EMPLOYMENT TRIBUNALS

Claimant: Miss Deborah Oziel

Respondent: Sainsbury's Supermarkets Ltd

Heard at: Watford Employment Tribunal
On: 3, 4, 5, 6 and 7 June 2024

Before: Judge Bartlett, Mr Miller and Mrs Hancock

Representation:

Claimant: in person
Respondent: Ms Zielinska

JUDGMENT

1. The claimant's claims for constructive unfair dismissal under s98 of the Employment Rights Act 1996 are successful.

2. The claimant's claims to have suffered a detriment under s47B (whistleblowing) of the Employment Rights Act 1996 succeed.

3. The claimant's claims to have suffered harassment for a reason connected to her sex under s26 of the Equality Act 2010 are dismissed because we have found that the same conduct was direct discrimination which prevents that conduct amounting to harassment.

4. The claimant's claims to have suffered Direct Discrimination because of her sex under section 13 of the Equality Act 2010 succeed.

Remedy

The Tribunal makes the following remedy awards:

1. Unfair dismissal:

The respondent is ordered to pay to the claimant a basic award of **£3375**
The respondent is ordered to pay to the claimant compensation in the sum of **£29,250**

The entire amount, namely £29,250 is the prescribed element. Calculated as follows: 74 weeks of net pay at £459.90 = £34032.60, this amount was subject to an uplift for failures to comply with the ACAS code taking it to the statutory cap of £29,250 (52 weeks of the claimant's pay)
The prescribed period is 52 weeks (once the cap is applied, if the cap was not applied the prescribed period would be 74 weeks).

2. The respondent is ordered to pay to the claimant an amount in respect of **Injury to feelings of £21,000**

3. The respondent is ordered to pay to the claimant an amount in respect of **Aggravated Damages £2,000**

Interest at 8% from the midpoint of the first and last act which has been taken by agreement as 1 June 2022. 8% interest on £23,00 from 1 June 2022 until the date of this award is **£3718.14.**

Total award £59,333.14

Notes to the parties: The Tribunal erroneously considered that recoupment did not apply because the statutory cap had been reached easily in this case. This is incorrect and the Tribunal is obliged to comply with the Recoupment Regulations. What this means for the claimant is that the prescribed element is to be held back by the respondent and if the DWP (Department of Work and Pensions) serves a recoupment notice in the amount or part amount of the Universal Credit the claimant has received at this date, the respondent is obliged to deduct that amount subject to the recoupment notice and pay the remainder to the claimant.

Reasons

Correction under Rule 67

The claimant has forwarded the Tribunal some correspondence between her and the DWP Recoupment Team. In it the claimant identifies that the Judgement of the Tribunal incorrectly sets out that the period from 1 April 2023 to 9 September 2024 was 62 weeks. This is a reference to para 96 of the Judgement.

As a result and under Rule 67 of the Employment Tribunal Rules of Procedure the Tribunal has decided to correct this accidental slip. This means that the Judgement is corrected at para 96.1 and 96.1.1 and the Remedy section at para 1.

The Hearing

1. The hearing took place via CVP. The morning of the first day was concerned with housekeeping matters and reading in. The witness evidence commenced in the afternoon with the claimant's witness evidence. This continued into the morning of the second day. Then the respondent called its witnesses who were Ms Chowdhury whose evidence was completed on the second day and Mr Curry whose evidence was taken on the morning of the third day.

The Issues

2. A CMR took place on 28 November 2023. The orders from the CMR set out that "*The list of issues as discussed and agreed at this hearing is attached*." The list of issues is a lengthy document including numerous allegations under the four main headings of:

    2.1. constructive unfair dismissal;

    2.2. Direct Sex discrimination (S13 Equality Act 2010);

    2.3. Harassment on the grounds of sex (S26 Equality Act 2010) and

    2.4. Detriment related to a protected disclosure (S47B Employment Rights Act 1996).

3. We have not found followed the list of issues slavishly because some of it is incorrect, repetitive and vague.

4. The List is as follows:

Jurisdiction

1. Has the Claimant's claim of sex discrimination been brought within 3 months of the acts complained of (accounting for any period of early conciliation (namely by the 17th January 2023)?

2. If any such complaints are out of time, do they form part of a continuing act, taken together with acts which are in time?

3. If any such complaints are out of time, would it be just and equitable to extend time in respect of such complaints?

4. Has the Claimant's claim of detriment related to a protected disclosure and/or unfair (constructive) dismissal and/or harassment been brought within 3 months of the Claimant's resignation (accounting for any period of early conciliation)?

5. If not, was this because it was not reasonably practicable for the Claimant to submit her claim in time?

6. If so, did the Claimant submit the claim within such further period as was reasonable?

Constructive Unfair Dismissal

7. Did the Claimant resign in response to a fundamental breach of the implied term of mutual trust and confidence by the Respondent?

8. The conduct relied upon by the Claimant to establish a fundamental breach of contract is:
    a. No/inadequate action being taken in relation to or against Matthew Henderson, despite his incidents of aggression against the Claimant, her colleagues, and customers.

    b. The lack of training/guidance provided in relation to dealing with staff with disabilities.

    c. The handling and conclusion of an allegation made in November 2021 against the Claimant (by Lukas Durilla).

        i. The Claimant was subjected to two investigations that were not concluded (the first started on 17 December 2021 and the second, where new allegations were added, was scheduled for the 09 February 2022).
        ii. The process was unnecessarily delayed.
        iii. There was no/insufficient evidence to warrant the Claimant being formally investigated.

d. The Claimant was encouraged by the store manager, Nick Galvin, not to take formal action/complain about Matthew Henderson.

e. The handling of an incident with Matthew Henderson on 07 February 2023 where he was aggressive/inappropriate toward the Claimant:

    i. The Claimant was blamed for the incident.
    ii. The Claimant was threatened with disciplinary proceedings if she did not attend mediation with Matthew Henderson.

f. The lack of support offered when the Claimant was involved in an incident with shoplifters on 25 January 2023.

g. Being discriminated against (see below).

h. Being subjected to detriments for making protected disclosures (see below) and the conduct set out in paragraph 29 below.

i. Did the above conduct occur as alleged by the Claimant? If so, did any of the conduct, or taken cumulatively, amount to a fundamental breach of contract? (the last straw in the chain of events being The Claimant's bodycam footage of Matthew Henderson being moved/deleted from the internal portal on 13 March 2023.

