

121. Mr Ellam also wrote to the claimant about her grievance saying he hoped to have an outcome by the end of the following week

122. In fact the outcome was provided on 2 June 2021. Mr Ellam said that:

I have received statements from 5 individuals who were present on that shift, and 3 of them stated that you had been shouting and aggressive towards TB initially, 1 stated that you were both aggressive and 1 stated that TB had been aggressive.

On viewing CCTV footage (no audio available), it could be seen that you had gone to TB at Kiestra Track 1, there was an altercation, and it could be seen that DA and Olayinka Olutoye (Yinka) intervened as supported by your statement and the 5 statements.

123. He partially upheld the claimant's grievance. He did not find that there was threatening behaviour by Ms Boateng or Ms Adjaklo but he did find there was unprofessional behaviour by both.

124. Also on 2 June 2021, there was an appeal hearing in front of Mr M Giibbins, HR director, and Mr O Joseph. The claimant said at the hearing that she had left early on ten occasions and had spoken to managers on ten occasions about making up the time. She said that there were others whose attendance was worse than hers but was unable to provide any names,

125. On 25 June 2021, Ms L Manze, group laboratory operations manager, sent the claimant an outcome to her earlier grievances about the following matters:

1. Mahrukh Kerawala

2. Treatment and training on Level 4

3. Level three incident

4. Discussion regarding your phased return in the laboratory.

126. Ms Manze upheld the grievance about Ms Kerawala discussing the claimant's phased return in a public area when there were confidential locations available but did not uphold the claimant's other complaints.

127. The period of ACAS conciliation was 28 July 2021 to 8 September 2021 and the claim form was presented on 8 October 2021.

128. Ms Mohammed, who is of Somalian background, gave evidence about what she described as a 'toxic' culture in the respondent organisation and made various allegations about her own treatment. We did not make findings on those issues, which were not relevant to the issues in front of us. Ms Mohammed had little direct evidence to give about the issues we did have to decide. Ms Mohammed resigned whilst facing a disciplinary about attendance.

Law

Unfair dismissal

129. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

130. Under s 98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

131. Tribunals must consider the reasonableness of the dismissal in accordance with s 98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?
(2) did the Respondent hold that belief on reasonable grounds?
(3) did the Respondent carry out a proper and adequate investigation?

132. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

133. We have reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

134. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA).

135. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

136. Whether it is fair in a particular case for an investigator to be the dismissal decision-taker is a matter for a tribunal to determine taking into account all the relevant circumstances: Premier International Foods Ltd v Dolan and anor EAT 0641/04.

Protected disclosures

137. Section 43B(1) ERA 1996 defines a qualifying disclosure as a disclosure of information which in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one of a number of types of wrongdoing. These include '(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject' and '(d) that the health and safety of any individual has been, is being or is likely to be endangered.'

138. To be a protected disclosure, a qualifying disclosure must be in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

139. Guidelines as to the approach that employment tribunals should take in whistleblowing detriment cases were set out by the EAT in Blackbay Ventures (trading as Chemistree) v Gahir (UKEAT/0449/12/JOJ):

139.1 each disclosure should be identified by reference to date and content

139.2 the basis upon which the disclosure is said to be protected and qualifying should be addressed

139.3 if a breach of a legal obligation is asserted:

each alleged failure or likely failure to comply with that obligation should be separately identified; and

the source of each obligation should be identified and capable of verification by reference for example to statute or regulation

139.4 the detriment and the date of the act or deliberate failure to act resulting in that detriment relied upon by the claimant should be identified

139.5 it should then be determined whether or not the claimant reasonably believed that the disclosure tended to show the alleged wrongdoing and, if the disclosure was made on or after 25 June 2013, the claimant reasonably believed that it was made in the public interest.

140. There is a number of authorities on what a disclosure of 'information' is. It must be something more than an allegation; some facts must be conveyed: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. There is no rigid dichotomy between allegations and facts. A statement must have sufficient factual content and specificity such as is capable of showing one of the matters listed at s 43B(1): Kilraine v Wandsworth LBC [2018] ICR 1850.

141. There is little authority on the issue of what 'likely' means in the various limbs under s 43B(1). In Kraus v Penna plc [2004] IRLR 260, the EAT interpreted 'likely' as meaning 'probable or more probable than not' and said that there

must be more than a possibility or risk that an employer might fail to comply with the relevant legal obligation. We note that more recent authorities on the meaning of the word 'likely' in other employment law contexts such as in the context of the definition of disability under the Equality Act 2010 have adopted a lower test for likelihood; in respect of the definition of disability, 'likely' means 'could well happen' but accept that for these purposes we must apply the guidance in Kraus v Penna.

142. The burden of proof is on the worker to show that he or she held the requisite reasonable belief. The tribunal must look at whether the claimant subjectively held the belief in question and objectively at whether that belief could reasonably be held. The allegation need not be true: Babula v Waltham Forest College [2007] IRLR.

143. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: Darnton v University of Surrey [2003] IRLR 133.

