EMPLOYMENT TRIBUNALS

Claimant: Mr James Murphy

Respondent: Wren Kitchens Limited (1)
Mr Alan Read (2)

Heard at: Cambridge Employment Tribunal (by CVP)

On: 13 November 2024 (preliminary matters and Tribunal reading day)
14, 15 and 18 November 2024 (3 hearing days)
19 November 2024 (Tribunal deliberation day)
20 November 2024 (Tribunal oral judgment)

Before: Employment Judge Hutchings
Ms L. Davies
Ms E. Deem

Representation:
Claimant: in person and Mr Terrent, lay representative
Respondent: Mr Willoughby, counsel

JUDGMENT having been given orally at the hearing on 20 November 2024 and the respondents having requested written reasons at that hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Summary of the claims

1. The Claimant was employed by First Respondent, a privately owned UK designer, manufacturer and retailer of kitchens with showrooms across the UK, as a mobile kitchen designer at the First Respondent's Peterborough showroom. The Second Respondent, Mr Alan Read, was the general manager of the Peterborough showroom. The Claimant was dismissed by Mr Read on 11 March 2023, the Claimant says due to the fact he gave a witness statement on 24

November 2022 to an internal investigation by the First Respondent to determine whether allegations by staff working in the Peterborough showroom that Mr Read made racial and sexual comments amounted to harassment and discrimination and constituted gross misconduct under the First Respondent's policies.

2. By ET 1 claim form and Particulars of Claim dated 13 July 2023 the Claimant brings a claim of victimisation in respect of his dismissal. By an ET3 response form and Grounds of Resistance dated 11 September 2023 the Respondents deny the allegations, saying the reason the Claimant was dismissed was his poor performance. Early conciliation commenced on 2 May 2023 and an ACAS certificate was issued on 13 June 2023.

Hearing process

3. The hearing was listed for 6 days.

4. On day 1 we considered preliminary issues raised by the parties (where a decision of the Tribunal was required, this is recorded below). Mindful the Claimant was not legally represented at the hearing, we explained the structure of the hearing. We agreed the order of witnesses with the parties.

5. Neither party nor any witnesses required adjustments to be made to the hearing process. We took regular breaks, about every hour, mindful this was a video hearing.

Evidence

6. The Claimant represented himself, with support from Mr Terrent, a lay representative, and gave sworn evidence. He called evidence from former colleagues Ms Caroline Lartillier and Ms Kavita Wahiwala, both of whom worked at the Peterborough showroom, but who have since left.

7. The Respondents were represented by Mr Willoughby of counsel, who called sworn evidence from:

    7.1. Mr Alex Miller, assistant general manager, Peterborough showroom;
    7.2. Mr Alan Read, general manager, Peterborough showroom; and
    7.3. Ms Rachel Swannack, HR business partner.

8. We considered the following documents:

    8.1. An agreed hearing file of 383 pages which the parties introduced in evidence; and

    8.2. Documents submitted by the Respondents on day 2 of the hearing in response to the Tribunal's request for documents explaining the First Respondent's performance rankings.

8.2.1. Record of the Claimant's quarterly review dated 26 July 2022 (and titled "Quarterly Performance Review – Aug 22");
8.2.2. Record of the Claimant's quarterly review dated 26 October 2022 (and titled "Quarterly Performance Review – Oct 22");
8.2.3. Designer Dashboard Training;
8.2.4. Wren manager - performance management flowchart;
8.2.5. Performance Management Guide – Manager v3; and
8.2.6. Designer Dashboard and my metrics guide.

9. Emails at pages 131, 213 and 235 of the hearing file are redacted. Mr Willoughby told us the copies in the hearing file were redacted as they were disclosed by the First Respondent to the Claimant in response to a data access request ("DAR") made by the Claimant. While the redaction may be necessary for the DAR request (that is not a matter for the Tribunal), this does not explain why the copies in the hearing file are redacted. Parties have included the documents in the hearing file and we consider these documents may be relevant to the issues before us; they are email exchanges about the Claimant's performance involving Mr Miller, Mr Read and Ms Leanord. We find it highly unusual that a represented party disclosed redacted documents which are relevant to the issues in dispute. Given the Respondents are legally represented, and these documents concern relate to the period of the allegations and individuals directly involved, unredacted copies of these documents should have been disclosed in line with the rules of standard disclosure. The DAR request does not explain the Respondents failure to disclose relevant documents without redactions in a timely manner, only disclosing them when the Tribunal requested unredacted copies on day 2 of the hearing. The Tribunal had this in mind when considering the overall credibility of the Respondent's evidence and conduct in these proceedings.

Preliminary matters

10. On 2 May 2024 the Claimant made a written request for specific disclosure. Employment Judge Alliot considered this request prior to the hearing and ordered the Respondents to reply to the request by 13 November 2024, either disclosing the documents or setting out the Respondents' reasons for not disclosing them. We have considered that response. We agree that it would be disproportionate for the First Respondent to search for colleague records to the extent requested by the Claimant. This is not a claim of unfair dismissal; it is not for the Tribunal to consider the fairness of the Claimant's dismissal or the process following by the Respondents. For this reasons we did not grant the Claimant's disclosure request.

11. However, we agree with the Claimant that there is a gap in the evidence provided to the Tribunal. Initially, it was not clear to the Tribunal how performance is assessed and the ranking system applied. In its pleadings and disclosure documents the Respondents failed to provide any explanation as to how the First Respondent's ranking operated, notwithstanding that the Respondents relied on the ranking as one basis on which they say they assessed the Claimant's performance. Hence the Tribunal requesting clarify on this, and the Respondents providing the documents noted above.