9. If yes, did the Claimant resign in response to the fundamental breach?

10. Did she waive any breach and affirm the contract?

11. If there was an unfair dismissal, what was the reason?

12. Was this reason potentially fair?

13. If there was a potentially fair reason, did the Respondent act reasonably in the circumstances in treating that reason as a sufficient reason for dismissing the Claimant, having regard to equity and the substantial merits of the case, pursuant to s.98(4) ERA?

Direct Sex Discrimination

14. Did the following less favourable treatment occur as alleged by the Claimant?

    a. On 23 September 2021, Matthew Henderson shouted at the Claimant stating, *"fuck you fucking bitch."*

    b. On 07 February 2023, Matthew Henderson was shouting and being aggressive toward the Claimant and stating – *"shut the fuck up you stupid bitch."*

15. The Claimant relies upon a hypothetical comparator.

16. If so, did any less favourable treatment occur in the course of Matthew Henderson's employment?

17. If so, did the Respondent take all reasonable steps to prevent Matthew Henderson from carrying out any less favourable treatment?

18. If not, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her sex?

19. If so, has the Respondent shown that it did not discriminate against the Claimant?

Harassment (Sex)

20. Did the following treatment occur as alleged by the Claimant?

    c. See paragraphs 15a and 15b above.

21. If yes, was this unwanted conduct related to the Claimant's sex?

22. If yes, did the unwanted conduct have the purpose or effect of:

    d. Violating the Claimant's dignity, and/or;
    e. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

23. If it had "the effect" referred to above, was it reasonable for this conduct to have that effect, taking into account the Claimant's perception and all the circumstances of the case?

Whistleblowing

24. Did the Claimant make a qualifying disclosure? The Claimant relies on:

    a. 07 February 2023 – Her email to Idrani Chowdhury, Yash Redman and "Ask HR" – reporting aggressive and threatening behaviour of Matthew Henderson toward staff and customers and that she and colleagues feared for their safety.

25. The Claimant relies on the following sections of the Employment Rights Act 1996:

    a. Section 43B (1)(a) – a criminal offence was /was likely to be committed.
    b. Section 43B (1)(b) – a person had/was likely to fail to comply with a legal obligation.

    c. Section 43B (1)d) – the health of safety of was/likely to be endangered.

26. Did the Claimant reasonably believe that the disclosures were in the public interest?

    a. The Claimant believed her disclosures were in the public interest because she was reporting that a colleague who had been aggressive may cause harm to people (staff or otherwise) in the Respondent's store.

27. Was the Claimant's qualifying disclosure a protected disclosure?

28. Did the Claimant suffer the following detriments on the grounds that she made a protected disclosure? The Claimant alleges that:

    a. The complaints about Matthew Henderson not being properly addressed or investigated.

    b. There being no action taken against Matthew Henderson.

    c. The Claimant being told by Nick Galvin not to complain about Matthew Henderson (07 February 2023).

    d. The Claimant (on 08 March 2023) being told by Idrani Chowdhury:

        i. That the Claimant needed training in conflict management.

        ii. That the Respondent felt like the situation with Matthew Henderson was dealt with incorrectly.

iii. That the Respondent felt like management had bullied Matthew Henderson.

iv. The Claimant being told she had to have a meeting/mediation with Matthew Henderson.

v. The Claimant being told that if she did not meet with Matthew Henderson, this was refusing a reasonable management request (and if she was ready to pay the consequences).

b. The Claimant's bodycam footage of Matthew Henderson being moved/deleted from the internal portal (13 March 2023).

The Evidence

5. The Tribunal heard oral evidence from:

5.1. The claimant;

5.2. Mrs Indira Chowdhury;

5.3. Mr Andy Curry

The Law

Constructive dismissal

6. When deciding if an employee was constructively unfairly dismissed pursuant to section 95(1)(c) of the Employment Rights Act 1996, a Tribunal must consider the following:

6.1. Did the Respondent commit an act or series of acts which cumulatively amounted to a breach of the implied term of trust and confidence?

6.2. If there was a series of cumulative acts, what was the last straw?

6.3. Did the Claimant resign in response to that breach?

6.4. Did the Claimant delay too long before resigning?

6.5. Was there a fair reason for the dismissal?

7. The Court of Appeal provided helpful guidance on the last straw doctrine in *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833* when it approved the comments made by Dyson LJ in *Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493*:

"19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the

employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred."

The Law relating to Direct Discrimination and Harassment s13 and 26 EqA 2010

8. S13 of the Equality 2010 sets out the test for Direct Discrimination:

"(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
(5)If the protected characteristic is race, less favourable treatment includes segregating B from others…"

9. In Dziedziak v Future Electronics Ltd UKEAT/0270/11, [2012] EqLR 543 the EAT found that the conduct complained demonstrated an intrinsic link with nationality which was sufficient in itself to pass the burden of proof to the respondent and the respondent had failed to establish another non-discriminatory reason.

10. In Amnesty International v Ahmed [2009] IRLR 884, [2009] ICR 1450, EAT, Underhill P set out:

"In other cases—of which Nagarajan is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling James v Eastleigh and Nagarajan. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

11. This has been confirmed in a number of subsequent cases including more recently by Linden J in Gould v St John's Downshire Hill [2020] IRLR 863, [2021] ICR 1, EAT(a case of alleged discrimination because of marriage):

"…the logic of the requirement that the protected characteristic or step must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied – but for the protected characteristic or step the act complained of would not have happened – and/or where the protected characteristic or step forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic or step itself did not materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. This point is very well established in the field of employment law generally where, for example, an employer may be held to have acted by reason of dysfunctional working relationships rather than the conduct of the claimant which caused the breakdown in those relationships (see e.g. the cases on the distinction between dismissals related to "conduct" and dismissals for "some other substantial reason", such as Perkin v St Georges Healthcare NHS Trust [2006] 617 CA; and the cases in relation to public interest disclosures such as Fecitt & Others v NHS Manchester (Public Concern at Work Intervening) [2012] ICR 372 CA and Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 EAT).

12. S.23 of the Equality Act 2010 sets out the law relating to comparators:

"(1) 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."

13. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that

"the comparator required for the purpose of the statutory definition of the discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

18. S26 of the Equality Act 2010 sets out the test for harassment:

"Harassment

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—
(a)A engages in unwanted conduct of a sexual nature, and
(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—
(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b)the conduct has the purpose or effect referred to in subsection (1)(b), and
(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect."

Burden of Proof

14. S136 of the Equality Act 2010 sets out the burden of proof which applies to discrimination cases:

"(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."