144. Factors relevant to the issue of whether a worker reasonably believed that a disclosure was in the public interest include:

144.1 the number in the group whose interests the disclosure served (the larger the number, the more likely the disclosure is to be in the public interest)

144.2 the nature of the interests affected (the more important they are, the more likely the disclosure is to be in the public interest)

144.3 the extent to which those interests are affected by the wrongdoing disclosed (the more serious the effect, the more likely the disclosure is to be in the public interest)

144.4 the nature of the wrongdoing disclosed (the disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing)

144.5 the identity of the alleged wrongdoer (the larger and more prominent the alleged wrongdoer, the more likely the disclosure is to be in the public interest)

(1) Chesterton Global (2) Verman v Nurmohamed [2017] IRLR 837.

145. A worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his or her employer done on the ground that the worker has made a protected disclosure under s 47B ERA 1996.

Causation of detriment / burden of proof

146. Where the employee complains of detriment under various provisions of the ERA 1996, including and s 47B, the tribunal will consider the complaint under

s 48. S 48(2) provides that it is for the employer to show the ground on which any act or deliberate failure to act was done.

147. The worker must show:

147.1 that he or she made a protected disclosure and

147.2 that he or she suffered less favourable treatment amounting to a detriment caused by an act, or deliberate failure to act, of the employer

147.3 a prima facie case that the disclosure was the cause of the act or deliberate failure to act which led to the detriment.

(International Petroleum Ltd v Osipov & others 2017 WL 03049094, EAT and Serco Ltd v Dahou 2017 1RLR 81, CA)

148. Once the worker has done that, the employer must show:

148.1 the ground on which the act, or deliberate failure to act, which caused the detriment was done

148.2 that the protected disclosure played no more than a trivial part in the application of the detriment (Fecitt v NHS Manchester [2012] ICR 372, CA).

Harassment

149. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

150. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.

151. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or

perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

152. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Victimisation

153. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.

154. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act. It is not necessary that the allegation refers to the Equality Act but the facts asserted must be capable of being a breach of the Equality Act. This is a fact sensitive question and the context in which the complaint is made is likely to be relevant: Fullah v Medical Research Council and anor EAT 0586/12.

155. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.

156. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.

157. A claim for victimisation will fail where there are no clear circumstances from which knowledge of the protected act on the part of the alleged discriminator can properly be inferred: Essex County Council v Jarrett EAT 0045/15.

Direct race discrimination

158. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an ‘effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

159. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: “(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. “

160. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful

discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

161. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: ‘The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.’ The ‘something more’ need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act

has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

162. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

163. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

164. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16,* Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

165. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

166. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Automatic unfair dismissal

167. In a case where a claimant says that the dismissal is automatically unfair, the Court of Appeal gave guidance on the approach to be taken in Kuzel v Roche Products [2008] ICR 709, per Mummery LJ:

the unfair dismissal provisions, including the protected disclosure provisions, presuppose that, in order to establish unfair dismissal, it is necessary for the tribunal to identify only one reason or one principal reason for the dismissal.

… the reason or principal reason for a dismissal is a question of fact for the tribunal. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

…the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employers knowledge.

…There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant….

I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures.

This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58 Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59 The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

Unlawful deductions from wages

168. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.

169. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

Holiday pay

170. Under regulation 13 of the WTR 1998, a worker is entitled to four weeks' annual leave in any leave year and under regulation 13A, a worker is entitled to a further 1.6 weeks' of annual leave.

171. Under regulation 14, where a worker's employment is terminated during the course of his leave year and 'the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu…' calculated in accordance with the formula set out in regulation 14(3).

By regulation 16, a worker is entitled to be paid for any period of annual leave he or she is entitled to at the rate of a week's pay in respect of each week's leave.

Conclusions

Ordinary unfair dismissal

172. We considered the three stage Burchell test.

Reasonable investigation

173. Much about the investigation seemed to us to be reasonable. There was a significant quantity of data obtained about the claimant's lateness and leaving early. The occasions were investigated with her and she had the opportunity to make representations about her attendance and give such explanations as she was able to.

174. We were not critical of the respondent for not investigating similar behaviour of other employees in circumstances where the claimant did not name anyone.

175. The claimant was critical of the fact that the respondent did not obtain data for a later period, in particular for December 2021. The claimant had said that she had not had any lateness or occasions when she left early since 10 November 2021, a period of over a month. We might not have been concerned about December 2021 had it not been for the nature of the evidence that the respondent did have. By the time of the investigation hearing, the sequence of events was that the evidence showed one infraction by the claimant after the letter of concern on 29 October 2021. The

respondent had obtained data up to 10 November 2021. There were three infractions in total in October 2021 on 4, 5 and 6 October 2021.

176. The respondent relied on the email traffic in August 2021, late September and early October as constituting warnings but the evidence showed that there was improvement after those warnings. The significant warning was the letter of concern. That letter was a clear warning to the claimant that she needed to improve her attendance or she would face serious consequences. It seemed to us that it was not within the band of reasonable responses for the respondent not to look at a longer period since the letter of concern, particularly in circumstances where the evidence the respondent did have showed a pattern of improvement.