Findings of fact

12. Having already outlined the length of employment, we turn now to findings of fact we consider relevant to the claim of victimisation.

Credibility

13. First we consider the credibility of the witnesses.

14. We found the Claimant keen to assist the Tribunal. He gave measured, direct answers to questions put to him by Mr Willoughby and the Tribunal. While Ms Lartillier and Ms Wahiwala could not give evidence about the Claimant's dismissal as they were not directly involved in this process, they articulated their concerns about Mr Read in their evidence to the internal investigation (to which the Claimant directed us in his witness statement) and explained the reasons they left the First Respondent's employment; we consider this evidence relevant context to this claim.

15. Mr Miller assisted the Tribunal, providing direct answers to the questions put to him. Occasionally he was reticent in answering questions concerning his interactions with Mr Read. For example when asked whether Mr Read was in room when he conducted the Claimant's Record of Conversation ("ROC") meeting, he took some time to consider his answer, appearing to the Tribunal very nervous when a question centred on Mr Read's conduct. He described having a very close professional relationship with Mr Read. In this context, and based on the Respondents' descriptions of how Mr Miller and Mr Read interacted in the management of the Peterborough showroom we find that it is simply not credible that Mr Miller did not know the outcome of the internal investigation against Mr Read until this hearing. For the reasons stated below, we find that Mr Miller knew the outcome at the time he was involved in decisions about the Claimant's performance and dismissal.

16. Mr Willoughby suggested to us that Mr Read was a "measured man who accepted the finding [in the internal investigation] against him". We disagree. Often he appeared agitated in answering the questions, on one occasion raising his arms to the Tribunal. When asked what he felt about the outcome of the internal investigation, Mr Read told us:

"I think the findings of the investigation were harsh."

17. His response did not demonstrate any measured reflection. On several occasions Mr Read was evasive; either he asked for a straight-forward questions to be repeated or sought to rephase a straight-forward question himself, saying "I think what you are asking", and proposing a question which did not align with what had just been said. Mr Read did not demonstrate knowledge of the First Respondent's performance processes nor was he able to articulate to the Tribunal a reasoned understanding of the actions he took and the decisions he reached. Often he did not answer the question put, for example questions he was asked by the Tribunal about how he conducted the ERM and

his reasoning for his decision to dismiss the Claimant, or his answers did not make sense. Overall, we find that it is, unfortunately, necessary to treat Mr Read's evidence with very considerable caution. There were several occasions where his evidence was manifestly inconsistent with the contemporaneous documentary evidence. Mr Read was generally unwilling to make factual concessions, however implausible his evidence. Inevitably, this affects our overall view of his credibility and assessment of his evidence, although we are mindful that it is sometimes the case that untruthful evidence may be given either to mask guilt or fortify innocence. We address specific examples in our factual findings.

18. The evidence provided by Ms Swannack was of limited relevance to this claim. She was able to assist the Tribunal with general oversight of the First Respondent's processes. However, she was unable to comment on what happened in this dismissal process, repeatedly telling us her involvement with the Claimant ceased once the internal investigation into Mr Read's behaviour concluded. Her HR colleague Ms Rachel Leonard, with administrative support from Mr Daniel Carn, oversaw the Claimant's performance review, liaising with Mr Miller and Mr Read. The Respondents did not call Ms Leonard or Mr Carn to give evidence to the Tribunal to corroborate what Mr Miller and Mr Read were telling us about their communications with HR from January to March 2023. Indeed, some of the redacted emails were communications between these parties, which is curious. We were not provided with an explanation as to why those HR colleagues directly involved the Claimant's performance process did not give evidence. We must take account of this in assessing the strength of the Respondents' evidence.

Factual allegations

19. Second, we set out our findings of fact relating to events relevant to the claim of victimization.

20. The First Respondent included a copy of its capability procedure in the hearing file. Mr Miller told us this policy only applies to employees with more than 2 years' service. It does not. The policy states it applies to all employees irrespective of length of service. Mr Miller is an assistant manager involved in reviewing the performance of employees yet we find he was unfamiliar with the First Respondent's written performance polices. Quite simply, Mr Miller did not know the First Respondent's processes and HR documents, despite his role requiring him to have this knowledge. We find this is somewhat worrisome, not least for the First Respondent. This evident failure by Mr Miller to understand a process that his role required him to be familiar with and implement when necessary inevitably casts doubt on the integrity of his involvement in reviewing the Claimant's performance.

21. That said, Mr Miller told us this capability policy was not applied at any time in the reviews of the Claimant's performance. Ms Swannack told us that it was not the First Respondent's practice to follow this policy where an employee had less than 2 years' service. Indeed, there is no evidence before us the Respondents applied this policy in reviewing the performance of an employee with less than 2

years' service. Therefore, while it is curious an employer with the First Respondents' HR resources (mindful of the size and financial resources of the First Respondent) would not apply a written performance / capability policy which applies as a matter of fact to employees with less than 2 years' service to employees in that category, we find that, as a matter of fact, the capability policy was not routinely applied when managers were concerned about the performance of an employee with less than 2 years' service. This rather begs the question why the First Respondent drafted the policy to apply to all employees if it did apply it. Certainly, it seems that Mr Miller, in a role requiring him to manage colleagues had not read the policy.