35. In Igen Ltd v Wong the Court of Appeal approved the guidance given in Barton v Investec Securities Ltd [2003] IRLR 332 concerning the burden of proof in discrimination cases which is that:

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".
(2) If the claimant does not prove such facts he or she will fail….
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive."

15. In Madarassy v Nomura International plc 2007 ICR 867, CA Lord Justice Mummery stated:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Whistle blowing - Detriments for making a protected disclosure s48 ERA 1996

16. In a detriment case the test is whether the detriment was 'on the ground that the worker has made a protected disclosure', this means that the disclosure must have been 'a material factor'.

17. A detriment claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker.

Findings of Facts

General

18. The claimant was employed by the respondent from 15 June 2016 until the end of her employment on 1 April 2023 following her resignation by email on 31 March 2023 effective on 1 April 2023.

19. The claimant was employed as a CTM at the respondent's East Finchley store. This is a small store and frequently there may be only one or two employees working on site. A CTM is a management position, it falls below the store manager and is somewhere between a supervisor and a manager. The claimant was a band 3. There were a number of other CTM's at the East Finchley store. We did not hear clear evidence about how many CTM there were at any given time at the store but it seems to us that there were at least three on the payroll. In addition, there was another position, called a responsible colleague, when carrying out responsible colleague duties the employee was required to be alone in the store for the first two and/ or final two hours of trading and act as the manager.

20. Some of the claims concern a colleague of the claimant called Matthew Henderson. He was a band 2. At all material times he was also a Responsible Colleague, this meant that when called upon he did those duties but he did not do them all the time.

21. One of the complaints that the claimant relies on in relation to unfair dismissal and whistle blowing is that no or inadequate action was taken by the respondent against MH despite his incidents of aggression against the claimant, her colleagues and customers. This allegation is worded slightly differently in the list of issues under the unfair dismissal heading and the whistleblowing heading, however, we consider that there is no material difference between what is being alleged. This is a very widely worded allegation because there are no particular dates or events specified. The tribunal accepts that the respondent will have focused its evidence on the points identified by the claimant in her grounds of claim which refer to 23 September 2021, 18 December 2021 and 7 February 2023. We will make

findings about what happened on those occasions.

22. We found the claimant to be a persuasive and credible witness. She had a firm grasp of the documents and facts in this case. She dealt with difficult questions in cross examination by referring to evidence. Her answers were consistent and largely supported by documentary evidence.

23. The respondent only called 2 witnesses. Mr Curry was only involved from 25 March 2023 at the earliest and given the claimant resigned effective 1 April 2023 there were some obvious limits to his evidence. Judge Bartlett did ask Ms Zielinska about what it was that he would give evidence on and she identified that as the claimant had complained about investigations and lack of action against MH his evidence was related to this and some other points. Mr Curry gave some reasonably full answers however he was questioned by the claimant and to a lesser extent by the panel on how he had reached some of these conclusions and his answers were generally found lacking by the tribunal. In several cases that we have identified below, his opinions were not supported by objective evidence. For the reasons set out more fully below, in some areas we could not accept his evidence as being accurate.

24. IC only became involved in the subject matter of this claim at the start of February 2023 and again this limited the evidence she could give. We also found her answers on some topics to be unpersuasive. In particular, her evidence about being able to access body worn camera and CCTV footage were inconsistent and not credible.

25. The limited witness evidence provided by the respondent has meant that there are significant parts of the claim about which the respondent has not provided witnesses with first hand knowledge. The respondent also did not provide witness statements for any other individuals. It is the respondent's choice how to present its case but it is obvious that failing to provide evidence can create a disadvantage.

23 September 2021

26. In summary the claimant's witness statement sets out that she spoke to MH about not performing his allocated tasks and he had an outburst of swearing. He went to the back of the store, she thought he was going to leave so she went to the entrance to speak to him and he had another outburst during which he swore at her which included the words "fucking bitch". This was on the shop floor in front of customers and colleagues.

27. We accept this account as it was not challenged by the respondent. We record that the respondent did not ask MH to appear as a witness, when asked about this they said they did not want to put him through the tribunal process. The Tribunal reminded the respondent that they were used to dealing with people with disabilities and making adjustments. Further, there is no medical evidence in the bundle about MH, it is entirely unclear what the impact of Asperger's is on him and it relevance to the issues in this case. On the evidence before us the respondent has no taken steps to discern this. Despite Nick Galvin (NG), the appellant's store manager, stating in an interview with AC that he had completed a Workplace Reasonable

Adjustments Plan (WRAP) there has been no other evidence of this and none of the respondent's witnesses saw it, knew what was in it or had even asked at any time what was in it. IC did undertake a WRAP after the events in question in this claim and concluded there were no adjustments to be made and MH said he could just walk away from situations to calm down. This is something he had not done previously as we set out in this Decision.

28. NG carried out an investigation which included interviewing the claimant, MH and other colleagues. The outcome was that no further action would be taken and the outcome letter said that "*there can however be no further incidents like this*". In the investigation and outcome meeting MH revealed for the first time that he had Aspergers.

29. We find nothing on the face of it to be unreasonable about the respondent's actions at that time.

November/ December 2021

30. We accept the claimant's evidence about what happened in relation to the respondent investigating a fair treatment complaint made by a male colleague, LD, against her. There was no contrary evidence. We accept that the investigation could have been handled better, that the claimant was not notified of the allegations in advance of a meeting or notified of the meeting in advance instead during her shift and without notice she was requested to attend a meeting. This denied her the opportunity to prepare. We accept that she was not notified of an outcome and find that this should have happened. The claimant alleges there was unnecessary delay. We find that there was a gap of about 3.5 weeks between LD making the complaint and the meeting with the claimant. The claimant was off sick from 27 December 2021 until 14 January 2022. On 23 January 2022 Mr Ulas Karakas, the investigating manager into LD's grievance, informed LD an outcome which is that part of his complaint was upheld. The outcome found no evidence to support the claim that he had been discriminated against due to a disability (a knee problem) but upheld that he had been harassed by the claimant.

31. On 2 February 2022 the claimant received a written invitation to an investigation meeting "*to investigate misconduct allegations against you of Aggression/inappropriate behaviour namely on the 19/11/2021 you followed [LD] outside of the store shouting at him whilst also leaving the store unattended*." She raised some concerns about this, Ms Danielle Hayes was appointed as an investigating manager. The investigation into the alleged misconduct by the claimant was abandoned at some point after she raised various concerns. The claimant's evidence was that she was told informally by NG that the allegations were not being pursued against her because she had a union representative on 2 March 2022. We accept the claimant's evidence, there was no evidence to contradict her claims. We accept that there were some delays and that the claimant was treated poorly due to the failings we have identified.