Reasonable grounds

177. The respondent had reasonable grounds to conclude that the claimant was guilty of some misconduct. There was good evidence that the claimant had arrived late and left early on numerous occasions over a particular period and she had not provided a satisfactory explanation, substantial mitigation or shown any real contrition. The claimant did not provide any convincing evidence that she was telling seniors that she was leaving or that she was making up the time.

178. What we considered the respondent did not have reasonable grounds to conclude was that the claimant was unlikely to rectify the situation, given what we have said about the investigation above. Mr Spratt concluded that the claimant had been given numerous opportunities to improve over the period investigated but had failed to do so. That was a problematic finding in circumstances where there was no analysis of the period after the only substantial warning was given.

Procedural issues

179. A procedural issue raised by the claimant was the lack of formal warnings. The respondent relied on the informal warnings which the claimant had been given as described in the findings of fact. We concluded that the informal warnings and the letter of concern could have formed the framework of a fair procedure had the respondent not disregarded the improvement after the warnings and further not looked at the subsequent period where the claimant said she had sustained the improvement.

180. We considered whether Mr Spratt's role in the audit was itself a cause of unfairness, given that the Acas Code states at paragraph 6 that 'where practicable, different people should carry out the investigation and disciplinary hearing' and recognising that this division of functions is an important safeguard for impartiality.

181. We concluded however that we had insufficient material to suggest that Mr Spratt had done more than extract the data from the system and pass it on to the other managers. It was not put to Mr Spratt that he had been excessively involved in the investigation; so whilst this could have been a significant concern, we did not find it was a further aspect in which the dismissal was unfair.

182. We also did not conclude on the evidence we had that there had been some sort of inappropriate discussion between Mr Spratt and Mrs Kerawala about the case which would have had an impact on fairness.

183. Was it unfair that Mr Spratt's answers to questions were not provided to the claimant before a decision was made on the appeal? We concluded that was procedurally unfair in circumstances where Mr Spratt made reference in those answers to rejecting as mitigation the claimant's evidence about the general communication to staff about how absence should be reported. That was not something he had mentioned in his dismissal letter so the claimant could not have been aware of it. She was also unable to address it on appeal because she was not shown this further material.

184. It was said on the claimant's behalf that it was unfair that Mr Spratt was not present at the appeal to be questioned. We did not consider that it is invariably necessary for the original decision maker to be present at the appeal, provided any follow up investigation with the decision maker is fairly handled. Here the problem was that Mr Spratt's answers to questions were not shared with the claimant.

Reasonable to dismiss in the circumstances

185. We considered the issue of whether there was evidence that other employees had been treated more leniently in similar circumstances which might have amounted to evidence that:

- the claimant had been led to believe that offences of this sort would not lead to dismissal;
- that the attendance issues were not the real reason for dismissal;
- that dismissal was not within the bands of reasonable response.

186. The reality was that there was one other employee who would have been relevant for us to consider: the individual who was picked up by the audit and did not resign before being disciplined. That individual was not dismissed. We were not provided with any documentation or detail about that employee. It was said on the claimant's behalf that the respondent had decided to repress that material and that in those circumstances, we should draw an inference that the material showed the claimant had been treated inequitably.

187. We considered that submission carefully. However, we noted that, in relation to the parallel allegations made as allegations of race discrimination, the claimant had been given opportunities to identify comparators and had not done so until very late in the day. The issues were not entirely clear and we did not conclude that the respondent should or must have anticipated the need to call evidence of this individual. When that individual was identified during the course of the proceedings and during the 'heat of battle' once the hearing had started, it would have been an option for the respondent to seek to produce some further evidence. However, we were unable to conclude that the fact that the respondent did not do so in circumstances where the claimant did not make an application for the material was likely to reveal anything about the particulars of that employee's circumstances. We did not infer that the material must show that the claimant was treated more harshly in truly parallel circumstances and there was therefore no evidence of lack of parity of treatment.

188. However, we concluded that it was not within the band of reasonable responses to dismiss in circumstances where, although there had clearly been a very bad period in relation to attendance, there had been significant improvement after the 'warnings'

Issue: If the claimant is found to have been unfairly dismissed, did the claimant's conduct contribute to her dismissal? If so, should there be a Polkey reduction to reflect her contributory conduct?

189. As expressed in the list of issues, this was an elision of two issues the Tribunal had to decide:

- Whether the claimant culpably contributed to her dismissal;
- Whether there should be a Polkey reduction on the basis that the claimant would have been fairly dismissed had a fair procedure been followed.

190. So far as the first issue was concerned, we considered that the claimant had culpably contributed to her dismissal. There was over a short period a large

number of occasions when she attended late or left early with no clear or coherent explanation provided either to the respondent or ultimately to the Tribunal. She did not elaborate on the 'emergencies' she said she had encountered. She did not accept responsibility or show contrition.

