EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105503/2023 Hearing Held at Edinburgh on 18, 19, 20 and 21 February 2025, and Members' Meeting on 3 April 2025 following the production of Written Submissions

Employment Judge: M A Macleod
Tribunal Member: Z van Zwanenberg
Tribunal Member: T Lithgow

Lydia Magloire	**Claimant** **In Person**
Earth in Common	**Respondent** **Represented by** **Mr B Pendreigh** **Trustee**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims succeed, and that the respondent should be ordered to pay to the claimant the sum of £7,642.48 by way of compensation for financial loss and injury to feelings.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 28 September 2023 in which she made a number of complaints against the respondent in relation to the events leading to and including the termination of her employment.

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.

3. A Hearing was listed to take place at the Employment Tribunal Office, Edinburgh on 18 to 21 February 2025. The Hearing concluded within those dates, but it was agreed that written submissions would be tendered by parties thereafter, and accordingly, the Tribunal met together to complete its deliberations on 3 April 2025.

4. The claimant appeared on her own behalf at the Tribunal Hearing. Mr Pendreigh appeared for the respondent.

5. The claimant, who speaks English, was provided with the benefit of an interpreter in the French language as she was not confident that she could understand everything said during the course of the Hearing without assistance. The interpreter attended by remote means, by Cloud Video Platform, which led to some difficulties due to a delay on the line and occasional problems for the interpreter in being unable to hear clearly what was being said in the Tribunal room. Thanks to the noble efforts of the interpreter, who demonstrated courtesy and great patience throughout, the Tribunal was able to note and understand the evidence of each witness, and in particular the claimant. The claimant was also able to understand what was being said, and be understood.

6. The claimant gave evidence on her own behalf.

7. The respondent called the following witnesses:

- Evie Pendreigh (nee Murray), founder and now Chief Executive Officer of the respondent;
- Malcolm Chisholm, Chair of the respondent's Board;
- Katriona Lindsay Harding, Trustee;
- Robert Eric Swanepoel, Development and Finance Officer; and
- Alison Smith, Trustee and Minute Secretary.

8. The parties each produced a bundle of documents. While it was unfortunate that they were unable to agree a single bundle, the Tribunal was able to function by reference to the two bundles. In this Judgment, documents in the claimant's bundle are referred to by the prefix "C" before the page number, and in the respondent's by the prefix "R" before the page number.

9. In the course of the Hearing, the Tribunal heard evidence about the alleged actions of a volunteer involved in the work of the respondent. It was agreed by all that that volunteer should not be named, but would be identified as "Mr X", on the basis that he was not a witness before this Tribunal and therefore had no opportunity to defend himself against any allegations made in this context.

10. The List of Issues set out by Employment Judge Sutherland in her Note following Preliminary Hearing dated 6 March 2024 was as follows:

Protected disclosure detriment and dismissal (Sections 47B and 103A Employment Rights Act 1996)

a. Did the Claimant made a disclosure of information which, in her reasonable belief, was made in the public interest and tended to show that a criminal offence had been committed and/or that there was a risk to health and safety?

b. Did the CEO subject the Claimant the following detriments because she had made that protected disclosure?

(i) On 12 July 2023, refusing annual leave and warning her that if she took her holidays she would be dismissed; and notifying her of allegations relating to her performance;

(ii) On 15 July 2023, requiring the claimant to work on her birthday;

(iii) On 21 July 2023, telling her colleagues falsely that she had resigned;

(iv) On 20 July 2023, following the receipt of the claimant's grievance, failing properly to consider her grievance;

(v) On 21 August 2023, failing to permit her to be accompanied or be given an interpreter at her grievance meeting;

(vi) On 21 August 2023, dismissing her without notice or right of appeal.

c. Did the CEO dismiss the Claimant because she had made a protected disclosure?

Victimisation (Section 27 Equality Act 2020)

d. Did the Claimant do a protected act (make an allegation of discrimination)?

e. Did the CEO subject the Claimant the following detriments because she had done that protected act?

(i) On 12 July 2023, refusing annual leave and warning her that if she took her holidays she would be dismissed; and notifying her of allegations relating to her performance;

(ii) On 15 July 2023, requiring the claimant to work on her birthday;

(iii) On 21 July 2023, telling her colleagues falsely that she had resigned;

(iv) On 20 July 2023, following the receipt of the claimant's grievance, failing properly to consider her grievance;

(v) On 21 August 2023, failing to permit her to be accompanied or be given an interpreter at her grievance meeting;

(vi) On 21 August 2023, dismissing her without notice or right of appeal.

Indirect race discrimination

f. Did the Respondent apply a practice of requiring workers to speak English in meetings?

g. Did this practice put non-UK nationals to a disadvantage compared with UK nationals?

h. Was the Claimant put to this disadvantage?

i. Was the practice a proportionate means of achieving a legitimate aim?

11. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

12. The claimant, whose date of birth is 15 July 1976, commenced employment with the respondent on 11 October 2022 as Urban Croft Co-ordinator.

13. The respondent is a registered charity, founded by Mrs Pendreigh and others approximately 10 years ago. It is an environmental charity working with food and food system change, based in Leith in Edinburgh. The charity has 2 acres of public park land, and recently, in 2024, completed the renovation of a dilapidated building on that land, now known as the Pavilion.

14. The claimant initially became involved with the respondent as a volunteer in April 2019, and helped out in the market garden and the café run by the respondent. In October 2022, she became an employee of the respondent.

15. The claimant was provided with particulars of employment (R2). It was confirmed that her place of work would initially be located on Leith Community Croft, largely in the "Hingabootery" shed-based café on the Leith side, and in the respondent's offices in Queen Charlotte Street.

16. Under "Holiday Entitlement", the particulars of employment provided:

"Holiday year runs from date of commencement and entitlement is thirty days per year, pro rata, including Scottish Bank Holidays. For convenience, this is considered to be 1/12th of the period of employment. We run a Christmas market in the weeks before Christmas and takings during this period are an important source of income for the charity, so it is strongly preferred that holidays are not taken then. Holidays are expected to be taken from Christmas, and, if they are indeed taken at this time, we shall round up the allowance such that paid holidays run up to and including Sunday, 9 January 2022, with a return to work on Monday, 10 January 2022, as shown in the provisional rota. (The rota has been modified in the two weeks following the festive break to ensure parity of working hours and weekends worked.) Holiday can be taken at other times only through prior agreement with the CEO, who requests at least a month's notice so that the rota can be amended to cover for absence."

17. So far as a disciplinary procedure is concerned, it was stated that *"The Company's Disciplinary Procedure is in accordance with ACAS guidelines…The Company reserves the right to discipline or dismiss you without following the Disciplinary Procedure if you have less than a certain minimum period of continuous service in accordance with ACAS guidelines."*

18. Every Wednesday, the claimant took responsibility for overseeing a group of volunteers who would attend to work on small garden areas. There were approximately 10 such volunteers.

19. On 30 May 2023, the claimant reported to Mrs Pendreigh that an incident had taken place on the previous day in which she had had an interaction with Mr X. The claimant was friendly with Mr X, an elderly man who had

regularly attended the site and been in the café. The claimant had recently bought a bicycle, which Mr X knew, and on 29 May, he arrived and brought a new seat for the claimant's bicycle. They exchanged a friendly hug. They had known each other for approximately 3 years.