25 January 2023

32. On 25 January 2023 two female shoplifters entered the store and began

shoplifting. The claimant monitored the aisle which resulted in one of them shouting, swearing and threatening her. She asked them to leave and when they were outside, she attempted to close the door but one of them forced it open and started punching her in the face. Other colleagues intervened to help. She was called abusive names by the shoplifters and had bleeding gums and bruises on her chin and arms. We saw CCTV footage which support this and we find that it was a shocking incident.

33. The claimant complains that she received no support after this incident. It was extremely distressing for her. On the night of the incident she was so distressed she called a suicide line. The only help she asked for was a reduction in her hours to NG. There is no evidence that her hours were reduced. She complained that she received no support and this was not disputed by the respondent. No manager had a conversation with her, directed her to sources of support, no security was requested or provided. We accept all of the claimant's evidence on this as we found her credible and there was little to contradict it. We find that no support at all was offered to the claimant.

2 February 2023

34. On 5 February 2023 the store manager changed at East Finchley from NG to IC. She worked two shifts and then took annual leave for 2 weeks.

35. On 2 February 2023 there was an incident in which MH told SD to fuck off 3 times and used the f word to a customer. This is set out in SD's statement to AC dated 3 May 2023. The respondent has not provided evidence to dispute this

36. On 2 February 2023 MH told a colleague, SM, on the way home from work that he intended to buy an imitation gun to bring into the store and with which to threaten the claimant. There is no evidence that MH was asked about this by anyone at the respondent and therefore we accept the claimant's evidence in this regard.

37. The claimant's evidence, which we accept as it was not disputed by the respondent, was that from the end of 2021 she and MH were on opposite shifts so that their interactions were limited.

7&8 February 2023

38. Though, for all material purposes, the respondent accepts what the claimant alleges was said by MH on 7 February 2023 and alleged to be harassment/Direct discrimination in the list of issues, the circumstances are disputed. Therefore we make the following findings:

    38.1. the CCTV footage shows that the offensive comments made by MH to the claimant on 7 February 2023 were made when the claimant, was on the first occasion, alone in the small office which had no windows, only one door in front of which MH stood, MH can be seen pointing towards her with his hand. We accept the claimant asked him to leave repeatedly but he did not do so until she turned on the body cam. We find that 3 or 4

minutes later MH returns to the office again swearing at her but with another colleague present. She asked him to leave again and he did not do so until he realised that the body cam was on again. These are the circumstances in which the comment were made.

38.2. We accept the claimant's unchallenged evidence (because NG was not called as a witness and neither was a statement taken from him for these proceedings) that NG, who was no longer the store manager and working elsewhere at the time, telephoned the claimant after the incident on 7 February 2023 and that he asked her to leave the matter with him. We also accept her evidence that NG laughed at her when she told him the threat MH had made to her about the imitation gun and expressed her fear of him. We find that he went on to say that she took things too seriously and became over emotional. We find that this is offensive and highly inappropriate.

38.3. Later that day the claimant emailed her complaint/grievance to Ask HR, IC, and Yash Redhman the Area Manager which included the alleged protected disclosure.

38.4. On 8 February 2023 NG suspended MH, the suspension letter set out the allegations being investigated were "*inappropriate behaviour; namely swearing, raising voice and acting in an aggressive manner towards other colleagues*." It is note worthy that there is no mention of the threat with the imitation gun in this letter despite it being set out in the Claimant's email of 7 February 2023.

38.5. Danielle Hayes was appointed as the manager dealing with the disciplinary action in respect of MH following the claimant's email of 7 February 2023 . She held a meeting with MH and no-one else.

38.6. She held a meeting with MH on 7 March 2023 in which she identified the allegations against MH as "*shouting and swearing at a CTM*". Again it is notable that there was no mention of the imitation gun threat. It is even more remarkable that MH was not asked a single question about this threat and neither was anybody else, including the Claimant or SM at any time by the respondent. During the course of this meeting DH stated that no further action would be taken.

38.7. DH's outcome letter dated 7 March 2023 sets out "*I believe there was a breakdown in communication and that the situation was not handled correctly or appropriately by anyone involved.*" It is hard to understand how that conclusion was reached when the only investigation was a meeting with MH. To put it another way there was limited evidence to support that conclusion. MH's comments were in contradiction to the claimants complaint and there is no explanation about why MH's comments were preferred. Further, the claimant was not given the opportunity to address the complaints made by MH. No consideration was given to the possibility that MH may have been making false statements to protect himself.

38.8. On 8 February 2023 MH lodged a fair treatment complaint against the claimant. This is a lengthy document in which, amongst many things, he complains about being victimised and *"the environment in the store is toxic from the management team*". He refers to the incident with SD on 2 February and the incident with the claimant on 7 February 2023. This was dealt with by Irfan Zulfiqar. It is unclear who he interviewed but it included MH, Lanika and the claimant. The claimant provided a written statement to him dated 10 February 2023 which included concerns about the threat

with the imitation gun.

38.9. On 28 February 2023 there is a fair treatment outcome letter to MH which includes:

> The investigation established that some of the action taken on the day of the incident and after were due to emotion and what happened in the pass between you and Deborah and were not appropriate. If management had acted as per training then you would have felt supported due to your condition. In conclusion I feel you could have been better supported which may have prevented some of the incidents taking place, however your use of foul language and threatening behaviour will have instigated some of the reactions from managers. Management team need to revisit their confrontational situation training and how to conduct a fact finding/Investigation.

38.10. As a result of IZ's request during his investigation the CCTV and BDW footage were uploaded to the portal. The claimant texted NG to inform him about this.

38.11. We find that there is a clear difference between how the respondent dealt with the communications by the claimant of 7 February 2023 and MH's email of 8 February 2023. MH's was treated as a grievance and the claimant's was not despite raising concerns about a threat with an imitation gun. There was little investigation and no outcome into her complaints of 7 February 2023.

8 March 2023

39. There were two conversations between the claimant and IC at store. The claimant recorded these without permission and an undisputed transcript is in the bundle. This transcript records that all the points identified by the claimant as said to her by IC were said. The respondent does not dispute them. These include but are not limited to the following:

39.1. the claimant needed training in conflict management;

39.2. the respondent considered that management had bullied MH;

39.3. the claimant had demonstrated poor management in dealing with MH;

39.4. the claimant was required to enter into mediation with MH and her refusal was a refusal of a reasonable management request which could lead to further action against her.