191. We have found that the respondent failed to acknowledge or properly assess the claimant's improvement after the informal warnings, which should themselves properly have been clearer as to the consequences of a lack of improvement. Looking at the level of fault on either side and trying to assess the extent to which that fault contributed to the dismissal, it seemed to us that it was evenly balanced and that the appropriate level of reduction to the compensatory award for contributory fault by the claimant was 50%.

192. In relation to Polkey, it seemed to us that we had to assess what would have happened had the claimant been placed on a clear improvement plan / system of warnings with reasonable review periods. Would or might the claimant have been dismissed fairly for her attendance had such a process been followed? Would she have been dismissed for some other reason, such as ill health absence?

193. Ultimately we did not feel we had had sufficient submissions from the parties directed to the Polkey issue and decided that it would be appropriate to invite additional submissions to be made at the remedy hearing, with the parties having had the benefit of our findings on the merits.

Issue: If the Claimant is found to have been unfairly dismissed, is the Claimant entitled to an uplift for Respondent's failure to follow the ACAS Code of Practice?

194. The matters the claimant identified as breaches of the Acas Code were set out as protected disclosure detriments and they are discussed below. We did not find there were any breaches of the Acas Code so we did not uphold the claim for an uplift.

Harassment related to race – s.26 Equality Act 2010

Issue:

Did the Respondent engage in unwanted conduct related to the Claimant's race which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile or humiliating environment for the Claimant? The Claimant identifies as Persian.

The conduct relied upon by the Claimant is:

Pragna Patel, Mahrukh Kerwala and Alan Spratt allegedly denying the Claimant training/opportunities to progress in January 2019 meaning that she was not trained and rotated on other benches/machines beyond processing faeces and urine and

MRSA between January 2019 and December 2020. The Claimant's colleagues who were of white or Indian backgrounds were allegedly provided with opportunities to progress

195. The evidence we had about the general practice at the respondent was lacking in detail. Similarly the evidence from both parties about the claimant's own experience was imprecise and incomplete. There were no records of training or of where the claimant worked placed in front of us. The respondent did not appear to have analysed any data it had about how long it took to train and rotate employees. It was difficult to form any conclusions.

196. However, ultimately we were not able to conclude that there was any real evidence to suggest that the claimant's allocation to benches was not based on considerations of where the work was required and what competences she had gained or that some delay in her being rotated was not caused by sickness absence and the speed at which she gained competence.

197. We did not have any good evidence that there was a proscribed motive on the part of any of the individuals. Was there a proscribed effect? We accepted that the claimant felt frustrated about what she perceived to be a lack of progress and that she understandably disliked some of the work she had to do on enterics and urine. Those were tasks which went with the territory of working in a microbiology lab. It seemed to us that a reasonable employee would have felt that the treatment had the proscribed effect only if there were evidence that the treatment was unfair or that there was an improper motivation by the managers. We were not satisfied that we had been provided with any such evidence.

198. So far as a relationship with race was concerned, we noted the respondent's submission that the claimant had not suggested there was a connection with her race in the two internal grievances she had brought about the issue. In any event, we could discern no evidence from which we could properly conclude that the claimant was treated differently from how employees of other races were treated. We had only an assertion from the claimant and her witness that that was the case.

199. We did not uphold this claim.

Issue: Marukh Kerawala, after the Claimant raised the issues noted in point 0, allegedly suggesting to the Claimant to reduce her hours in February 2021 and would not have said this to white colleagues. The Claimant allegedly felt humiliated.

200. Ms Kerawala was involved in the short term change to the hours of both the claimant and Ms Boateng on 24 and 25 Janaury 2021. That resulted in no

loss of pay, seems to have been a sensible response to the immediate problem and was not objected to by the claimant.

201. What the claimant was complaining about to the Tribunal was the longer term effect on her pay from the reduced hours she was doing as a result of the flexible working request she then made.

202. There was no evidence before the Tribunal that Ms Kerawala played any role in that matter.

203. Even if there had been, we could not see how it could be said to have had the proscribed effect in circumstances where the documentary evidence showed the claimant applying for the change in circumstances where the documents spelled out to her what the effect would be. There was no evidence at all in front of us that the claimant had been 'forced' by either Ms Kerawala or Mr Spratt to make the flexible working request or even encouraged to do so.

204. There was no evidence from which we could properly conclude that the claimant's race played any role. We considered carefully in relation to this and the other race complaints the evidence we heard from Ms Mohamed. Ultimately that evidence did not seem to us to assist; she gave evidence that she felt she and the claimant were not well-treated. She suggested that some other (white and Indian) employees got away with lateness and benefitted from other more favourable treatment whilst she and the claimant did not but there were no clear examples of white or Indian employees and the treatment they allegedly received. Ultimately we had allegations with no underpinning.

205. We did not uphold this claim.

Issue: Whistleblowing Detriment – section 47B(1) Employment Rights Act 1996

Did the Claimant make the following disclosures?

The Claimant relies on the act of raising grievances on 25 January 2021, 4 May 2021 and 21 February 2019.

In each case, was it a disclosure of information to the Respondent which, in the Claimant's reasonable belief, was made in the public interest and tended to show information which fell under any of the limbs set out in section 43B(1) Employment Rights Act 1996?