22. Notwithstanding our observations about the First Respondent's curious approach to its own HR policies, non the less we have accepted the First Respondent's evidence that the policy was not routinely applied to employees with less than 2 years' service. Therefore, we must find that, as the Claimant had not been employed for 2 years, this policy was not considered in the review of the Claimant's performance, following the First Respondent's custom to disapply its own performance policy to employees with less than 2 years' service.

23. Mr Miller, Mr Read and Ms Swannack all confirmed to the Tribunal that the First Respondent treats mobile and showroom sales staff the same in setting targets and reviewing performance. We find that, as a matter of general practice, the Respondents did treat employees in these roles by reference to the same policies and targets, notwithstanding that the daily duties of these respective roles differ (a mobile designer selling kitchens in people's homes, as compared to a showroom based designer selling in the showroom, a case of treating apples and pears the same, perhaps).

Claimant's performance pre 24 November 2022

24. As a result of the Tribunal's request for information to understand the First Respondent's performance processes and the status of an E2 performance ranking, the First Respondent submitted the Claimant's July 2022 and October 2022 quarterly reports on day 2 of the hearing. As the Respondents have not addressed these documents in any of the Respondents' witnesses' statements, we allowed Mr Willoughby to ask the witnesses questions about these documents. It is curious that the Respondents relied heavily on these documents to evidence, they say, the Claimant's on-going poor performance, yet (given the reliance on the at the hearing) did not consider it necessary to disclosure them as part of the evidential process. We have taking this delay in disclosing relevant evidence into account in assessing the overall credibility of the Respondents'' evidence, mindful that as a result of this conduct the Claimant had not had sight of these documents since leaving his employment, until day 2 of the hearing.

25. That said, both documents identify areas (highlighted amber and red) where the Claimant's performance required improvement. We find that these are concerns that Mr Read, as the manager overseeing staff in the Peterborough showroom, and Mr Miller, as assistant manager, should have been aware of at the time of

these reviews. However, given that they demonstrated to the Tribunal that they had lack of familiarity with and understanding of the First Respondent's HR policies and performance records, we find that it is possible that did not have a grasp on the Claimant's performance at this time. While it is not for the Tribunal to judge, we consider it relevant context that it is likely Mr Read and Mr Miller did not perform at a level expected of a reasonable manager overseeing the performance of staff, not least as both demonstrated to the Tribunal a distinct lack of understanding of their roles in this regard.

26. Following the 26 July 2022 quarterly review, in an email exchange between Ms Leonard and Mr Read on 12 August 2022 regarding the Claimant's July quarterly review, no concerns are raised with the Claimant's performance. (We note that this is one of the emails where the parties to the email names had been redacted by the First Respondent and, curiously not reinstated by those acting for the Respondents in the hearing file, given the relevance of these documents). The 26 October 2023 quarterly review document also identifies performance concerns; there is no evidence these concerns are followed up by the Respondents following this review. The Claimant accepted that these documents show his performance was not good. No further action is taken by Mr Read or Mr Miller as the Claimant's managers, or by HR, following these reviews. An ROC is not requested or commenced after these reviews or at any time until February 2023.

Mr Read's disciplinary investigation

27. Between October and December 2022 Mr Read was the subject of an internal investigation. We have seen the outcome letter the First Respondent sent to Mr Read dated 21 December 2022; the investigation was to determine whether serious allegations made by some of his colleagues at the Peterborough showroom regarding sexual and racial comments they alleged Mr Read had made were harassment and discrimination and amounted to gross misconduct under the First Respondent's internal policies.

28. We have seen statements from colleagues who worked with Mr Read in the Peterborough showroom which were taken by either Ms Leonard or Ms Swannack between 28 October 2023 and 7 December 2023 as part of the investigation into allegations about his conduct. The Claimant directed us to these statements in his witness statement. The Claimant also gave a statement in this process. Mr Read received a copy of all statements (including the one given by the Claimant) as part of the investigation process and was given a right of reply. We find Mr Read knew what that Claimant had said about him. Given Mr Read told us that he considered the outcome of the investigation (a final written warning) harsh, we find that, on balance, he was not pleased that the Claimant had made a statement against him.

29. As the Claimant says he was dismissed by the Respondents <u>because</u> of his statement to the internal investigation into Mr Read's conduct, we consider the content of the statements relevant to our decision in this case, and specifically whether the burden shifts to the Respondents' to explain the reason they say the Claimant was dismissed. Therefore, we set out below relevant extracts from the

statements given in the internal investigation. These statements are in the hearing file; the content of the statements is not disputed by the Respondents.

30. On 28 October 2022 Ms Leanard interviewed a kitchen designer at the Peterborough showroom who told her:

"it's a can of worms that I can gauge people are just too scared to say something because apparently, he [referencing Mr Read] finds out who puts a message in against him and just gets rid of them. Obviously, you said it wasn't the case, but everyone is scared to voice their concerns because they don't want to lose their job. Pretty sure people won't put witness statements in against him because they are afraid, they will lose their jobs. People have done it before and apparently, he got hold of them by crypted the witness statements or something like he managed to find a way of who it was and got rid of them."

31. On 1 November 2022 Ms Wahiwala gave a statement to Ms Leonard in which she recalls a conversation she had with Mr Read as follows:

"I think I was on my computer, he walked passed and just made a comment. I thought that's strange why would he make a comment about… I don't know the comment word for word but he walked passed and said to me "did you say something?" I said "no I didn't". I was on my computer… he said "if you did say something I will find out".