Bodycam footage

40. The claimant asserts that the footage from her bodycam of MH on 7 February was deleted on 13 March 2023. The respondent says that footage was automatically deleted after 31 days. We accept that there was automatic deletion but the claimant's point was that it should have been flagged and preserved in the circumstances. The Body Cam footage had been requested by Ifran to be uploaded on to the portal which it was. The respondent has not provided any evidence to dispute this and therefore we accept the claimant's evidence on this point. We accept that the footage should have been saved as an incident due to the claimant's complaint, the serious nature of the allegations and in line with internal policy, the footage preserved and it was not.

25 March 2023

41. On 25 March 2023 the claimant sent an email which, in her evidence, she calls a fair treatment complaint and which is on the face of it a grievance. The claimant did not receive any response until she resigned on 29 March 2023.

On 31 March 2023 she received an acknowledgement which also asked her to reconsider her resignation. She was invited to, and attended, a meeting with AC on 3 April 2023.

42. AC interviewed a number of employees including NG, Keith, SD, Lanika, IC, LD but notably not MH or the claimant. We accept that AC did have a meeting with her but he did not ask her anything about her complaints.

43. When AC was asked about why he chose not to interview MH, he said did not think he would give him any new information and it would have been stressful for him. He also did not review the CCTV footage as he did not "consider it necessary" and his evidence was that he was not aware that there was BDW footage. However, the claimant's complaint of 23 March 2023 sets out that there was BDW and we find that he took no action to obtain or consider this.

44. We find it concerning that AC did not seek discuss or clarify any of the claimant's complaints with her. He did not ask her a single question about the imitation gun threat which prevented him from risk assessing how serious that threat had been or may still be. Not speaking to her is very concerning given that his conclusions were that "*it was clear, upon reflection, that there had been issues with how Mr Henderson was managed, including by the claimant, and that behavioral issues presented themselves when he was put under pressure by colleagues who did not deal with him well. My view was that that was the root cause of the issue in this case*." Later is his witness statement AC stated "*my view was that the claimant, as a leader in the East Finchley store, could have done more to address the issue by putting a WRAP in place and doing more to seek advice from ER and potentially Occupational Health*". He did not seek to understand what the claimant had done, what her position was and her ability to take actions or specifically what dealing with MH looked like. Therefore, we find that there is a lack of evidence for his conclusions. They are mere assertions.

45. We find it concerning that AC did not speak to MH, as we have said above there is no information from the respondent about how MH is affected by Aspergers in relation to any of these issues. There are no work place adjustments. His two page grievance did not contain a single typo. MH had carried out responsible colleague duties. There is little to support the contention that MH was not fit to be interviewed. It is shocking that neither AC nor any of the managers who received the claimant's complaints of 7 February 2023, particularly DH, and 25 March 2023 which set out a threat to her from MH (via a colleague) that he intended to use an imitation gun to threaten her in store, asked MH a single question about it. There was no enquiry whatsoever into this threat. There could be no risk assessment of that threat in the circumstances.

46. AC did not review any of the previous investigation notes or interview records because he said he wanted to review it afresh. This meant that he was not even aware of what MH had said in those interviews. This compounded the issues created by AC not seeking to ask MH anything as part of his investigation.

47. AC stated that he did not interview SM (the colleague who heard the imitation gun threat) because she said that she did not want to meet with him. We have seen no evidence about this situation except for AC's evidence. Further, the claimant's complaint of 25 March 2023 refers to her having a signed statement from SM which AC agreed that he did not see and it seems he took no steps to request it from the claimant. Again this was a total failure to make any enquiry whatsoever into the imitation gun threat. We find that AC could have asked for that statement and compelled SM to attend a meeting. These are further failures to take steps to investigate the imitation gun threat.

48. We find that the respondent has completely failed to even consider that the claimant was raising concerns she had about her personal safety around MH as evidenced by undisputed aggressive behaviour towards her (the swearing). Instead they have put the blame for the situation on the claimant.

49. Part of the respondent's witness evidence and its case is that the claimant was, at least, in part responsible for the incidents with MH because she had poor management of MH. IC was asked by the panel what she had meant by the claimant's poor management and she said the claimant switching on her Bodycam during the incidents with MH on 7 February 2023. Firstly, the respondent's BodyCam policy sets out "*Colleagues should activate their camera when the situation presents that it is: There is fear of being verbally abused or physically assaulted… necessary to record the events taking place as it will help to calm the situation…*" and it is not limited to customers. Therefore we find that the claimant's actions were in accordance with the respondent's policy. Secondly, AC confirmed in his evidence that it was not poor management by the claimant to turn on her body cam in these situations. We reject the assertion by IC that the claimant managed MH badly because IC was not able to identify a single management failure (except this insupportable assertion about the BDW) by the claimant.

50. In cross examination AC repeatedly stated that the claimant was in part responsible for MH's behaviour because there were things that she, as a manager, could have done differently. He was asked by the panel what the claimant could have done differently in the situation she found herself in on 7 February 2023 which was that she, a female, was in a confined space with MH swearing at her with her exit blocked. AC could only suggest that she could have called central control. We find that other suggestions that had been made in documents in the bundle by various managers, including AC generally saying that the claimant could have asked him to leave, suspend him etc were not open to her in that situation and that is plain once the facts of it are considered. She did ask him to leave and he refused.

51. AC was asked specifically by the panel what the claimant should have done in light of his comments that her poor management was responsible for the situation. He made some general suggestions of options that were open to managers which were that she could have referred him to OH, contacted HR for help, contacted other managers for assistance, telephoned health heros and could have done work around putting a more effective WRAP in place. He was asked if it was poor management of the claimant to not refer MH to OH and AC said no. AC was asked what the claimant should have done specifically and he repeated his general comments. We found that the

suggestions he made were not open to the claimant on 7 February 2023 or she had done them. It was concerning that the respondent considered that not doing them was a failure on the claimant's part. It shows a failure by the respondent to understand the context (which included that the claimant had heard about the imitation gun threat a few days before) and the claimant's concerns. The criticisms of the claimant that she had poorly managed MH were not sustainable on the evidence available to AC or any of the other managers who repeated this. We note that NG said in an interview with AC that the claimant poorly managed MH but he was fine with NG. AC at no point asked NG how he managed MH, what good management looked like, what the claimant did wrong, what she should have differently etc. It appears nobody asked NG what good management of MH was and what the claimant was doing wrong.