21 February 2019 grievance

206. So far as the February 2019 grievance was concerned, we were satisfied that there was information disclosed.

207. The claimant's case in evidence was that the information disclosed tended to show all of the types of wrongdoing in section 43B(1) Employment Rights Act 1996. We could discern nothing in that information which could reasonably be thought to point to any of the following types of wrongdoing: a criminal offence, a miscarriage of justice or harm to the environment.

208. The claimant said that the grievance was about being treated differently, harassed, shouted at whilst in a break and about health and safety. As to the health and safety element, she said that both the harassment and the fact that she said she was having to deal with faecal matter without a proper induction were matters which tended to show a risk to her own health and safety.

209. So far as the public interest was concerned, the claimant said that the public would have an interest in whether she was being harassed and not properly inducted as, if these things happened to one person, they would happen to others.

210. Looking at the incident with Ms Patel, we noted that the claimant did not raise a complaint about it until after the disciplinary investigation was commenced. We were not satisfied that the claimant reasonably and genuinely believed she was being harassed by Ms Patel or that the information she provided in this respect tended to show that there was breach of a legal obligation in the form of a breach of the claimant's contract or some aspect of employment law or that there was a risk to her health and safety.

211. It was apparent that Mr Spratt's investigations of the grievance found proof that the claimant had had the relevant induction. Again, she had not complained about the adequacy of her training or any risk to her health and safety until the incident with Ms Patel and the disciplinary investigation. In those circumstances, we were not satisfied that she reasonably and genuinely believed that the information tended to show a risk to her health and safety.

212. Furthermore, in the absence of any information in the grievance which tended to show that anyone else was affected or likely to be affected – for example other employees in the lab or the patients whose samples were being processed, we could not see any basis for concluding that the claimant had a reasonable belief that her disclosure was in the public interest.

213. We did not conclude that this amounted to a protected disclosure.

25 January 2021 grievance

214. Again, there was clearly information disclosed in this grievance.

215. The claimant said that this information tended to show all categories of wrongdoing. Again there was nothing to point to danger to the environment or a miscarriage of justice.

216. The claimant said that the information tended to show a criminal offence had been committed in the form of an assault by Ms Boateng on the claimant. We were not provided with any guidance on the criminal law by claimant's counsel but are broadly aware that threatening behaviour can be a criminal offence. Similarly it could show a risk to her health and safety.

217. We note however that the claimant did not herself raise the incident until a week later, having become aware that Ms Boateng had complained. The evidence of other witnesses supported Mr Ellam's conclusion that there had been similarly unprofessional behaviour by both parties to the dispute. In those circumstances and absent an explanation for that delay, we concluded that the claimant had not reasonably believed there was a criminal offence. We considered that she could (just) have reasonably believed there was a risk to her health and safety.

218. However, we did not conclude that she had a reasonable belief in the public interest. This was a workplace altercation between two individuals. It was not of importance to any wider group of people. Whilst health and safety at work is an important interest, the level of threat, given the circumstances, was slight.

219. We did not conclude that this amounted to a protected disclosure.

4 May 2021 grievance

220. This was the claimant's grievance about Ms Kerawala asking the claimant in a public area about her phased return and her occupational health report.

221. Ms Kerawala was not challenged on her evidence that there was in fact no one nearby and that she had spoken quietly.

222. The claimant said that there was a breach of a legal obligation under the GDPR, although counsel for the claimant gave us no specifics.

223. Even if we assumed that the facts described could reasonably be thought to be a breach of some provision of the GDPR, we were not able to conclude

that the claimant reasonably believed her disclosure was in the public interest. Whilst rights of privacy in relation to sensitive information are important rights, we did not conclude that a relatively minor infringement of those rights in relation to one individual in this workplace could be said to be a matter of public interest.

224. We therefore concluded that there were no protected disclosures.

225. We nonetheless went on to give some consideration to the alleged detriments in the alternative, bearing in mind that it is not really possible to assess causation accurately on the basis of a hypothetical protected disclosure.

Issue: If so, did the Respondent subject the Claimant to a detriment? If so, was the Claimant subjected to the alleged detriments because she did the alleged protected acts?

The Claimant relies on the following alleged detriments:

The reduction of the Claimant's hours indefinitely in February 2021 by Alan Spratt/HR/Mahrukh Kerwala;

226. The claimant's hours were not indefinitely reduced. We have found as a matter of fact that there was no evidence of pressure on the claimant to do what she did, which was to apply for this reduction in hours.

227. We would not have found that this was a detriment. We did not find any activity by Mr Spratt or Ms Kerawala which could have been influenced by the claimant's disclosures.

Issue: The Claimant's grievances of January and April 2021 not being investigated properly per the Respondent's policy by Mahrukh Kerawala/Alan Spratt/the Respondent's HR team and Stephen Ellam.

228. The claimant explained that 'not being investigated properly' and in accordance with the respondent's policy comprised the following:

- Delay in investigating the grievances;
- Being shouted at by Mr Ellam;
- The outcomes being predetermined;
- Not being provided with the CCTV footage of the altercation with Ms Boateng.