20. The claimant described this as a happy day, on the basis that the respondent had reopened the Pavilion.

21. Mrs Pendreigh kept an incident log, which was produced to the Tribunal (R8ff). It was noted in the log as follows, on 30 May 2023:

"Lydia reports what she regards as sexual assault – deliberate inappropriate touching by a Crofter on the Croft as 11am the previous day – and talks about going to the police. She said he put his hand on her bottom and used her fingers to indicate that he'd repeatedly stuck his finger up into her genital area. She says he claimed to have fallen against her. Evie is in the middle of hosting a major event on the Croft that day, making it impossible to address her concerns immediately."

22. In the absence of Mrs Pendreigh, the claimant did not report the incident to anyone. She intended to report it to Mr Swanepoel, but found that he was very busy, and she wanted to speak about this in private only.

23. In her evidence, the claimant described the incident to the Tribunal. she said that when she hugged Mr X, she felt his hand come down to her bottom, and then felt his finger "inside/between" her legs. She pushed his shoulder and asked him what he was doing. Mr X crouched down on the floor, and said that the sole of his shoe was damaged. She said that she felt shocked by what had happened, and that she had told Mr X that she would need to tell her husband about the incident. She said that Mr X said that her husband would spank him because he had been a bad boy.

24. Subsequently, Mr X came to the window of the building and asked the claimant if she was angry. She replied that she was disappointed as she had thought that they were friends.

25. On the following day, she met with Mrs Pendreigh to report to her what had happened, and asked her for advice as to what to do. Mrs Pendreigh said to the claimant that what she had reported was a criminal act and that it should be reported to the police. The claimant responded by pointing out that this incident had happened in the workplace and asked her what she intended to do. Mrs Pendreigh told her that she would raise and discuss it with the Board, and asked her to keep matters confidential until she got back to her about it.

26. With regard to going to the police, Mrs Pendreigh indicated that this was for the claimant to do, and that nobody could go with her.

27. Mrs Pendreigh's evidence was that she was alarmed by the allegation made, and took it extremely seriously. She decided to contact the HR Committee of the respondent's Board.

28. She arranged a meeting with Malcolm Chisholm, the Board Chair, on 1 June 2023 to alert him to the incident which had taken place on the croft. They agreed that it was a very serious issue and that there should be an extraordinary Board meeting, to launch a full investigation into establishing the facts.

29. Ms Pendreigh conducted the investigation herself. Her first act was to identify whether there was CCTV footage available. The system was brand new, as she put it, and so they had to contact the contractor to obtain the footage. At the same time, she contacted Albany HR, the respondent's HR Consultants. They also asked staff not to come to the croft until the following Monday.

30. She took a witness statement from the claimant and from Mr X. She advised Mr X not to return to the croft in the meantime. She was advised by Albany HR to keep the investigation confidential, as neither the claimant nor Mr X had done so. She was told by someone that Mr X had advised that he was feeling suicidal due to the allegation.

31. Mrs Pendreigh's evidence to this Tribunal was that they went on to hold "many HR meetings" and then the Board took the view that they wanted to view the CCTV footage.

32. The incident log noted that on 7 June an initial review of CCTV footage proved *"time-consuming and inconclusive. Lydia is in shot from the outset. Several others are seen in the area in front of the Pavilion (Camera D5). [X] appears at 11.34. using a combination of D5 and D10 it can be seen that Lydia enters the Pav with Eric just three minutes later at 11.37. looking back to the sliding doors on at least one occasion. 11.41 [X] speaks with Tom outside. 11.48 [X] is seen on Camera D10 (Side adjacent path) either at the sliding doors or side of building. 11.59 [X] leaves. No contact between the two occurred."*

33. The log goes on to note that the claimant's account of [X] following her to the building is consistent with footage from 11.48.

34. It is then noted: *"Further review of earlier footage reveals a meeting just outside the Pav, much earlier than Lydia had suggested. 9.31 Front of building camera gives a very clear, close-up view: [X] appears. Lydia goes to hug him. He responds by putting his arms around her and placing a hand on the small of her back. There appears to be a stumble. It is unclear what caused the stumble. John's hand moves lower onto Lydia's bottom. It does not reach the bottom of her bottom. It is momentary, less than a second. After the incident Lydia puts her arm round John again. They seem to be looking at what he may have tripped over. BP is in shot at this point, seemingly oblivious."*

35. On 8 June 2023, Mrs Pendreigh met with [X], having informed him of a complaint, firstly over a telephone call and then face-to-face. During the telephone call, Mrs Pendreigh says in her log, he said it was an accident: *"She was cuddling me and I was cuddling her back. We were on rough ground near the Hingabootery and I tripped on the loose stuff. I apologised profusely to her. We talked about it and we looked at the ground and I thought we had sorted it out. I am disappointed this has*

happened. This is flipping horrendous." Mrs Pendreigh records that his comments in the face-to-face meeting are consistent with what he said on the phone.

36. An appointment was then made for the claimant to meet with Mrs Pendreigh and Mr Swanepoel, which took place on 8 June 2023, in the Pavilion. The claimant prepared a statement which she handed to Mrs Pendreigh at the start of the meeting (C13). In that statement, which was partly typed and partly handwritten, the claimant said:

"Around 11.30am on Monday 29 May 2023, I was at my work (Earth in Common Charity) in Leith Community Croft 4A St John's Pl, Edinburgh EH6 7EL.

A user (a crofter), whose first name is [X], whom I've known for three years, came up to me to say hello and offer my a bicycle saddle. I had bought him a bicycle a year ago.

Out of friendship, we gave each other a hug, but to my great surprise, [X] then took the opportunity to press me against him, putting a firm hand on my buttocks with a finger pointing at my anus. I pushed him away firmly, asking him what he was doing.

He said he'd been knocked off balance by his damaged shoe, and that he'd had to catch himself by grabbing my bottom. I immediately denied this, [interlined in handwriting 'I shook my head LM'] told him I would let my husband know about that assault.

Then, [interlined in handwriting 'when I was unlocking my bike'] he said ironically, miming 'oh, your husband will tell me off and spank me because I'm a nasty boy'.

I was so shocked that I walked in the pavilion but couldn't say a word, and, as it was a very busy day, I got back to work, ignoring him.

The following day, I let my husband and my boss know about that."

37. The claimant then added in her own writing:

"Later, I was cleaning the skirting board in the education space of the building. He came and squatted opposite me, outside the building (the sliding door was open) and asked me, 'Are you worried?' and said something else I didn't understand. I said 'I'm shocked. You were my friend."

38. The claimant signed and dated the note 8 June 2023.

39. The claimant also added a further page, signed and dated 8 June 2023, and written by her:

"Now I remember this is the second time something like this happened. About a month ago (I don't remember exactly when) I was in the garden with my winter coat on. I gave my old friend, David Morrison, a hug. I then gave [X] a hug and he ran his hand down my buttock, very lightly and rapidly. He apologised, saying, 'Sorry, I was falling'. I had not been aware of him losing his balance, but I took his word for it at the time. I remembered this a few days after the incident of 29 May."

40. The meeting was conducted in English. The claimant speaks English. Mr Swanepoel was present, and was available to translate any points which the claimant did not fully understand, as he is a fluent French speaker.