32. On 24 November 2024 Ms Lartillier gave a statement to Ms Swannack in which she tells Ms Swannack

"But I feel like I don't know if he'll know or I don't know if he will start treating me different. I know he said to Kavita, he just randomly walked past her desk one day and said, "Oh did you say something" and she said "No" and he said, "Well if you did, I'd find out". We didn't think about it at the time but now with everything getting brought up, we don't know whether he knows or he's trying to tell us that he knows."

33. On 24 November 2022 the Claimant gave a statement to the Ms Swannack in which he says:

"A few people made witness statements, and nothing happened in terms of Alan, and then you quickly saw the people who made witness statements targeted and then forced out, either because they treated differently, weren't fed leads as much as other people so they couldn't perform as well. I think that's generally people's overriding fear around doing any sort of evidence to HR, is that they f eel like if it doesn't go anywhere then people are treated differently. If it doesn't go anywhere because it shouldn't go anywhere then absolutely fine, but no one should be treated differently for doing the right thing and giving evidence. I think that is the majority of people's concern, and my concern, is that I don't want to now be treated differently by Alan and to be fair if I was, I wouldn't just accept it. But I think some people do and maybe don't realise they're being treated differently, and they don't want to give evidence because they don't want to lose their job. So, I think there's that whole thing around, word goes around, and I've

heard that I may be contacted for it. I've written this down because it was soon after. It was the 30th of October, and I was walking to my van and Alan accidentally kicked t, and I said, "Did you just kick my bag" and he said, "Well better kicking your bag than you because otherwise I'll have another HR case on me". It now makes you think is he on about previous ones or something that's happening now. I know that comments recently that he's made specific to HR, which made everyone a little bit nervous and makes everyone thinks is he aware that people aren't happy with his behaviour or is he just somehow being very specific but somehow on the money about what's going on.

34. We find that the Claimant was worried that he may be targeted by the First Respondent as a result of giving a statement to this investigation and HR were aware of these concerns; he says so in his statement to the internal investigation. It is curious this concern was not flagged by HR when Mr Read addressed concerns about the Claimant's performance. The same concern was reflected by other colleagues who gave statements. We find that the First respondent was already on notice that the Claimant thought Mr Read may take negative action against the Claimant because the Claimant gave a statement detailing Mr Read's inappropriate behaviour. This begs the question as to why HR allowed Mr Read to be involved in any performance conversations concerning the Claimant.

35. In his statement to the internal investigation the Claimant refers to an incident he says took place on 30 October 2022, telling Ms Swannack:

"I've heard that I may be contacted for it. I've written this down because it was soon after. It was the 30th of October, and I was walking to my van and Alan accidentally kicked it, and I said, "Did you just kick my bag" and he said, "Well better kicking your bag than you because otherwise I'll have another HR case on me".

36. When asked about this incident at the hearing Mr Read told us it did not happen. We prefer the Claimant's evidence. He recorded the incident at the time, and told Ms Swannack. Based on our assessment of Mr Read's credibility, we prefer the Claimant's recollection of this incident.

37. We find that the Claimant stood up to Mr Read. He tells Ms Swannack on 24 November 2022 that:

"He has had a go at me a few times, but I have always said I'll respect you if you're my manager and you want me to do something different, but don't speak to me in that way, especially not in front of people. I wouldn't say it's a good working relationship because he doesn't really speak to me anymore in all honesty. I don't think he wants to because he knows that I won't accept his shit."

38. Mr Miller was also interviewed on 24 November 2022 by Ms Swannack, who tells the Mr Miller that she is *"looking to gain an understanding of your experience working in the Peterborough Showroom"* and *"that she has some concerns that"* , after which she asks Mr Miller questions about Mr Read's interactions with colleagues, including: *"Does Alan communicate with all*

employees in a fair and consistent manner regardless of the protected characteristics? E.g., sex, age, race, religion, disability etc" and *"Has there ever been an instance where you have been a witness to discrimination in the showroom*".

December outcome internal investigation

39. Ms Swannack reviewed the evidence in the internal investigation concluded that that Mr Read did make inappropriate, offensive and racially directed comments which amounted to a serious breach of the First Respondent's Anti-Harassment and Bullying Policy. In an outcome letter dated 21 December 2022 Mr Read is told that he is issued with a:

    "Final Written Warning, this warning will remain active in [his] personnel file for a period of 12-months." He is also told *"that any future breaches of any of the Company's rules, policies or procedures may result in further disciplinary action being taken against you and may result in the termination of your employment."*

40. When Mr Read was asked what he thought of this outcome, he told us *"I think the findings of the investigation harsh".*

41. Mr Miller told us he was unaware of the sanction given the Mr Read until he received the documents for this hearing. Mr Miller emphasised his close working relationship with Mr Read when interviewed in the investigation and when asked about their relationship at this hearing.

42. From the nature of this questioning, we find, on balance, Mr Miller was aware allegations had been made against Mr Read. Mr Miller was aware that allegations were being investigated (not least as he was part of that investigations). It is a fact that Mr Miller knew allegations of a serious nature concerning racial and sexual comments had been made against Mr Read, even if he did not know the details or discuss it with Mr Read (he says). Mr Miller knew the nature of the allegations from the questions he was asked by Ms Swannack on 24 November 2022.

43. Given the nature of these questions, the close working relationship Mr Miller told us he had with Mr Read, his nervousness answering questions about his interactions with Mr Read and the fact he was aware of and involved in the investigation we find that it is simply not credible that Mr Miller first learned about the outcome of the investigation when he received the documents for this hearing. Mr Miller knew that Mr Read was given a final written warning and felt this unjust from January 2022.