52. AC gave evidence that if MH had been managed better prior to 7 February 2023 the events may not have happened and that the claimant was in part responsible for these failures. We do not accept that the claimant bore any responsibility for poor management of MH. The claimant and MH worked opposite shifts from the end of 2021 to February 2023 which limited their interactions. She did not manage him. We accept her evidence that NG took on all the HR responsibilities for the store, she had no input into that whatsoever. It is untenable to say that she should have made OH referrals or HR referrals in respect of management matters in which she was not involved in relation to an employee she did not manage. It is ridiculous to say that she should have carried out a WRAP in respect of MH in these circumstances. We wholly reject the assertion that the claimant failing to do any of these things was poor management in the circumstances. The assertions by AC to the contrary show that he did not investigate the situation with sufficient care and made conclusions without obtaining evidence to support them.

53. We find that the respondent has failed to identify any poor performance on the claimant's part. AC's investigation notes set out that both NG and IC said that the claimant managed MH poorly but neither were asked what good management was and what the poor management was. DH also said as part of her investigation into MH's complaint against the claimant that she managed him poorly but again there was no identification of what this was or what should have been done. Her conclusion was not supported by evidence.

54. AC set out in his evidence, both written and oral, that MH was under pressure, working long hours. The claimant took AC to time sheets which set out that MH had not worked over time for several weeks prior to 7 February 2023, that he had been on holiday prior to that and the only overtime he had worked was 4 hours at Christmas. The panel asked AC how he concluded that MH was working long hours, AC said that in an interview he conducted it had been said that MH was working 6 days. The panel asked him if working 6 days a week necessarily meant long hours as staff could work only 2-3hours per day and so work less hours that someone working 3 days. AC agreed. We find that there was no reasonable basis on which AC could form an opinion that MH was under work pressure given the investigation he carried out. By the time of this hearing there was clear evidence that MH was not under work pressure and this did not form part of the background to the incidents - he had not acted as a Responsible Colleague which entailed additional

responsibilities or worked overtime in the run up to 7 February 2023. AC's investigation is marred by AC forming out conclusions which are not supported by evidence and instead he has used assumptions based on other individual's he knows.

55. We find that AC's investigation was biased against the claimant and fundamentally flawed. It also failed to understand or consider that she was concerned about her safety at work. We also find that there was no real investigation into the claimant's complaint of 7 February 2023. Given the examples we have set out elsewhere where grievances have been progressed from LD and MH against the claimant, this is deeply unfair and unjustified.

Decision

Jurisdiction

56. Despite what is said in the list of issues Ms Zielinska said the time point only related to the allegations at 14.a and 20 which is the events of 23 Sept 2021. It was also agreed that the list of issues identified the wrong test in relation to harassment. As harassment is a claim under the Equality Act 2010 the correct test relating to extending time is would it be just and equitable.

57. We find that this allegation is out of time and not part of a continuous course of conduct due to the gap of almost 17 months between the allegations.

58. The test we must consider is whether or not it would be just and equitable to extend time. We find that it is just and equitable to extend time for the following reasons:

58.1. There was little or no prejudice to the respondent to the inclusion of this claim because it has not added any substantial length to the hearing or required additional evidence. The respondent did not seek to call MH as a witness and accepts that these comments were made by him;

58.2. the claimant identified that she did not have interactions with MH at work after around October 2021 which limited opportunities for MH to act aggressively towards her. Her evidence was that she was relying on these allegations as a wider part of a general campaign of harassment and lack of action. We find that the claimant thought that there was a continuing course of conduct and that this is a reason for delay;

58.3. We also considered that it would be unusual for an employee to launch an Employment Tribunal claim relating to the one allegation set out here and we considered that delaying in bringing a claim until further actions took place is reasonable.

Direct Discrimination

59. We find that the comments identified are related to the claimant's sex. The term used by MH towards the claimant was "bitch" which we find is primarily used against women and even if used against men it still has a sex related offensive element. We consider that the words used by MH were related to

sex. This is further supported by the wider context and background of this claim as set out in this judgement.

60. We accept the claimant's evidence that MH swore aggressively at her on the occasions alleged. We also accept he swore at Sam Davies, another female CTM and customers. This was not challenged by the respondent. There is no evidence provided by the respondent that MH behaved this way or made the same or similar offensive comments to male colleagues or managers around this time. We recognise the 2017 formal warning against MH but we consider that the situation we are considering arises because of the claimant's sex. In NG's interview with AC NG identified that "*2 male CTM had no problem [with MH] but Sam [female] and I know Deborah had ongoing issue*." Overall we find that this conduct was because of the claimant's sex.

61. We find that the comments are less favourable treatment. Being sworn at offensively is less favourable treatment.

62. The comments were made in the work place and we do not accept that they were outside MH's employment. The respondent has not provided sufficient evidence about the reasonable steps they have taken to prevent MH from carrying out the less favorable treatment.

63. The claimant has discharged the prima facie burden of proof which lies on her because she has established that the comments on their face are related to sex, further she has also established that MH did not act this way towards male CTM's or the store manager. The respondent has not discharged the burden of proof which lies on it as, though it seems to assert that the claimant was responsible for MH's conduct, we do not accept that. We have set out elsewhere that the respondent has wholly failed to establish the repeated and strongly made claims that the claimant showed management failings which caused MH to conduct himself in this way.

Harassment

64. As we have found that the conduct was direct discrimination because of the claimant's sex, it cannot also amount to harassment. However, for completeness we have set out our findings on harassment even though this is not strictly necessary.

65. It is accepted that the alleged acts occurred.

Was the conduct related to sex?

66. We have set out above the reasons why we consider it is related to sex.

Did the conduct have the purpose or effect of violating the claimants dignity, and/ or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

67. We find that it did for the following reasons:

67.1. the swearing was directed towards to the claimant and said to her face. This is aggressive;

67.2. the CCTV footage shows that the comments on 7 February 2023 were made when the claimant, was on the first occasion, alone in the small office which had no windows, only one door in front of which MH stood, MH can be seen pointing towards her with his hand. We found that the claimant asked him to leave repeatedly but he did not do so until she turned on the body cam. We find that 3 or 4 minutes later MH returns to the office again swearing at her but with another colleague present. She asked him to leave again and he did not do so until he realized that the body cam was on again. These are the circumstances in which the comment were made.