41. A summary of the investigation was produced by the respondent (R11) setting out recommendations following the investigation of alleged sexual abuse. In that document, which was produced on 17 June 2023, the respondent stated:

"Both individuals have presented their accounts of the alleged incident and we have viewed the footage from CCTV, which covers the area and the meeting between them. The footage gives a clear view. Both individuals have been very upset by events. They have both been heard and have only marginally differing versions of what happened physically. Lydia feels she was sexually assaulted. [X]'s hand very briefly touched her bottom. [X] maintains this was the result of a stumble while they were hugging and Lydia agrees he said this at the time. It caused Lydia alarm

and [X] now expresses deep regret for having been the inadvertent cause of so much distress.

We are mindful of the wellbeing of both these individuals. Our response to the incident has been proportionate to the individuals' accounts and the CCTV footage.

Earth in Common has a duty of care for everyone on the Croft and recognise both parties involved in this incident feel great distress.

We urge everyone to consider differing individual perspectives, outlooks and likely responses.

Conclusion:

We have found no evidence of sexual assault."

42. The claimant had sought to book a holiday with the respondent for the period 27 July until 17 August 2023. She raised the matter first at the weekly Monday team meeting, at which Mrs Pendreigh was present. She wrote the dates on the calendar in the office, and did not understand there to be any difficulty about having those days off.

43. In April 2023, the claimant sought to formalise the holiday request, by including it in the Outlook calendar as well as the physical calendar.

44. Mrs Pendreigh advised the claimant at some point after this that the respondent would be introducing a new system for leave requests, by way of an HR application. The claimant was only able to have access to this application by the end of June (it was called "Breathe"). She submitted her request for 6 and 7 July, and then for 27 July to 17 August, via the application. She advised Mrs Pendreigh on a number of occasions that she was waiting for confirmation as to her holiday request, but received no response.

45. On 12 July 2023, Mrs Pendreigh asked to meet with the claimant at the end of the day, which Mr Swanepoel also attended. She confirmed that

the claimant's holiday request had been refused. She provided the claimant with a letter on that date (C4). The letter stated:

"Dear Lydia

Refusal of holiday, and plan for improvement

I have been instructed by the Board on the 10th July meeting to refuse permission for you to take a holiday from 27 July to 17 August 2023. You marked this time on the office calendar but did not follow due organisational procedure by sending in a written request, as laid out, for example, in your contract dated 11 October 2021 (on which date you ceased to be a freelancer and became a salaried employee):

> *'Holidays are expected to be taken from Christmas and, if they are indeed taken at this time, we shall round up the allowance such that paid holidays run up to and including Sunday, 9 January 2022, with a return to work on Monday, 10 January 2022, as show in the provisional rota. […] Holiday can be taken at other times only through prior agreement with the CEO, who requests at least a month's notice so that the rota can be amended to cover for absence.'*

You will understand that for an organisation to run effectively, employees cannot be permitted to take time off without asking for permission to do so reasonably far in advance. On this occasion, you made no formal written request, nor entered into any appropriate verbal discussion but simply scored out the days you did not wish to work. Moreover, requesting four weeks of holiday in the summer months just as we reopened our building is deemed to be an unreasonable request. If you insist on taking a breark at this inconvenient time, we shall consider this tantamount to your resignation. To be clear, your employment with us will cease, and this letter should then be considered to be your formal notice of termination (dismissal). You have been an employee for less than two years, and we are giving you a month's notice."

46. It is perhaps worth noting in passing that the reference by the respondent to the requirement for a request for holidays to be in writing is not reflected in the contractual provision to which they referred in the letter; and the claimant's position was that she did enter into an appropriate verbal discussion with Mrs Pendreigh, but received no response from her. In addition, it is plain from this letter that the respondent was well aware of the claimant's wish to take holiday from 27 July from much earlier in the year.

47. The letter then moved to a different subject:

"This is not the only example of unsatisfactory conduct. Should you decide to cancel your holiday and stay on, we shall be issuing you with a formal warning, and shall expect you to work towards addressing the points below.

1) In the past, you have refused or been unwilling to perform tasks such as:

- *helping with our social media*
- *engaging with email correspondence, and laptop work in general*
- *helping run workshops*

We shall expect you to be willing to perform such work. If you have specific difficulties in doing any of these things, we undertake to respond positively to reasonable training or support requests. If you refuse to perform such work and do not flag any specific training or support needs, we shall consider this to be a serious disciplinary matter.

2) You have appeared to ignore direct instructions. For example:

- *You failed to complete and return a feedback questionnaire.*

- *You were asked to produce a list of flowers on the Croft in advance of a public event, but you only did this when it was insisted upon, on the day of the event itself.*

- *You failed to set out tables for an event, the timing of which was very important.*

- *You have ignored formal lines of communication and complained about issues to colleagues rather than reporting them to management, despite being repeatedly told to stop doing this.*

We shall expect you to follow procedures and obey all reasonable instructions. If you have not understood instructions or procedures, we expect you to let us know. We shall then explain/repeat them and, if necessary, issue them in writing and/or translate them into French, as you request.

If you fail to follow procedures or to obey instructions in future, without having given us good reasons at the time for your lack of compliance, or without having asked for clarification in good time, we shall consider this to be a serious disciplinary matter.

If you decide to cancel your holiday and stay on, we look forward to working constructively with you. We shall schedule regular meetings to review your progress and to discuss any issues you might have. I look forward to a positive response from you.

Best regards,

Evie Murray, Ms

CEO"

48. On 19 July, Mrs Pendreigh asked the claimant to meet with her, and advised her that the respondent had agreed to allow the claimant 50% of her time off as requested. In evidence, Mrs Pendreigh explained, when asked about the connection between the claimant's allegation of sexual

assault and her holiday request, that the connection was that she felt that she had a very unhappy, uncooperative and pretty hostile member of staff who was very unhappy with the outcome of the investigation. She went on to say that she felt not bullied but placed in a situation where she had to grant some time off to the claimant. The claimant therefore requested on 23 July (C8) to have 6 days off, based on the distribution of her shifts on the Breathe app, namely 9, 10, 11, 12, 15 and 16 August 2023. She intended to attend for work on 19 August in terms of the schedule. She advised that it was essential for her to have time off in order to visit a dying relative in France.

49. On 21 July, the claimant reported the incident of 29 May to Police Scotland (C14). The "Victim Care Card" issued by Police Scotland indicated that the claimant had reported a sexual assault. She was given a crime reference number (1378). The claimant attended Edinburgh Sheriff Court on 31 October 2024, to be advised that the trial was "deserted simpliciter". She understood this to mean that the prosecution arising out of her complaint would not proceed. She wrote to the Procurator Fiscal to ask why this was. She received a reply to that email on 23 January 2025 (C16) from Stuart Coleman, Procurator Fiscal Depute, in which he said that *"I can confirm that the evidence we did not receive from the police was CCTV footage. The police had been previously requested to bring that CCTV to our office. The procurator fiscal depute in court who was handling the case requested a further adjournment in order for our office to receive the CCTV footage from the police. However, that requested was refused by the Sheriff overseeing the case as the case had previously been adjourned on two occasions."*

50. We noted that Mrs Pendreigh wrote to the Tribunal on 4 November 2024 to advise that the Crown was unable to produce any evidence and the judge threw the case out (R12). She made reference in that email to expenses.

51. On 21 July 2023, the claimant also submitted a fitness to work statement, advising that she was not fit to work due to stress at work (C15). She was

signed off until 18 August 2023, submitting a second fitness to work statement to cover the further absence.