Record of conversation ("ROC")

44. On 29 January 2023 Mr Miller emails Ms Leanard, copying Mr Read requesting an ROC for the Claimant and another employee in the Peterborough showroom, who also gave a statement to the internal investigation. Mr Carn progresses this for the Claimant on 1 February 2023 when he sends Mr Read and Mr Miller the ROC documentation for the Claimant. Mr Carn states the ROC "will run for 4 – 8

weeks". We have seen a copy of the ROC sent. It is populated with the Claimant's performance statistics for the previous 4 week period.

45. On 4 February 2024 the Claimant attended the ROC meeting at the Peterborough showroom with Mr Miller. The Claimant suggested Mr Read was in the room. After some reflection, Mr Miller denied this. Based on Mr Miller's own evidence that he and Mr Read worked closely and played to the other's strengths, and the fact he did not seem to be able to answer this question initially, we find it is likely Mr Read was in the room when the ROC took place.

46. Mr Miller raised performance concerns were by reference to the *"L4 weeks performance"* statistics in the ROC document as follows:

    46.1. - Quotes to Sales: 26.3% NET, 42.1% GROSS, against a Showroom Average of 56.2% NET and 61.6% GROSS.
    46.2. - Cancellations: 40%, against a Showroom Average of 9%, losing £30,350 over 3 orders.
    46.3. - Sales per Hour: £283, against a Showroom Average of £685/hour.
    46.4. - Rank E2

47. Mr Miller set the Claimant KPI targets, telling the Claimant that *"we will review these in 4-8 weeks"* He tells the Claimant an *"immediate and sustained"* improvement is required.

("ERM") meeting

48. Mr Read reviews the Claimant's performance 5 weeks later. On 7 March 2023 Rachel Leanord sends and email to Alan Read and Alex Miller asking them how they want to proceed. There is no record of Mr Read or Mr Miller replying to this email. In their witness statements Mr Read and Mr Miller acknowledge that they made the decision to proceed with the ERM. Mr Miller told us that *"we would have made the decision to proceed with the ERM*".

49. On 11 March 2023 the Claimant attended an ERM meeting with Mr Miller and Mr Read. The ERM took place 5 weeks after the ROC. This meeting was led by Mr Reed. Mr Miller was present and took notes. The statistics show that the Claimant was improving:

    49.1. Ranking increased to E1 from E2; and
    49.2. Quotes to sales increased from 26.3% (ROC) to 43.8% (ERM).

50. It is curious that, given HR were on notice from the internal investigation about Mr Read's behaviour that the Claimant was concerned Mr Read would retaliate given the content of the Claimant's statement to the internal investigation, that Mr Read was identified by the First Respondent as an appropriate person to conduct a review of the Claimant's performance and attend this meeting.

51. We agree with Mr Miller's evidence that the Claimant had achieved an immediate improvement. Mr Read told us he did not accept that an increase in ranking is an improvement, telling us that the Claimant remained in the bottom

10% of designers. That may be the case. However, a move from E2 to E1 is an improvement in category ranking. To suggest otherwise makes a nonsense of a ranking system on which Mr Read says, in part, he based his assessment of the Claimant's performance. Indeed, we found that Mr Read struggled to articulate his reasoning for his concerns about the Claimant's performance in this regard. He could not explain the rankings and relied heavily on the statistics before him, which we find he did not seem to understand.

52. At this meeting the Claimant asked Mr Read to explain his shortcomings; this was a reasonable request, given Mr Read was raising concerns about the Claimant's performance. Mr Read did not do so, telling the Claimant:

"I can see that there is an improvement, but I am unable to discuss at this meeting what your shortcomings are."

53. The Claimant tried again, saying: *"I am trying to understand where my shortcomings are and if you can't tell me now, when will I know?"* Mr Read replies: *"I will tell you after".* He does not.

54. When the Tribunal asked Mr Read to explain why he told the Claimant *"I am unable to discuss your shortcomings"* until after the meeting, Mr Read told us:

"Was trying to structure meeting on questions asked
Serious nature of underperformance
Questions on commitment and dedication"

55. On any interpretation this reply does not answer the question. Nor does it make sense. Just as Mr Read was unable to articulate his concerns about the Claimant's performance or provide a clear and articulate explanation of the statistics on which he says he relied to dismiss the Claimant, he was also unable to explain to the Tribunal why he did not explain to the Claimant what the Claimant's shortcomings were.

Dismissal

56. Mr Read adjourned the meeting to consider his decision. The note records the meeting was adjourned for 12 minutes. During this time Ms Wahiwala saw Mr Read chatting to colleague in the showroom, but could not say for how long. As the meeting took place on a Saturday Ms Swannack confirmed HR telephone support would not have been available to Mr Read during this time. We find that Mr Read did not apply his mind to the dismissal decision during this adjournment, not least as we have found he could not articulate his concerns about the claimant, explain the issues identified by the Claimant's performance statistics nor could he identify to the Claimant his shortcomings.

57. Mr Read reconvened the meeting and told the Claimant he had made the decision to terminate his employment with immediate effect. This was 5 weeks after the ROC and 3 weeks before the period of the ROC review. Mr Read did not explain to the Claimant (or the Tribunal) why he was not allowing the Claimant an 8 week period during which his performance was reviewed (this

being the period for which Mr Miller told the Claimant he would be reviewed. When the Tribunal put to Mr Read that the Claimant had only had 4 weeks, asking "*why did you not give him a further 4 weeks?"* Mr Read told is it was the *"expectation of how job done, number of quotations."* His reply does not answer the question; it does not make sense. We find that was because he gave no consideration to the process of the Claimant's review or his performance statistics.