229. We heard little in evidence or submissions about the investigation of the April 2021 grievances and have focussed, as the claimant did, on the Janaury 2021 grievance.

230. Looking at the delay issue: there was delay because of the claimant's ill health from 12 February 2021. On 30 March 2021 she said she was able to attend a meeting. There was some minor further delay setting the meeting up and then a week's delay to accommodate the claimant's trade union representative before the meeting was held on 20 April 2021. Mr Ellam produced his report on 2 June 2021, having conducted further investigations.

231. We did not conclude that the delay in that grievance investigation could properly be considered to be a detriment given the role played by the claimant's ill health.

232. The investigation carried out by Ms Manze into the claimant's other grievances did not appear to have been significantly delayed and we could see no detriment.

233. We accepted that Mr Ellam may have come across as brusque and that he raised his voice at the outset of the grievance meeting because the claimant and her representative had walked in without being invited to do so. The issue was not brought up by the claimant or her representative at the time, Whilst we are mindful that any employee coming to a grievance meeting would be likely to feel sensitive to tone, given that the rest of the meeting was conducted courteously and, given what we considered to be the claimant's exaggeration about the incident itself, we were not persuaded that the claimant had a justified sense of grievance about this matter.

234. As to the CCTV footage, it was clear to us that Mr Ellam had tried to provide the claimant and her representative with an opportunity to view it. He could not simply provide it to them for GDPR reasons. An arrangement was made for the claimant and her representative to view the CCTV footage but they appear to have failed to turn up or to pursue the appointment.

235. As to whether the grievance was predetermined: Mr Ellam partially upheld it. He found that there was unprofessional behaviour on both sides, a finding which seemed to us to be unremarkable and consistent with the evidence which was in front of him. There was no predetermination so no detriment.

236. We did not have our attention drawn to anything in Ms Manze's findings which was said to have been predetermined.

237. Mr Ellam was not involved with the 2019 grievance. His evidence was that he was aware that the claimant had brought a grievance against Ms Patel but he did not know its content. We could see nothing on the evidence we had

which caused us to infer that these matters complained of as detriment were connected with the disclosures, although this is a somewhat artificial exercise since, for example, if we had found the grievances had been predetermined, that might have been evidence in itself which pointed to a role having been played by disclosures,

Issue: The Claimant being subjected to additional allegations by Mahrukh Kerawala in February 2021 and in a meeting held in March 2021 for work related stress;

238. Some further disciplinary concerns arose after Ms Kerawala started investigating the issue of the claimant's attendance. She proposed to add these to the existing investigation. There was nothing unreasonable about that. The claimant was subsequently off sick with work-related stress and said she was unable to attend a meeting to investigate these issues. Ms Kerawala initially suggested sending her written questions and then ultimately did not pursue the matter after the claimant indicated she could not deal with it in any way.

239. Even had we concluded that there was any detriment to the claimant in this course of events, we could see no evidence which suggested a causative link with the disclosures

The Claimant being emailed and contacted by Alan Spratt on her rest days on several occasions and/or by Mahrukh Kerwala in January and February 2021 whilst off sick from the Respondent;

240 We were provided with no evidence of Mr Spatt contacting the claimant on rest days and none was put to him in cross examination. In Ms Kerawala's case, the only matter relied on was the correspondence about the additional allegations. We have already discussed that correspondence above.

Issue: The Claimant complaining that other staff were being awarded bonus payments and promotions and that she was being treated differently by department managers and seniors ie (Mahrukh Kerwalla/Alan Spratt/Pragna Patel) in relation to not receiving Christmas bonuses/appraisals/training opportunities throughout her employment.

241. So far as bonuses were concerned, the clear evidence we had was that the claimant was not entitled to a bonus, unlike staff who had transferred from the Doctor's Laboratory. Being provided with benefits in line with your terms and conditions is not of itself a detriment.

242. So far as appraisals were concerned, we did consider that the failure to provide appraisals could reasonably be regarded as a detriment. An appraisal provides an employee with feedback on performance and the opportunity to reflect on this and to discuss training needs and opportunities for promotion.

243. We had no evidence that the claimant was not provided with training opportunities which should have been available.

244. We were concerned about the respondent's apparently poor and chaotic processes in relation to appraisals but there was nothing in the evidence which pointed to any causative relationship with the disclosures.

Issue: The Respondent failing to follow the ACAS process, specifically by:

Failing to follow grievance procedures;

NB: there followed a series of matters in the list of issues under this heading which we consider below but which seemed to us to be incorrectly described as failures to follow 'the ACAS process', which we understood to be a reference to the Acas Code of Practice on Disciplinary and Grievance Procedures.

245. No alleged failures in relation to the grievances beyond those already discussed above were put to witnesses. We saw no failure to follow the Acas Code.

Not paying the Claimant Statutory Sick Pay between 17 August 2020 to 30 November 2020;

246. These dates were incorrect. There was only one day of sickness absence in that period. It appeared that the claimant had intended to rely on the dates in 2019 when she was off sick following her car accident but there was no application to amend and we were unable to consider this matter further.