52. The claimant was upset about the terms of the letter of 12 July. In response, she decided to submit a grievance to the respondent (C6) on 22 July 2023.

53. Firstly, she pointed out that when she had made her holiday request several months before on the calendar, the respondent was aware of this and there was no issue about it. When she was told about the new HR system for holiday requests, she said that she had submitted her request for August, but that it was left pending. She said that she asked her line manager about it many times, but that she was evasive in her answers.

54. Secondly, she sought to address the performance issues. She asked the respondent to clarify when she failed to help with social media, when she failed to engage with email correspondence and laptop in general and what she was asked to do, and what was meant in relation to helping run workshops.

55. With regard to the allegations that she had ignored instructions, the claimant pointed out that there was no date by which she was required to complete a feedback questionnaire; that she took photographs of every wild flower on the croft on her own phone, identified them and shared them with the colleague who needed the information; and asked for further information about carrying and putting out tables, helping run workshops and formal lines of communication.

56. She continued:

"I would also like to add into this grievance how the sexual assault incident was treated by the organisation on the 29th May.

I felt unsupported, the organisation failed in their duty of care to take steps to help me report this to the police or buddy me up with an appropriate person whom I could confide in.

On the 8th June, I attended a meeting with my line manager and colleague and presented a letter about my assault, which my colleague added information too.

Then on 19 June morning, I attended a meeting with the CEO and a trustee, I was handed an undated summary of incident. This was done in a public place, making me feel very uncomfortable.

All this has caused me untold anxiety and affected my health. It constitutes continuous harassment making me fell (sic) very vulnerable in my workplace.

I sincerely hope we will found a middle ground and resolve this dispute."

57. On 22 August there was an exchange of text messages between the claimant and Mrs Pendreigh (C17):

Claimant: Morning, for health reasons I'm unable to cover my current shift and those to come.

Mrs Pendreigh: Morning Lydia, I'm sorry things haven't worked out. I accept your resignation. Good luck with whatever you do in future. Evie

Claimant: I'm sending a copy of my sick leave to your email address.

Mrs Pendreigh: I'm processing this as your resignation, Lydia. You are on a final warning for your holiday issue. You asked for equity but equity would mean allowing all staff to take four weeks holiday in the summer months. that is an impossible position to put EIC in. I'm taking your decision to indefinitely leave your shifts as a resignation of your position.

58. On that same date, the claimant emailed Mrs Pendreigh (C17) at 16.58 to say:

"Dear Evie,

Please see attachment of sick note from doctor. It appears that there has been a misunderstanding about the text I sent. In no way did I mean to

imply that I was not coming back. I am on sick leave for two weeks. Thus I have not resigned from my position in Earth-in-Common.

You also say I am on a final warning. I have never been given a warning regarding my holidays. So I don't understand this.

I would say it is unreasonable for management to take issue and cancel my holiday leave on 12th July when no problem was seen when I booked in February. This has caused myself and family unnecessary stress and anxiety.

Regards,

Lydia"

59. On 23 July the claimant received a text message from her colleague Jaime, saying that she was so sad that she would not be part of their team any more. She replied to say that she was on sick leave for a fortnight, and that she had not resigned.

60. On 7 August 2023, the claimant, who was in France, visited a doctor in Nantes and obtained a further medical certificate (R20) which she presented to the respondent.

61. A grievance hearing took place on 21 August 2023. The claimant attended, and the meeting was conducted by Katriona Harding and Alison Smith.

62. Notes were produced (R27/8). With regard to the claimant's holiday request, it was noted that the claimant was unhappy that her holiday request had been denied at short notice. It was noted that *"We discussed the fact that shortly after she formally submitted the request, she told Evie Murray about an alleged SA, and this took priority over everything else and was fully, and immediately, investigated. While there was an ongoing incident under investigation, LM's holidays could not be approved or denied. LM reiterated her complaint that it was too short notice to deny her holidays."*

63. It was decided not to uphold this part of the grievance, on the basis of the organisation's needs, since it was an unreasonable amount of time off at the busiest time of year. They acknowledged that it was unfortunate that they could not deny the request quicker, but this was not possible due to the timing of the ongoing investigation.

64. With regard to the second issue, it was noted that the claimant said that she was willing to help with social media, email and laptop tasks, but that due to language barriers she was not confident of doing this work on her own.

65. The panel decision on this point was that *"We are not upholding this part of the grievance. The CEO is responsible for managing the staff team, their work and performance. The Board has confidence in the CEO's ability to manager her team and stands by her decision to address the performance issues according to EiC policy."*

66. The third point considered was the claimant's unhappiness about the manner in which her sexual assault allegation was dealt with by the Board. Ms Harding expressed that she was very sorry that the claimant felt unsupported, but that the Board had taken the report very seriously and had acted swiftly and appropriately. She reiterated that the respondent had taken advice from independent HR consultants on multiple occasions and acted according to this advice.

67. The panel decision was that this part of the grievance was not upheld, and that the Board stood by its handling of the reported sexual assault, and by the investigation's findings.

68. Following the conclusion of the grievance process, the respondent wrote to the claimant, on 21 August 2023, in the following terms:

"Dear Lydia,

Your position within Earth in Common has been discussed by the Board and it has been agreed that the organisation will not be continuing your employment, which will end with immediate effect today, Monday August

21. You will be paid for your remaining holiday entitlement plus a month's pay in lieu of notice. Confirmation and details of this will be sent to your personal email in the next few days, once they have been finalised by our payroll provider."

69. The claimant was then asked to return her keys to the Community Croft, and invited her to arrange to collect any personal items.

70. No reason was given by the respondent in the letter for the termination of the claimant's employment.

71. The respondent's witnesses gave evidence as to the reason for the claimant's dismissal.

72. Mrs Pendreigh said that she did not take part in the decision to dismiss the claimant, but that the Board made this decision; but said that she was told that the reason for the claimant's dismissal was conduct and performance, and the holiday issue. She explained that she had reported to the Board that she had been the subject of a lot of aggressive behaviour, which she told the Board along with the examples of the conduct issues. She denied that the reason for dismissal was that the claimant had raised an allegation of sexual assault.

73. Mr Chisholm, who chaired the Board and did participate in the decision, said that the reason for dismissal was the holiday issue; if that issue had been resolved there would have been no dismissal. He stressed that the period during which the claimant was seeking to be on holiday was a very busy time due to the Pavilion reopening, and that would be unreasonable and unfair to other staff. He made clear his view that there was absolutely no connection between the claimant's allegation and her dismissal: he said that he found it "totally ludicrous" that it might be suggested that the claimant was dismissed because she raised an allegation of sexual assault. He maintained that the respondent had no problem with her raising the issue of sexual assault.

74. Ms Harding's evidence was that the reason for the claimant's dismissal was that her behaviour had been completely unacceptable, and was having a detrimental effect on the Chief Executive and others. The claimant was not carrying out her duties. The Chief Executive was extremely stressed, and Ms Harding said that the claimant's conduct fell far below what they expected from their staff. She denied that the reason for the refusal of her holiday or her dismissal was that she had raised an allegation of sexual assault. When the claimant asked her, in cross-examination, about the fact that she did not have the opportunity to defend herself against allegations relating to conduct and performance, Ms Harding said that the Board would not get involved in operational management issues, but left that to the Chief Executive to deal with. She also said that one of the reasons for dismissal was that the claimant had less than two years' continuous service with the respondent.