58. Mr Read's decision to dismiss the Claimant was confirmed in a letter from HR dated 13 March 2023.

Appeal

59. On 14 March 2023 the Claimant emailed "HR Retail" asking if he can appeal the decision to dismiss him. Ms Leanard replies by email on 17 March 2023, telling the Claimant:

    "Unfortunately, you do not have the right to appeal against the decision made to terminate your employment and therefore, the Company will not accept any appeal should you make the decision to submit one."

60. The Claimant did not appeal. We find there was not point given he had been told by Ms Leonard any appeal would not be accepted by the First Respondent.

61. We have found Ms Leanard was aware of concerns colleagues who gave evidence to the internal investigation had about Mr Read's behaviour to them had Mr Read found out they had gave statements. Mr Swannack was also aware of these concerns given the statement she took from the Claimant. The Claimant asked Ms Swannack: *"Was support is put in place by Wren's HR to ensure my line manager remains impartial?"* She replied HR *"Would need to be made aware if there was any issues and then we would act"* HR were aware.

62. Ms Leanard and Mr Carn (and therefore the First Respondent) who liaised with Mr Read about the ROC and ERM was aware colleagues in the Peterborough showroom were worried Mr Read may retaliate if he found out someone had given a statement against him. As HR were on notice about these concerns, it rather begs they question why they did not act to ensure Mr Murphy's performance was reviewed and the ERM conducted by someone other than Mr Read.

63. On 19 March 2023 the Claimant replies to Ms Leanard expressing his view that, notwithstanding he had no right to appeal to the First Respondent he *"should still be able to launch an appeal through the ombudsman as wrongful dismissal and discrimination."* Contrary to the submission made by the Respondents, we find that the Claimant did express a view that he had a claim for discrimination after his employment ended and before bring this claim to the Tribunal.

64. Ms Wahiwala and Ms Lartillier both left the First Respondent's employment on 29 June 2023, telling us the grievance and Mr Read's behaviour made it impossible for them to stay.

Issues

Victimisation: section 27 Equality Act 2010

65. The issues were agreed by the parties at the case management hearing which took place on 2 February 2024.

65.1. Did the claimant do a protected act as follows:

65.1.1. On 24 November 2022 made a statement to Rachel Swannack regarding discrimination against his colleagues [confirmed at the hearing to be Mr Read].

65.2. If the protected act was false, was it made in bad faith.

65.3. Did the respondent do the following things:

65.3.1. Did the respondent dismiss the claimant?

65.4. By doing so, did it subject the claimant to detriment?

65.5. If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

65.6. If so, has the respondent shown that there was no contravention of section 27?

Relevant law

66. We set out below the legal tests applicable to this claim.

Victimisation: section 27 Equality Act 2010

67. Section 27 Equality Act 2010 provides:

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

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

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4)This section applies only where the person subjected to a detriment is an individual.
(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

68. A detrimental act will not constitute victimisation, if the reason for it was not the protected act itself, but some properly separable feature of it. There is no requirement that the circumstances be exceptional for such a case to arise: *Page v Lord Chancellor and anor* [2021] IRLR 377 (CA), per Underhill LJ at paras.55-56.

69. A claimant seeking to establish victimisation must show two things:

    69.1. That they have been subjected to a detriment; and

    69.2. That he or she was subjected to that detriment <u>because of</u> a protected act.

    69.3. There is no need for the claimant to show that the treatment was less favourable than that which would have been afforded to a comparator who had not done a protected act.

70. To succeed in a claim of victimisation the claimant must show that he or she was subjected to the detriment *because* of doing a protected act or because the employer believed the claimant had done or might do a protected act. Where there has been a detriment and a protected act, but the detrimental treatment was due to another reason, a claim of victimisation will not succeed.

71. The essential question in determining the reason for the claimant's treatment is: what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? This will require an inquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.

72. The case of <u>Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL</u> is relevant to our assessment. The House of Lords guides us that a tribunal must identify *"the real reason, the core reason, the causa causans, the motive"* for the treatment complained of. What is the real reason for the detriment?

73. Mr Willoughby referred us to the case of <u>Chief Constable of Greater Manchester Police v Bailey 2017 EWCA Civ 425, CA.</u> In his closing statement Mr Willoughby told us that the relevance of this case was self-evident and did not provide further explanation as to why the Respondents considered it so. That said, we agree with Mr Willoughby that the case is relevant for the reasons we state below.

74. This case provides guidance on how a Tribunal show apply the reason why test and reiterates the well-established legal test for victimisation that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome. The case cautions an Employment Tribunal from making an error of law, reminding (and perhaps cautioning us) that:

75. *"It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act…."*

76. The case is helpful to this Tribunal not least as Underhill LJ recites the key statutory provisions, noting that in section 27 of the Equality Act 2010 the question is whether a detriment was done 'because of a protected act. The decision directs us that 'because' is the key word. Crucially, this is not identical to a 'but for' test; Ahmed v Amnesty International [2009] ICR 1450. One is looking for the 'reason why' the treatment occurred. Where treatment is not inherently discriminatory, one must look into the 'mental processes' of the decision maker. We must be satisfied, and have sufficient evidence before us, that the decision-maker's 'mental processes' were discriminatory if we make a finding of victimisation.