Was it reasonable for the conduct to have that effect, taking into account the claimant's perception and all the circumstances of the case?

68. We find that it was reasonable for the conduct to have the effect in all the circumstances as set out above.

Whistleblowing

69. The alleged protected disclosure is contained in the claimant's email of 7 February 2023 to IC, Ask HR and the area manager Yash Redman. It includes but is not limited to the following:

> He also been heard by Silvia he intends to buy a false gun in order to threaten me.
> Matthew had numerus aggression incidents in the past already – 1 towards myself, 2 towards a colleague name Stacey, 1 towards a shoplifter (running after him with a bottle of wine to hit him), and 1 towards a customer.
> Only once an investigation opened, and no further action ever been taken.
> Today I came back to work after a day off, and I was very anxious and concerned from Matthew, knowing he intended to threat/harm me and knowing his past aggressions.

70. The claimant relies on, amongst others, s43B (1)(a) ERA which is "*in the reasonable belief of the worker making the disclosure, it is made in the public interest tends to show…(a) that a criminal offence has been committed, Is being or is likely to be committed*".

71. Babula v Waltham Forest College 2007 ICR 1026, CA sets out that an individual is not required to know the ins and outs of criminal law and identify the correct criminal offence. We find that the claimant had a reasonable belief that a criminal offence was likely to be committed. The background as well as the specific threat relating to the imitation gun and threats to the claimant are sufficient to establish this. The background includes the aggressive incidents by MH as detailed in the disclosure. It is reasonable to believe that threatening to harm or scare someone with an imitation gun is a criminal offence even though not many people would be able to identify the exact statutory offence. The claimant reported the incident about the gun to the police on or around 12 March 2023.

72. As we have found the claimant's email of 7 February 2023 is a protected disclosure under this heading we have not gone on to consider other categories of protected disclosure.

Did the claimant reasonably believe that the disclosures were in the public

interest?

73. In Ellis v Home Office 1953 2 QB 135, CA, Morris LJ set out *that 'one facet of the public interest is that justice should always be done and should be seen to be done'*. We find that there is a public interest arising from the disclosure of a likely criminal offence because of the inherent public interest in that.

Did the detriments occur?

74. We find that all the alleged detriments except C occurred as set out in our findings of fact.

75. In respect of allegation *C. the claimant being told by NG not to complain about Matthew Henderson (7 February 2023).* We find that this happened before the claimant made the protected disclosure. As set out in paragraphs 43.11 and 43.12 of the claimant's witness statement and evidenced by the call log of when NG called the claimant. As such the claimant cannot have been subject to this for a reason at all related to the disclosure.

Were the acts detriments?

76. Allegation a is that *complaints about MH were not properly addressed or investigated*. As we set out in our findings of fact we agree that complaints about MH were not properly addressed or investigated. We considered that these were detriments against the claimant because her serious complaints which related to her safety were not addressed, she was subject to an unfair process and particularly in relation to her e-mail of 7 February 2023 her complaints were not treated as a grievance, they were not investigated.

77. Allegation b is that *no action was taken against MH*. We have set out that no action was taken against him. We consider that this is a detriment as this undermined the claimant and created real concerns that MH could act with impunity against her. It was also acceptance of MH's and NG's criticisms of the claimant where he sought to put the blame on the whistleblower. This was acceptance of disparaging the whistleblower as an easy way to ignore the whistleblowing and to damage the claimant's reputation.

78. Allegations d i,ii & iii all place blame on the claimant for MH behaving aggressively towards the claimant. They are all detrimental to the claimant.

79. Allegation d iv is that *the claimant was required to have a meeting/ mediation with MH*. We find that this was a detriment in respect of the claimant because it was requiring her to do something which she was not in fact contractually required to do so and was something she was concerned about particularly because we accept that in a previous mediation MH had sworn at her. We find that this was part of the respondent apportioning blame inappropriately towards the claimant.

80. Allegation d v *which is being told that the claimant was refusing a reasonable management request and was she ready to pay the consequences* by refusing to meet with MH is a detriment. It created stress for the claimant and concerns that she may be subject to disciplinary action.

81. Allegation b, which should be e, is *the deletion of the body camera footage of MH from the internal portal* we find is a detriment because it meant that the claimant faced a real risk of not having evidence to support her claim and that it would not be available to be viewed by those investigating her complaints.

Did the claimant suffer the detriments on the grounds that she made a protected disclosure?

82. S48(2) of the ERA sets out "*it is for the employer to show the ground on which any act or deliberate failure to act was done*." This means that after all the other elements of a claim have been proved (that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment) the burden shifts to the respondent to prove that the worker was not subjected to the detriment on the ground that she had made the protected disclosure.

83. Ms Zielinska's submissions set out the reasons given by the respondent. Even if we reject them the claimant does not necessarily win, we can find that a reason not presented by either party was the ground for the detriment. These submissions can be summarised as:

83.1. In relation to allegation a the respondent's submission is that any failures are inherently unlikely to stem from the protected disclosure rather than inadvertent error. AC said that he did not have sight of the 7 February 2023 e-mail at the time. Neither AC nor DH worked at the East Finchley store and had no prior knowledge of the claimant's prior history with MH. A similar submission is made in respect of allegation b and that DH decided on a reasonable outcome having considered all of the evidence. As is apparent from our findings of fact, we have found otherwise and that DH's investigation outcome was not reasonable and not supported by adequate evidence.

83.2. In relation to allegations d the respondent submission is that IC was only implementing recommendations of DH and IZ. Further, she believed that the mediation was mandatory and that was a genuine mistake.

83.3. In relation to allegation b/e it is highly likely that the deletion was because of the respondent's policy.

84. We have set out above that there were serious failings in relation to the investigation carried out into the claimant's complaints of 7 February 2023. The respondent did not even treat the 7 February 2023 email as a grievance despite its extremely serious allegations. We have set out that not a single question was asked of anyone about the imitation gun incident. The failings including no action being taken against MH despite it being accepted that he swore repeatedly at the Claimant are so unreasonable that we find that respondent has not been able to prove that the claimant was not subject to the detriment on the ground she made the disclosure.

85. We find that blame was apportioned to the claimant to protect the respondent and other employees from the potential consequences of the

protected disclosures she made which included a real risk to the respondent that it would be exposed that it not deal with MH properly. They were trying to discredit the claimant and disguise failings. We consider that the allegations at d i, ii, iii & iv were part of putting blame on the claimant by setting out that she had failings and creating ways in which these alleged (but untrue) failings were to be addressed in order to damage the claimant.