75. Alison Smith said that the claimant's dismissal was discussed at the point of the decision because the claimant was not coming back from holiday but had not submitted a fit note. While she described this as a "muddy area", she said that the reason was that this was a "short-service dismissal", and that no reason was required. However, she explained that in her view, the claimant's conduct, performance and hostile attitude fell below the standard which the respondent expected of their employees. In no way, she said, was this related to her allegation of sexual assault.

76. The claimant wrote to the Board Chair on 29 August 2023 to ask for a copy of the video recording of the grievance meeting as she did not feel that the meeting respected her grievance and that she was coerced into attending at short notice (C21). Mr Chisholm responded to say that there were issues with the recording, and they would not be able to provide it to the claimant without professional assistance.

77. It is not clear if the claimant received the notes of the Hearing.

78. Following her dismissal, the claimant undertook training to obtain a horticulture certificate at the Botanical Gardens in Edinburgh, which would

take approximately a year to complete. In addition, she carrying out volunteering for another charity in a garden.

79. In November 2023, the claimant applied for a position at Edinburgh Zoo, as a groundsperson, for which she was successful. She started in that employment on 4 December 2023, working 37.5 hours per week at £12 per hour. Her employment with the respondent involved her working 26 hours per week, and accordingly her income with her new post exceeds that of her previous employment.

80. Following the dismissal, she said that she was in "torment", with high stress levels, and she could not rest or sleep properly. She attended her GP and was prescribed medication (she did not specify what it was) to keep her well, but she stopped taking this medication shortly afterwards as she did not wish to rely upon pills. She applied for Universal Credit while she was unemployed, and received it.

Submissions

81. Both parties presented written submissions following the Hearing, which were taken into account in our deliberations, to the extent that they were relevant.

The Relevant Law

82. Section 43A of the Employment Rights Act 1996 ("ERA") provides:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

83. A qualifying disclosure is defined in section 43B as *"any disclosure of information which, in the reasonable belief of the worker making the*

disclosure, is made in the public interest and tends to show one or more of the following:

a. *That a criminal offence has been committed, is being committed or is likely to be committed;*
b. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*
d. *That the health or safety of any individual has been, is being or is likely to be endangered;*
e. *That the environment has been, is being or is likely to be damaged; or*
f. *That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."*

84. Section 47B prohibits a worker who has made a protected disclosure from being subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker made a protected disclosure.

85. Helpful guidance is provided in the decision of **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** at paragraph 98:

"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content.

2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to

act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."

86. In addition, we had reference to the well-known decisions in **Kuzel v Roche Products Ltd [2008] EWCA Civ 380, Fecitt & Ors v NHS Manchester [2012] ICR 372** and **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT**.

87. In, **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f). Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a

tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

88. Section 19 of the Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

89. Section 23(1) of the 2010 Act provides that *"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."*

90. Section 27(1) of the 2010 Act provides:

"A person (A) victimizes 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."

Discussion and Decision

91. We addressed our decision in terms of the List of Issues, which we take in to the order set out above.

92. **Protected disclosure detriment and dismissal (Sections 47B and 103A Employment Rights Act 1996)**

a. Did the Claimant make a disclosure of information which, in her reasonable belief, was made in the public interest and tended to show that a criminal offence had been committed and/or that there was a risk to health and safety?

b. Did the CEO subject the Claimant the following detriments because she had made that protected disclosure?

(i) On 12 July 2023, refusing annual leave and warning her that if she took her holidays she would be dismissed; and notifying her of allegations relating to her performance;

(ii) On 15 July 2023, requiring the claimant to work on her birthday;

(iii) On 21 July 2023, telling her colleagues falsely that she had resigned;

(iv) On 20 July 2023, following the receipt of the claimant's grievance, failing properly to consider her grievance;

(v) On 21 August 2023, failing to permit her to be accompanied or be given an interpreter at her grievance meeting;

(vi) On 21 August 2023, dismissing her without notice or right of appeal.

93. The protected disclosure relied upon by the claimant was her report to Mrs Pendreigh on 30 May 2023, verbally, that Mr X had sexually assaulted her on 29 May 2023; and also, as we understand it, the report (partly typed and partly handwritten) dated 8 June 2023 (C13) provided by the claimant to Mrs Pendreigh and Mr Swanepoel at the meeting on that date.

94. The report was that Mr X had pressed himself against her, putting a firm hand on her buttocks with a finger pointing into her anus (C13); and that in her verbal report to Mrs Pendreigh, noted in the respondent's incident log, was that he had in fact "repeatedly stuck his finger up into her genital area" (R8).

95. In our judgment, this amounted to a disclosure of information which tended to show that a criminal offence had been committed, in that the claimant considered that this had amounted to a sexual assault. That the prosecution of the complaint to the police did not proceed is not determinative of whether or not this amounted to such a disclosure under section 43B(1). It was reasonable for the claimant to belief, at the time, that this was a matter which was in the public interest; the respondent's charity operates in a public place, and allows access to members of the public such as Mr X.

96. Accordingly, we were of the view that this amounted to a protected disclosure within the meaning of section 43B(1).

97. We then considered whether or not any of the alleged detriments were visited upon the claimant by the CEO, that is Mrs Pendreigh, because she had made the protected disclosure.

98. The first alleged detriment relates to the letter of 12 July in which her request for annual leave was refused, and she was advised that if she did insist on taking her break, this would be considered tantamount to her

resignation; and that if she did return, she would be issued with a final warning as a result of “unsatisfactory conduct”.

99. We would make a number of observations about this letter.

100. Firstly, each of the respondent’s witnesses who spoke of this letter stressed that its true significance could be found in the final paragraph, when it was said that “we look forward to working constructively with you”. Mr Chisholm, in his evidence, observed that that was the context of everything which was said in the letter.

101. In our view, that final paragraph must be read in the context of what comes before, not only in the remainder of the letter, but in the opening words of the paragraph “If you decide to cancel your holiday and stay on”.

102. Secondly, the letter starts by saying that the claimant did not follow the organisational procedure by sending in a written request, and then quoted from the claimant’s contract of employment. We were shown no organisational procedure requiring a written request to be made; the contract of employment simply requires that holiday could only be taken at “other times” (a rather unclear provision) only through the prior agreement of the CEO. No mention is made of any requirement to make a written request. The claimant was clear throughout that she understood that she needed the permission of the CEO to take the holidays sought; she awaited that permission, with some eagerness, regularly asking her about it after she submitted it through the new Breathe system.

103. In any event, it is clear that the claimant noted her wish to have the holidays in July and August on the holiday calendar in the office, and that this was known to the respondent. It is unclear why this matter was not dealt with much earlier as a result.

104. Thirdly, the respondent did not simply refuse the holiday request in this letter; they went on to say that if the claimant insisted on taking the holiday, this would be treated as tantamount to her resignation. We found this to be an extraordinary intervention at that stage, and to be a

considerable overreaction. Why the respondent felt it appropriate to threaten the claimant with dismissal for what may be seen to be a fairly minor managerial issue – a request to take holiday – is entirely unclear from the letter. If the claimant did subsequently act in breach of the respondent's refusal to grant her a period of annual leave, then the respondent would be at liberty to act, but at this stage, there is no evidence that the claimant would disregard their refusal and go on holiday anyway.