77. It is important that a Tribunal has the burden of proof foremost in its mind when making a decision about a victimisation complaint. The victimisation claim is subject to the provisions of section 136 of the Equality Act 2010 relating to the burden of proof, which read (so far as material):

    "(1) This section applies to any proceedings relating to a contravention of this Act.

    (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

    (3) But subsection (2) does not apply if A shows that A did not contravene the provision

78. In this case the Court of Appeal held that the correct test we must apply is that the detriment occurred "because of" the protected act. A tribunal must first decide whether a claimant has established a *prima facie* case of unlawful victimisation; if he has, the burden shifts to the respondent to prove a non-discriminatory explanation.

Analysis & conclusions

79. A claimant seeking to establish victimisation must show two things:

    79.1. That they have been subjected to a detriment; and

79.2. That he or she was subjected to that detriment because of a protected act.

79.3. There is no need for the claimant to show that the treatment was less favourable than that which would have been afforded to a comparator who had not done a protected act.

80. To succeed in a claim of victimisation the claimant must show that he or she was subjected to the detriment because of doing a protected act or because the employer believed the claimant had done or might do a protected act. Where there has been a detriment and a protected act, but the detrimental treatment was due to another reason, a claim of victimisation will not succeed. For this reason we must consider the mental processes of the decision maker, Mr Read. The essential question in determining the reason for the Claimant's treatment is: what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? This will require an inquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed. We must identify *"the real reason, the core reason, the causa causans, the motive"* for the treatment complained of. Simply, what is the real reason Mr Read dismissed the Claimant.

81. The Respondents accept that the Claimant gave a statement to the internal investigation into Mr Read's conduct on 24 November 2022 and this amounts to a protected act. We agree.

82. The Respondents accept that Mr Read dismissing the Claimant on 11 March 2023 amounts to a detriment. We agree.

83. Therefore there remains one issue for this Tribunal to determine: has the Claimant proven facts from which we can conclude the Claimant was dismissed by Mr Read because the Claimant gave a statement on 24 November 2022 to the First Respondent's investigation into Mr Read's conduct, or was it wholly for other reasons, that reason the Respondents say, being the Claimant's performance.

84. First, we must assess whether the Claimant has established some facts which switches the burden to the Respondents to show an adequate, in the sense of a non-discriminatory, reason for the dismissal.

85. We conclude that the Claimant has switched the burden to the Respondents for the following reasons:

85.1. We have found that when giving his statement to the internal investigation the Claimant expressed concerns about how Mr Read would treat him if he found out and the Respondents were aware of these concerns.

85.2. We have found that the Claimant had expressed concerns to the internal investigation that Mr Read singled him out as the Claimant stood up to him the Respondents were aware of these concerns.

85.3. We have found that Mr Read did kick the Claimant's bag referencing HR investigations and the Respondents were aware of this incident;
85.4. We have found that other colleagues giving statements to the investigation expressing their concerns about how Mr Read might treat them if he found out they had given statements to the internal investigation.
85.5. We have found that Ms Lartillier and Ms Wahiwala left the First Respondent's employment because of Mr Read's behaviour.

86. We consider the timeline relevant. Mr Read made the decision to dismiss the Claimant. He did so just over 2 months after he was told the outcome of the internal investigation (a final written warning). We have found his treatment of the Claimant changed after the Claimant gave the statement.

87. Mr Read claims he had earlier concerns about the Claimant's performance, predating the Claimant making the statement. We have found that documents disclosed by the Respondents on the second day of the hearing record some concerns with the Claimant's performance. However, mindful we must focus on the thought processes of the decision maker, Mr Read, we conclude these were not of concern to him. We have found Mr Read was unable to articulate to the Tribunal why the August and October showed issues with the Claimant's performance. We have found he did not raise any material concerns with the Claimant's performance after these reviews. We conclude that was because in his mind he had not addressed what the documents said in any detail (we conclude this is the more likely explanation given Mr Read's inability in his evidence to articulate how the record of performance statistics translated into actual concerns to be discussed with an employee.

88. We note that the change in Mr Read's approach to how he addressed the Claimant's performance pre and post the statement (set out below), in our judgment, also switches the burden to the Respondents.

89. For these reasons we conclude that the Claimant has switched the burden of proof to the Respondents. Therefore, we must ask ourselves what, consciously or subconsciously, was the reason for Mr Read dismissing the Claimant. Was it because of the fact the Claimant made a statement or was it because Mr Read considered the Claimant's performance poor. In assessing the mental processes of Mr Read, whose decision it was to dismiss the Claimant, we must identify *"the real reason, the core reason, the causa causans, the motive"* for dismissal.

90. Mr Read identified issues with the Claimant's performance on 26 July 2022. Mr Read did not request an ROC until 6 months later. Mr Read told us he did not make the request following the July and October quarterly meetings as "this is not how we do things". Mr Read could not give a coherent explanation to the Tribunal as to why he did not request and ROC sooner, and why he only did so after the outcome of the internal investigation

91. We have found Mr Read did not request an ROC for the Claimant at any time prior to the Claimant's statement. When he was asked to explain why not, he told us *"This is not how we do things".* He could not articulate why he decided not to take action and request a ROC given performance concerns before the

Claimant's statement but did so after. Therefore, mindful of the case of *Bailey* we must consider his thought processes at that time. Given Mr Read's inability when asked by the Claimant and Tribunal to articulate how the performance data translated into performance concerns which could be discussed with an employee, he did not request an ROC at any time prior to the statement as he either did not understand (as he could not explain the performance data) or did not care (again he could not articulate why the performance data was a problem) about the Claimant's performance at that time.