Issue: Failing to follow provide requested information prior to meetings on April 2021 and 21.5.21;

247. This was said to relate to the CCTV (which we have already discussed) and the witness statements of the witnesses to the Ms Boateng altercation. All that was put to Mr Ellam in evidence in relation to the latter matter was that he had not provided a witness statement for a witness called Scott. He said that he assumed that was the anonymous witness statement which he had received as he had no witness statement from someone called Scott. There was a discussion about this at the grievance hearing and he told the claimant she could have copies of all the statements including that of Scott.

248. It was not clear to us what happened after that and whether the statements were provided. The matter was only lightly explored in evidence. There was no sign of the claimant or her representative chasing for any statement which was not provided.

249. We concluded that if there was any failure to provide statements, there was no evidence to suggest that the failure was anything other than an oversight.

Issue: Failing to be told to bring a friend to a meeting on April 2021and 21 May 2021

250. It appeared from the evidence that the claimant was told she could bring a work colleague or trade union representative to every relevant grievance or disciplinary meeting.

Issue: Failing to pay enhancements when requested in timely manner, from January - June 2021;

251. We saw some correspondence in the bundle which showed that the claimant had submitted, after her dismissal, a tranche of claims for enhancements. Ms Kerawala raised questions about some of the claims including claims for days when the claimant was on annual leave. Some of the claimant's claims had been submitted months after the relevant shifts. Any delay seems to have occurred because of the delay in submission and reasonable queries about entitlement. We did not conclude that there was a detriment and we could see no evidence to connect Ms Kerawala's handling of the matter with any disclosures.

Issue: Treating the Claimant differently in relation to timekeeping in May 2021 by being investigated and subjected to a disciplinary hearing whereas other were not getting the same treatment and put closed eyes on, compared with Gemma who released incorrect results in April 2021.

252. We never heard anything in evidence about 'Gemma'. Three individuals were named on the second day of the hearing, of whom only Safiyo could be identified by the respondent. Safiyo was the individual who was subject to a disciplinary investigation and resigned before the process could run its course.

253. The other individual caught by the audit was of course also disciplined but received a lesser sanction.

254. The claimant and Ms Mohamed made vague allegations that other people were attending late and leaving early but the absence of names meant it was impossible for the respondent to respond and the evidence was simply too vague for us to reach conclusions on.

255. We could see no evidence which would lead us to conclude that the claimant was disciplined because of her disclosures and ample evidence that, over a period at least, she was regularly failing to work her full contractual hours and that it was this which caused her to be disciplined.

Issue: Failure to pay the Claimant's wages on time in May 2021;

256. In cross examination, the claimant accepted that she had received her salary on the usual date; her complaint was that the amount was reduced because of her reduction in hours.

257. The claimant's pay was reduced because she reduced her hours in line with a flexible working request she made and which we could find no evidence she was pressured into making,

258. In the circumstances, we could see no evidence to connect the reduction in pay to any disclosure.

Issue: Failure to pay the Claimant's notice and holiday pay

259. The claimant received no notice pay because the respondent concluded that she should be summarily dismissed due to gross misconduct. We have found that the claimant's dismissal was unfair but not that her dismissal was because she made a protected disclosure (see our findings below). We not only did not conclude that any disclosure was the sole or principal reason for dismissal but we also would not have concluded that there was any evidence that any disclosure played a material role in the claimant's dismissal.

260. As to her holiday pay, the claimant identified only the changes to her annual leave entitlement consequent on her change of hours. The reason for the change was the change of hours, not any disclosure she made.

Issue: Not upholding the Claimant's appeal against her dismissal;

261. We could identify no feature of the appeal which would have led us to conclude that the rejection of the appeal was materially caused by the disclosures.

Issue: In April 2021 during a grievance meeting with Steven Ellam, denying the Claimant witness evidence and CCTV footage.

262. This is repetitive and we have considered it above.

Victimisation – section 27 Equality Act 2010

The alleged protected act relied upon by the Claimant is her grievance complaints of 29 April 2021, 4 May 2021 and 21 February 2019.

Issue: Is the act relied upon by the Claimant a protected act within the meaning of section 27(2) Equality Act 2010?

263. The grievances contained no references to race or anything that might be a proxy for race or to any other protected characteristic. The word 'discrimination' was not used. The words 'bullying' and 'harassment' were used but do not of themselves indicate that a person is making an allegation of poor treatment because of a protected characteristic.

264. There was nothing to which our attention was drawn in the context of the grievances that would have alerted a reader to there being any allegation being made by reference to the Equality Act 2010.

265. We therefore concluded there were no protected acts and no victimisation. We nonetheless went on to consider the alleged detriments briefly.

Issue: If so, did the Respondent subject the Claimant to a detriment by doing any of the following alleged acts:

If so, was any detriment done because the Claimant did, or the Respondent believed that she did or would do, the alleged protected act?