105. The respondent also said that the claimant had been employed for less than 2 year. In that context, there was no need to make reference to the claimant's service, but in our view it was a telling comment, suggesting that the respondent felt free to terminate the claimant's employment without following a full procedure.

106. Fourthly, the letter goes on to add an entirely new issue to the conversation, namely the claimant's unsatisfactory conduct, and without further ado, advises the claimant that if she does cancel her holiday and return to work, she would be issued with a final warning. In a text message on 22 July, Mrs Pendreigh confirmed that the claimant was in fact on a final warning "for your holiday issue" (C17).

107. The unsatisfactory conduct is set out thereafter in the letter of 12 July, and is reflected in the Performance, Conduct and Capability Timeline (R21ff). In the timeline, there are a number of incidents recorded against particular dates.

108. In August 2022, the claimant is noted as having a "problematic attitude", and being "rather abrupt" to Mrs Pendreigh; in October 2022, Mrs Pendreigh reports that she had to speak to the claimant about her uncooperative and aggressive behaviour; in November 2022, there was a failure to follow instructions; in January 2023, there was a failure to attend a team meeting, whereupon Mrs Pendreigh advised her that she needed to do so; in April 2023, Mrs Pendreigh had to speak to the claimant about carrying out assigned tasks.

109. All of these incidents, which it is understood Mrs Pendreigh took into consideration in her letter of 12 July, preceded the making of the protected disclosure on 30 May, but no formal action was taken against the claimant until July, when, without notice, a warning was issued to her.

110. Taking these points together, we found the respondent's actions in writing this letter at this stage, on 12 July, to be explicable only by reference to the fact that the claimant had made her protected disclosure on 30 May. It is plain that the relationship between employer and employee was significantly altered after this date. Prior to the disclosure the respondent had dealt informally with the claimant's performance and conduct, and with her holiday request; subsequent to it, the terms of this letter are extremely harsh, and not justified by the circumstances.

111. While it is clear that the respondent felt that the claimant's request for annual leave at a busy time of year – made busier this year by the reopening of the Pavilion – was not helpful or reasonable, it was an extraordinary overreaction to propose that the claimant would be dismissed if she went on holiday anyway. There was no suggestion, as we have found above, that the claimant would do that; she had been awaiting permission from the CEO as her contract required. Then to advise that if she did continue in her employment, she would be issued with a written warning for unsatisfactory conduct, which is specified in the broadest terms in the letter and which the claimant clearly either did not understand or contested, demonstrated a lack of open-mindedness on the part of the respondent in their attitude towards the claimant by this stage.

112. A dispassionate reading of the respondent's letter of 12 July does not allow for the view that the respondent was acting constructively towards the claimant and encouraging a positive relationship. The tone and content of the letter are, in our judgment, threatening and excessive, in the sense that the letter appears to have been written initially to refuse the holiday request, but is then opened out to introduce an entirely new matter which has not been the subject of formal action before.

113. The respondent's position seems to be that since the claimant has worked for less than 2 years, they may act towards her with impugnity. However, the question before the Tribunal is whether or not they issued this letter to her because she raised the protected disclosure on 30 May. Notwithstanding the frequent denials by the respondent's witnesses, we have concluded that their attitude to the claimant did change significantly after she raised the allegation of sexual assault, and because of it. They were very anxious about the nature of the allegation, and stressed how seriously they took it. However, in our judgment, it was apparent that they considered the impact upon Mr X to be of great importance, and they stressed at great length how much time and expense had been incurred in investigating this complaint. We deal with this in more detail below, but it was our conclusion that the manner in which this was investigated demonstrated that the respondent wished to focus upon information which allowed them to deny that any incident had occurred as alleged by the respondent. Their over-reliance upon the CCTV footage, which was not produced to the Tribunal, without taking into account the consistent statements made by the claimant both verbally and in writing, made clear to us that they were anxious not to make a finding that a person (Mr X) who was well known and popular within the community had been guilty of something very serious.

114. Their finding in the investigation that there was no evidence of a sexual assault is simply incorrect; there was significant evidence from the claimant to the effect that this incident did happen. The inherently unlikely explanation given by Mr X appears to have been seized upon by the respondent as the reason for supporting his version of events. This left the claimant feeling isolated and entirely unsupported, which, as a complainer of an intimate sexual assault, was a consequence of the respondent's response to her allegation. The basis upon which the respondent viewed this incident was essentially of Mr X accidentally and momentarily touching the claimant's buttocks, but this discounts the claimant's version where it was more than momentary, and that his

intimate use of his fingers, which she reported on 30 May and thereafter, cast this incident into an altogether more serious light.

115. The respondent may have felt that the claimant's conduct and performance required to be addressed, but it is notable, in our judgment, that they took no formal steps to address it until after the claimant's complaint had been received. The conduct of the respondent in sending this letter was so inexplicable and excessive that it leads us to the conclusion that the real reason for their actions was because the claimant had raised a protected disclosure on 30 May. The gap in time is partly explained by the work being carried out by the respondent to investigate the claimant's report.

116. Accordingly, we consider that, on the balance of probabilities, the respondent's letter of 12 July 2023 was sent because the claimant made a protected disclosure on 30 May 2023.

117. The second alleged detriment was that the claimant was required to work on her birthday, on 10 July 2023. We heard very little evidence about this, and in our judgment, this does not rise to the level of being a detriment, that is an act which causes disadvantage to any individual, simply because it was plainly an unimportant matter both objectively and in the fact that the claimant made nothing of it before us.

118. The third alleged detriment was that on 21 July 2023, Mrs Pendreigh told the claimant's colleagues, falsely, that the claimant had resigned.

119. This relates to the text messages exchanged between the claimant and Mrs Pendreigh and also her colleague Jaime, who texted her to say that she was sorry she was leaving.

120. The text messages, set out on C17, arise after the claimant's initial message, saying that *"for health reasons, I'm unable to cover my current shift and those to come".* The claimant's evidence was that she meant the other shifts for which she was on the rota.

121. Mrs Pendreigh's response was, immediately, to accept the claimant's resignation, and then, when the claimant makes reference to sending her sick leave by email, to send another message shortly thereafter to say that this was being processed as her resignation: *"I'm taking your decision to indefinitely leave your shifts as a resignation of your position."*

122. The claimant emailed Mrs Pendreigh at 4.58pm that afternoon, the text messages having been exchanged at approximately 9am, attaching her sick note and confirming that she had not resigned from her position.

123. It appears that once the claimant sent that email, the matter was clarified and the respondent no longer insisted that the claimant was resigning.

124. It is clear that Mrs Pendreigh told Jaime that the claimant had resigned, as she then sent the claimant a message the next day, though it is unclear when Mrs Pendreigh told her that.

125. The detriment alleged is that Mrs Pendreigh told colleagues falsely that the claimant had resigned. Our conclusion here is that the claimant's initial text message simply did not suggest that she was resigning, nor did the follow-up, which made clear reference to sick leave. Mrs Pendreigh overstated the position in her responses. It is not clear exactly why she did this. However, we are not persuaded that the claimant has made out that this detriment. Mrs Pendreigh, whether disingenuously or not, acted as if the claimant had resigned, and as a result told her colleagues. We do not consider this to be creditable behaviour on her part, but it appears that the matter was cleared up once the claimant emailed her late that same afternoon. The claimant could have clarified the matter immediately by saying explicitly that she was not resigning, but she did not do so in response to two messages from Mrs Pendreigh. Accordingly, we do not consider that Mrs Pendreigh's actions here amounted to a detriment as a result of having made a protected disclosure.