92. We have found that following the Claimant's statement to the internal investigation Mr Read did things differently. He reviewed the Claimant's performance for January 2023, supporting Mr Miller's request for an ROC on 29 January 2023, attending the ROC, we have found, on 4 February 2024 and conducting a the ERM on 11 March 2023. Therefore, we must ask ourselves what motivated this change in approach? What were Mr Read's mental processes that meant it not considered it necessary to be directly involved in actively reviewing the Claimant's performance?

93. We conclude the evidence before us of Mr Read's mental processes at that time, in particular our finding that Mr Read's was incapable of explaining why the Claimant's performance statistics were a cause for concern, his inability to offer an explanation of the Claimant's shortcomings and his inability to articulate the reasons for his decision to dismiss was because it was not the Claimant's performance which motivated Mr Read's decision to dismiss him. Had these things all been in Mr Read's mind when he dismissed the Claimant he would have been able to provide explanations to the Tribunal. His evidence and explanations were nonsensical. That is because concerns about the Claimant's performance were not in Mr Read's mind when he dismissed the Claimant.

94. By his own admission he felt the outcome of the internal investigation harsh. He showed no remorse or self-reflection as to the inappropriateness of the racial and sexist comments the internal investigation found he had made. From Mr Read's own evidence we conclude that what was in his mind what a sense of unfairness in the tariff he received and knowledge that the Claimant had given a statement which had resulted (albeit in part) to this unfair outcome (as Mr Read sees it). Applying the guidance in the case of *Bailey* this evidence, coupled with Mr Read's inability to provide an explanation which made sense as to the concerns he had with the Claimant's performance can only lead to the conclusion that the real reason, the core reason Mr Read dismissed the Claimant was because of the statement the Claimant made to the internal investigation.

95. Indeed, our conclusion about Mr Read's thought processes leading up to the Claimant's dismissal are supported by the timeline. At the ROC, of which Mr Read admits he had oversight, having seen the prepopulated and completed form, the Claimant was given 4 – 8 weeks to improve on his performance for the last 4 weeks. Mr Read knew of this timeline.

96. At the ERM 5 weeks later the Claimant's statistics evidence he did improve his ranking from E2 to E1 and increased his quotes to sales by over 20% in this 5

week period. Again, Mr Read could not explain to us why, given these improvements, he did not allow the Claimant the whole 8 week period. Had his mental processes focused on concerns with the Claimant's performance at this time he would have been able to offer a coherent explanation of those concersn to the Tribunal. He could not, because the Claimant's performance was not foremost in his mind; indeed, given the explanations Mr Read provided we conclude the Claimant's performance was not in his mind at all.

97. Furthermore, it is simply not feasible that Mr Read dismissed the Claimant for his performance, having conceded to the Tribunal that there had been improvement in the Claimant's performance.

98. We have found that Mr Read did not discuss the Claimant's shortcomings with him, despite being asked twice to do so by the Claimant at the ERM. He did not do so as the Claimant's shortcomings and performance concerns were not in Mr Read's mind at the ERM meeting. He could not articulate an explanation as to why he told the Claimant he would discuss these after. It is simply not feasible that someone with genuine concerns about an employees performance is unable to explain their shortcomings, or at least offer an explanation as to why, as a manager, they are unable to discuss them at an ERM.

99. At the ROC the Claimant was given two improvement criteria: immediate and sustained improvement. Mr Read accepted there had been an immediate improvement. It is simply not feasible that a manager faced with statistical evidence that an employee has improved in their performance at week 5 of an 8 week review period, dismisses that employee because of their performance when the employee has made an immediate improvement. By dismissing the Claimant at week 5 Mr Read ensured the Claimant could not address the second criteria, a sustained improvement. The evidence before us is that Mr Read was aggrieved with the outcome of the internal investigation and that he dismissed the Claimant half way through the period Mr Read was aware Mr Miller had allowed by the Claimant to improve. We conclude the reason for this is that Mr Read's mental processes were focused on the fact he found the outcome of the internal investigation harsh and his knowledge that the Claimant had given an unfavourable (to Mr Read) statement to this investigation.

100. Therefore, our assessment of Mr Read's mental processes at the time he dismissed the Claimant lead us, unanimously, to the conclusion that the explanation offered by the Respondents for the Claimant's dismissal (his performance) is not supported, on balance, by the evidence before us, and our findings of fact. Mr Read's evidence (as decision maker) as to his mental processes at the time of dismissal does not support the explanation offered by the Respondents that the reason for the dismissal was the Claimant's performance. Had this been the case Mr Read would have been able to articulate his mental processes about his concerns with the Claimant's performance statistics and shortcomings, and why he had not addressed the Claimant's performance following the August and October reviews. The explanations given by Mr Read did not make sense, even taking the explanations at the highest. That is because it was not the Claimant's performance that was in his mind. What was in his mind was his view that the

outcome of the internal investigation was harsh and this outcome was in part due to the Claimant's statement.

101. When faced with evidence that the Claimant's performance was improving, Mr Read decided not to allow the Claimant the full review period, motivated to do so because of the fact the Claimant made a statement against him in the internal investigation and aggrieved at the outcome of that investigation.

102. For these reasons it is the unanimous judgment of this Employment Tribunal that the complaint of victimisation is well-founded and is succeeds.

Employment Judge Hutchings

9 December 2024

REASONS SENT TO THE PARTIES ON

10 December 2024

FOR THE TRIBUNAL OFFICE