In April 2021 during a grievance meeting with Steven Ellam, not being provided with CCTV footage or witness statements (e.g. that of Scott Churcher) to review despite requesting it, being 'treated like a criminal rather than a victim', and being shouted at and told to get out of that meeting.

266. Our conclusions would not have differed from those we reached above in respect of the protected disclosure detriment claim.

Issue: Mahrukh Kerawala sending emails to the claimant between February and April 2021 and gathering evidence against her whilst she was on sick leave.

267. Our conclusions as to victimisation would not have differed from those we reached above in respect of the protected disclosure detriment claim.

Issue: Denying the Claimant data swipe entry records for the Halo building on December 2020 when requested in April 2021, May 2021 and June 2021

268. We did consider that this was a detriment, for reasons we have elaborated on when considering the unfair dismissal claim.

269. Had there been protected acts, we did not have evidence of facts which would have led us to conclude that the failure to provide and consider this

data was because of the protected acts. It seemed to us that the respondent's managers had overlooked the improvement we identified because the claimant's attendance record had been so very poor for a period and because she lacked contrition.

Issues: Dismissing the claimant/ Failing to uphold the claimant's appeal against her dismissal

270. These were clearly detriments. Our analysis of causation is the same as for the previous detriment.

Issue: Failing to uphold the Claimant's grievance or for the Respondent's management team to discuss it with her

271. Ms Manze did decide the claimant's grievance without a hearing. In circumstances where the claimant's employment was terminated before the grievance was investigated and Ms Manze produced a careful and reasoned outcome which partly upheld the grievance, we were not persuaded there was a detriment. We heard no evidence or submissions on this point from the claimant and there was nothing we could see which suggested a connection with the nature of the grievance, even had we found there was a protected act.

Issue: Failing to move the Claimant to another shift after she raised concerns about threats made by a colleague on January 2021/April 2021

272. It was not put in terms to any of the respondent's witnesses that the claimant had asked to be moved to a different shift and been refused so we would not have found a detriment even had we found a protected act.

Issue: The training/progression issues listed at 2.2.1

273. Our findings in relation to victimsiation would not have differed from our findings in respect of protected disclosure detriment.

Issue: The claimant and her Trade Union Representative being 'ridiculed' by Alan Spratt in the grievance investigation meeting in April 2021

274. The grievance was heard by Mr Ellam not Mr Spratt. The claimant gave no evidence of what the 'ridicule' was said to consist of and there was no evidence of ridicule in any of the notes we saw. We did not conclude there was a detriment.

Issue: Not paying the Claimant Statutory Sick Pay between 17 August 2020 to 30 November 2020.

275. As we have stated above, there was no evidence of SSP not being paid to the claimant during this period so there was no detriment.

276. For the above reasons we dismissed the victimisation claims.

Holiday Pay and Unlawful Deduction from Wages

Issue: Is the Claimant owed holiday pay and/or other wages? The Claimant claims that she is entitled to the following:

Statutory sick pay between 17 August 2020 to 30 November 2020 in the sum of £4,680.

Holiday pay between 2020 and 2021 in the sum of £3,974.53 based on a calculation of 312 hours

277. The sick pay issue was, as we have stated, not supported by evidence. So far as the holiday pay was concerned, it appeared that the claimant's complaint was that she did not receive the number of hours holiday she would have received had she not reduced her hours. She was entitled to holiday pay on the basis of the hours she in fact worked. We therefore did not uphold either of these claims.

Issue: Wrongful dismissal: failure to pay notice pay

278. It follows from our conclusions above (that it was not reasonable for the respondent to form the view that the claimant was guilty of gross misconduct / repudiatory breach of her employment contract) that we ourselves did not consider it was such a breach. Whilst the attendance issues were significant over a period, there was no evidence that they persisted significantly after a clear warning.

279. We upheld this claim.

Race Discrimination: section 13 Equality Act 2010

Issue: Did the Respondent treat the Claimant less favourably than it would treat a person in materially the same position as the Claimant save that the person is not of her race, by the alleged acts in 2.2.1 and/or 2.2.2 above?

280. We refer to the findings we have made in relation to the claims of harassment because of race. For similar reasons, we did not find that there were facts from which we could reasonably conclude that the claimant had been treated less favourably than actual or hypothetical comparators because of race.

281. Safiyo was the only comparator who could be identified. His circumstances were materially different from the claimant's in that he resigned before his disciplinary process was concluded. It is not possible to know whether he would have been treated more favourably than the claimant or also have been dismissed.

282. We did not uphold these claims.

8. Automatic unfair dismissal for making a protected disclosure: section 103A Employment Rights Act 1996

Issue: 8.1 Was the sole or principal reason for C's dismissal that she had made a protected disclosure?

283. We were satisfied that the genuine sole or principal reason for the claimant's dismissal was her conduct, as discussed above. In any event there were no protected disclosures.

284. We did not uphold this claim.

Conclusion

285. There will be a short case management preliminary to set directions and a date for a remedy hearing unless the parties are able to agree remedy between themselves.

Employment Judge Joffe

29 July 2024

Sent to the parties on:

1 August 2024

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For the Tribunal Office:

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