126. The fourth detriment related to the CEO's alleged failure to consider properly the claimant's grievance following its receipt on 20 July 2023.

127. Taking this on its terms, it is our view that the CEO, Mrs Pendreigh, did not fail to deal properly with the claimant's grievance, but asked Ms Harding to deal with it, as a trustee of the respondent's Board. The grievance related to Mrs Pendreigh's actions, and accordingly it would not be appropriate for her to hear the grievance.

128. We do not consider that the grievance was not dealt with properly by the CEO, and therefore that this detriment did not arise in this case.

129. The fifth grievance was that the CEO failed to allow the claimant to be represented at the grievance hearing, or to have the benefit of an interpreter. The claimant said very little about a representative to be present at the grievance hearing, and there is no indication that she raised this as an issue at the hearing itself. It is true that no interpreter was brought to the grievance hearing either, though the claimant did not ask for one. The claimant herself speaks and understands English, though her need for an interpreter in these proceedings was understandable due to the formality and language of the process before the Tribunal. We considered that the claimant, who was able to communicate on a day-to-day basis in English in the workplace, was capable of understanding and communicating about her grievance during the hearing. We were persuaded that had she encountered any difficulties with language in the hearing, Alison Smith, who was present as note-taker and was an experienced and mature professional, would have stepped in to ensure fairness.

130. We have therefore not concluded that the claimant has demonstrated that this amounted to a detriment.

131. Finally, the claimant complained that her dismissal was a detriment, without notice or right of appeal. However, under section 47B(2)(b), the section does not apply if the detriment complained of is dismissal.

132. Accordingly the claimant's dismissal cannot amount to a detriment under section 47B.

c. Did the CEO dismiss the Claimant because she had made a protected disclosure?

133. In considering this issue, we note that the question put is whether the CEO dismissed the claimant for this reason. The evidence which we have heard is that the CEO was not involved in the deliberations or discussions which led to the decision to dismiss the claimant. However, we consider that this issue still requires to be considered very carefully on the basis that the letter of dismissal was sent and signed by Mrs Pendreigh.

134. In any event, while it may have been the Board which took the decision, it is plain that they regarded the claimant's performance and conduct as an operational matter, to be dealt with by the CEO.

135. Accordingly, we have considered whether the claimant was dismissed by the respondent because she had made a protected disclosure.

136. The claimant was dismissed at the conclusion of the grievance process, on 21 August 2023. The precise sequence of events is unclear. However, the decision was made on that date and conveyed to the claimant by the letter of dismissal (R29).

137. The letter of dismissal gave no reason for the decision. The respondent's position appears to be that this was a "short-service" dismissal, and that they had sought HR advice justifying their actions.

138. The reasons given by the respondent's witnesses related to conduct and performance, and the holiday issue. Essentially, we understood that the respondent's position was that they were justified in terminating the claimant's employment because her conduct had been unacceptable over a period of time, and in particular due to a hostile attitude demonstrated towards Mrs Pendreigh, and because she had sought to take holidays at a very busy time for the charity.

139. It is important to stress that the Tribunal's role here is not to consider whether or not the dismissal was fair, or procedurally sound, as would be required for an unfair dismissal claim under section 94 of the Employment

Rights Act 1996. The claimant lacks the necessary qualifying service to bring such a claim.

140. The only issue before us is whether the dismissal was because of the protected disclosure, that is, whether the reason, or if more than one, the principal reason, for the dismissal was that she had made a protected disclosure (section 103A, Employment Rights Act 1996).

141. In **Kuzel v Roche Products Ltd 2008 ICR 799, CA** Mummery LJ stated that a Tribunal assessing the reason for dismissal may draw "reasonable inferences from primary facts established by the evidence or not contested in the evidence"

142. In this case, it is our view that the respondent's attitude to the claimant changed following the making of her protected disclosure to them on 30 May 2023. To that point, they had dealt informally with the claimant, in relation to conduct, performance and holiday issues, but thereafter, and particularly on 12 July, their actions altered to the point where they became, in our view, hostile towards her. They administered a warning to her in relation to actions which she had not yet taken, and regarded it at a later stage as having been effectively administered; and they threatened her with dismissal in the event that she took holidays following their refusal.

143. Once the claimant submitted her grievance, they conducted the hearing, and then dismissed the claimant (without any hearing or opportunity to defend herself) immediately the grievance decision was made.

144. In seeking to understand the respondent's actions, we noted that they took into account the claimant's conduct and performance, and "the holiday issue".

145. At the point when the claimant was dismissed, it was entirely unclear what conduct and performance the respondent was taking into account. The claimant had already, whether fairly or not, been issued with a warning due to her conduct and performance, in the letter of 12 July

2023; what more the claimant had been guilty of to the point where she was dismissed was simply not explained by the respondent in evidence. Mrs Pendreigh did not give any evidence to the Board to assist them with this, and it appears that they took the view that she was unhappy with the claimant and therefore that she needed to be supported.

146. However, the claimant was absent from her employment from 21 July to 18 August, inclusive, on the grounds of ill health, duly certified by statements of fitness to work (C15). The respondent's witnesses accepted in evidence that these were valid, and accordingly that her absence during this time was not a matter of conduct.

147. The implication of relying on the "holiday issue" as a reason for dismissal suggests that the respondent considered that having been refused her holiday request, she simply went off sick and thereby secured the time off which she wanted; but they do not say that, and did not rely upon this in evidence as an explanation.

148. The dismissal was effected at the conclusion of the claimant's grievance, in which she continued to complain about the manner in which the complaint of sexual assault had been handled by the respondent. That grievance was not upheld by the respondent, but immediately following its conclusion the claimant was dismissed.

149. In our judgment, the reason for the claimant's dismissal was primarily that she had raised a protected disclosure about the sexual assault on 30 May 2023. It is clear that the respondent has expressly denied this in their evidence and throughout, and has sought to defend its actions robustly in this matter.

150. However, we consider that we may infer from the established evidence that the reason was the claimant's protected disclosure, for the following reasons:

- The significant change in approach to the claimant following the making of the protected disclosure, most particularly

demonstrated by the inexplicable terms of the letter of 12 July 2023 to her;

- The threat of dismissal for actions not yet taken, in the letter of 12 July 2023;
- The conclusion of the respondent's investigation into the incident of 29 May 2023 that there was "no evidence" of sexual assault. This was simply wrong. The claimant gave clear and consistent evidence of an incident which amounted to a sexual assault. They may not have accepted that evidence, but there was no basis for saying that there was no evidence of such an assault.
- The issuing of a written warning for conduct and performance which was never clearly specified or explained, and in respect of which the claimant never had any opportunity to defend herself, in a manner which was, in our view, grossly unfair and dismissive of the claimant;
- The decision to dismiss the claimant without giving a reason to her on 21 August, the same day as the grievance about the respondent's handling of her sexual assault allegation;
- The decision to dismiss her following a period of absence which was properly and medically certified, for a reason related to the "holiday issue", which was not properly specified or explained by the respondent;
- The decision to dismiss her for conduct and performance, following a period of absence, when she had already been given a warning in respect of the same conduct and performance on 12 July 2023.

151. These actions were not readily explicable by the respondent, and in the context of a report made by the claimant that she had been sexually assaulted by a member of the public, give rise to the inference that the respondent was very unhappy with the claimant for having raised this

matter and not accepted their assurances that it had been dealt with properly. We heard considerable evidence about Mr X from the respondent's witnesses, emphasising how popular and well-known he was within the community of the charity, and eliciting sympathy for his advanced years, his difficulties with his son and his recent widowhood. Against that, the respondent's witnesses were extremely critical of the claimant throughout, and we were left with the very strong sense that this contrasted strongly with their attitude towards Mr X.

152. Accordingly, it is our judgment that the reason for the claimant's dismissal was that she had made a protected disclosure on 30 May 2023, and that thereafter the respondent wished to take steps to remove her from the business. They may have considered that since she had less than two years' service they were at liberty to dismiss her without consequence, but in our judgment, they were very strongly influenced by the claimant's disclosure and her subsequent refusal to accept their response to it.

153. The Tribunal's Judgment is therefore that the claimant was automatically unfairly dismissed contrary to section 103A of the Employment Rights Act 1996 because she made a protected disclosure.

Victimisation (Section 27 Equality Act 2020)

d. Did the Claimant do a protected act (make an allegation of discrimination)?

e. Did the CEO subject the Claimant the following detriments because she had done that protected act?

(i) On 12 July 2023, refusing annual leave and warning her that if she took her holidays she would be dismissed; and notifying her of allegations relating to her performance;

(ii) On 15 July 2023, requiring the claimant to work on her birthday;

(iii) On 21 July 2023, telling her colleagues falsely that she had resigned;

(iv) On 20 July 2023, following the receipt of the claimant's grievance, failing properly to consider her grievance;

(v) On 21 August 2023, failing to permit her to be accompanied or be given an interpreter at her grievance meeting;

(vi) On 21 August 2023, dismissing her without notice or right of appeal.

154. The primary issue for us to determine here is whether the claimant's report on 30 May 2023, supplemented by her statement of 8 June 2023, amounted to a protected act under section 27 of the Equality Act 2010.

155. Section 27(2) sets out the acts which are protected.

156. The claimant did not bring proceedings under this Act as a protected act, nor did she give evidence or information in connection with proceedings under the 2010 Act. However, the Tribunal considered then whether the claimant had done any other thing for the purposes of or in connection with the Act, or made an allegation that A or another person had contravened the Equality Act 2010.

157. Here the claimant alleged that a user of the respondent's services, but not an employee, committed a sexual assault upon her in the workplace. Although the user was a volunteer permitted into the workplace by the respondent, he was not in any sense an employee for whom the respondent would be vicariously liable in the event of a complaint. However, she brought to the respondent's attention a matter within their area of responsibility which affected her, an employee, on the grounds of her sex. In our judgment, this amounted to an allegation that Mr X was responsible for a contravention of the 2010 Act in committing an act of sexual harassment upon her.

158. We consider that the same conclusions apply as we have reached above in relation to the detriments alleged under section 27 of the 2010 Act as to detriments arising from the making of a protected disclosure,

159. Accordingly we have found that the detriment (1) was visited upon the claimant by the respondent for the reason that she did a protected act, and accordingly that the claimant was subjected to victimisation on the grounds of sex contrary to section 27 of the 2010 Act.

Indirect race discrimination

f. Did the Respondent apply a practice of requiring workers to speak English in meetings?

g. Did this practice put non-UK nationals to a disadvantage compared with UK nationals?

h. Was the Claimant put to this disadvantage?

i. Was the practice a proportionate means of achieving a legitimate aim?

160. We considered, finally, the claimant's claim of indirect race discrimination. The claimant is French, and her reliance upon the French language, and her limitations in English, were the basis for this complaint.

161. We found that the respondent did not apply a practice of requiring workers to speak English in meetings. While it was normal for people to speak English in meetings, and in this case, in each instance, they did, it was possible for the claimant to have in attendance at a meeting with her Mr Swanepoel, who was specifically brought to the meeting of 8 June 2023 because of his fluency in French. Indeed, we heard evidence that he did assist the claimant in language at that meeting.

162. We did not consider that the PCP alleged was applied, and in any event, we do not find that the claimant was subjected to any disadvantage in comparison with UK nationals. In our judgment, the claimant could speak English and understand it, and had she had any difficulty at the meeting

of 8 June, she could, and did, ask for help. At the grievance meeting, the claimant had her husband available to her, and while we did not hear any evidence as to whether or not he was fluent in English, it is not clear to us that the claimant was able to point to any specific disadvantage. She did not complain about it at the time, and there was no evidence to this effect.

163. Accordingly, we find that the claimant's claim of indirect discrimination on the grounds of race fails, and is dismissed.

Conclusion

164. It is therefore our conclusion that:

(1) The claimant was subjected to the following detriment because she made a protected disclosure on 30 May 2023 and 8 June 2023: On 12 July 2023, refusing annual leave and warning her that if she took her holidays she would be dismissed; and notifying her of allegations relating to her performance.

(2) The claimant was dismissed because she raised a protected disclosure on 30 May 2023 and 8 June 2023, and was therefore automatically unfairly dismissed contrary to section 103A of the Employment Rights Act 1996;

(3) The claimant was subjected to the following detriment because she did a protected act on 30 May 2023 and 8 June 2023: On 12 July 2023, refusing annual leave and warning her that if she took her holidays she would be dismissed; and notifying her of allegations relating to her performance.

(4) The claimant's claim of indirect discrimination on the grounds of race fails, and is dismissed.

Remedy

165. We require then to consider the remedy to be awarded to the claimant.

166. Firstly, we considered the award of compensation to be made to the claimant as a result of loss of earnings following her dismissal. It is not appropriate to consider the award of a basic award here as the claimant lacked two years' qualifying service.

167. The claimant was out of work from 21 August 2023 until 4 December 2023, when she started new employment as a groundsperson at Edinburgh Zoo. Her role with the respondent was a part-time one, and her new job is full-time. As a result, she suffers no ongoing losses or future losses following the start of her new job.

168. It appears that the claimant took reasonable steps to mitigate her losses, and succeeded in finding alternative employment with better terms and conditions soon after leaving the employment of the respondent.

169. We consider that it is just and equitable to award the claimant a sum equivalent to 8 weeks' pay following her dismissal. The claimant was paid four weeks' notice on termination of her employment by the respondent.

170. The claimant's net pay per month was £1,193. This brings out weekly net pay of £205.31. 8 weeks at £205.31 brings out a figure for compensation of **£1,642.48**.

171. In addition the claimant seeks an award in respect of injury to feelings. It is plain that the claimant was upset and distressed by the dismissal, particularly following the sequence of events which led to it. She attended her GP and was prescribed medication, though she only took the medication for a limited period of time.

172. We consider that the injury to feelings award in this case falls within the lowest Vento band, given that the impact on the claimant was not significant in terms of the demonstrable upset she suffered, and in terms of the length of time which it took her to recover herself sufficiently to seek alternative employment within some three months.

173. Accordingly, it is our judgment that it is just and equitable that the respondent be ordered to pay to the claimant the sum of £6,000 by way of injury to feelings.

174. In total, therefore, it is our finding that the respondent should be ordered to pay to the claimant the sum of **£7,642.48** by way of compensation for financial loss and injury to feelings in this case.

Entered in register: 19 May 2025
and copied to parties