86. In relation to the allegations relating to IC, we do not accept that she was merely carrying out a management instruction. The claimants e-mail of 7 February 2023 was sent to her and others. IC complained about the time that it was sent and that it was sent to the area manager. We find that IC was annoyed by this because it reflected badly on her or created problems for her that she would rather not have had. In the meeting with the claimant on 8 March 2023, she calls the claimant rude and emotional. She disparages the claimant. We find that she has formed the view that the claimant is an annoyance because of the protected disclosure and tries to impose the detriments. The detriment relating to requiring the claimant to attend mediation with MH and that the claimant's refusal to do so would be taken as a refusal to comply with a reasonable management request is a typical whistle blowing detriment because it is trying to get the claimant to be quiet and to not to do anything about the protected disclosure.

87. We consider that the allegations are typical whistleblowing detriments and the sort of detriment that the Whistleblowing legislation was put in place to address. By this we mean that the claimant was seen as an annoyance for raising these allegations, it was thought that she should have dealt with the situation herself, she was blamed for the situation and raising these allegations was something that she should not have done. People involved in the allegations such as MH and NG disparaged the claimant and their disparagement was taken at face value. Again it is typical in whistleblowing situations that those directly or indirectly criticised in whistle blowing situations seek to blame the whistleblower. This is exactly what happened here and it was accepted without question. This led to the detriments which the claimant has identified.

Constructive dismissal

88. In relation to the lack of training /guidance provided in relation to dealing with staff with disabilities, we accept that the respondent had various forms of training for staff in general and for the CTMs. However, we consider that the claimant puts this allegation more specifically which is that she was provided inadequate training/guidance in relation to dealing with this particular member of staff, MH. We find that this is made out in all the circumstances because, as we have set out above, though there was much blaming of the claimant no one could identify how or what she should have done differently.

89. We have set out above out findings on all the allegations under the constructive dismissal heading and that the claimant has established that all of these alleged acts occurred as a matter of fact.

90. We find that handling of the incident on 7 February 2023 with MH including blaming the claimant and threatening her with disciplinary action if she did not

attend mediation with MH, lack of support relating to the shoplifting incident on 25 January 2023 all individually amount to a fundamental breach of the duty of trust and confidence. We find that the respondent erroneously and without reason failed to adequately investigate her serious complaints about her fears for her safety or address any concerns that she raised, even when raised in a formal manner through her written complaints. The claimant raised complaints on more than one occasion, a number of managers were involved, they did not adequately consider her claims, they did not adequately consider them or assess what some individuals told them, they made unfounded assumptions and she was inappropriately blamed. The respondent went further than a failure to properly investigate, it blamed the claimant without good reason and without even having being able to identify (what she realistically rather than abstractly and therefore what was not actually available to her) should have done differently in the situations which she faced.

91. Further, we have found that the claimant suffered direct sex discrimination and detriments on the grounds of having blown the whistle. These are fundamental breaches of the duty of trust and confidence.

92. Taking all of the allegations together, we find that the duty of trust and confidence was broken. We recognise that the deletion of the body worn camera footage was not the most serious breach. However, given the seriousness of the breaches we have mentioned above, and all the breaches combined we find that this was a qualifying final straw. We find that the claimant was at the point of despairing that her real and genuine concerns would be dealt with and that she was exposed to a potentially threatening and dangerous situation at work from which the respondent would not provide any protection to her. This final straw demonstrated that it would not properly investigate her serious concerns instead it would blame her without good reason. It is symptomatic and a continuing chain of the respondent not giving her complaints due care and attention and the support and care to her with which she should have been provided.

93. We find that the respondent fundamentally breached the duty of trust and confidence, that deleting the body worn footage on 13 March 2023 was the last straw. We do not accept that she affirmed the breach by not resigning until 31 March 2023 effective the following day. She was off sick at the time, there is evidence of her mental turmoil at this time and she had been diagnosed with depression some time before. She took a short period of time when off sick to make her decision and we do not find that she affirmed the contract. We find that she resigned in response to the fundamental breach.

Decision

94. For the reasons set out above:

94.1. The claimant's claims for constructive unfair dismissal under s98 of the Employment Rights Act 1996 are successful.

94.2. The claimant's claims to have suffered a detriment under s47B

(whistleblowing) of the Employment Rights Act 1996 succeed.

94.3. The claimant's claims to have suffered harassment for a reason connected to her sex under s26 of the Equality Act 2010 are dismissed because we have found that the same conduct was direct discrimination which prevents that conduct amounting to harassment..

94.4. The claimant's claims to have suffered Direct Discrimination because of her sex under section 13 of the Equality Act 2010 succeed.

Remedy

95. The respondent agreed that the basic award for unfair dismissal in this case was £3375 based on 6 years full service. We agreed and awarded this amount.

96. In respect of the compensatory amount of the unfair dismissal award this was calculated as follows:

96.1. We decided that the claimant's loss was of 74 weeks net pay for the following reasons:

96.1.1. This 74 weeks was the period from the end of her employment until 9 September 2024. 9 September 2024 was 14 weeks which is 3 months from the date of this hearing. We considered that it was reasonable for the claimant to require some time to recover from the Tribunal process, make job applications and start a job. We considered that this was the claimant's period of loss.

96.1.2. There was some medical evidence provided to us which showed that the claimant had depression and anxiety which pre-dated the events in question. However, we also accepted the claimant's evidence that the events that form part of this claim seriously and detrimentally affected her mental health. We accepted her evidence that she was significantly affected by the shoplifting event and the events of which she complained about which included the threats to her person, the failure of the respondent to address this and her fears and the respondent repeatedly blaming the claimant for the difficulties she experienced. The Tribunal asked the claimant if she was applying for jobs and what jobs they were. She gave some examples and stated that she was not successful at some interviews and for others she got anxiety on the way to the interview and could not attend the interview. We accepted this evidence as we accepted her evidence about her poor mental health.

96.2. The claimant's net weekly pay was £459.90;

96.3. We did not apply an uplift for failure to follow the ACAS Code because the statutory cap in respect of unfair dismissal awards had already been reached. However, if the cap had not been reached we would have applied a 20% uplift.

97. In respect of injury to feelings, we placed the claimant in the middle of the middle vento band for the following reasons:

97.1. We consider that this was not one of conduct. It continued over a period of time and involved multiple actors.
97.2. The conduct was serious and ultimately led to dismissal,
97.3. The impact on the claimant was significant, she had suffered from depression and anxiety previously but we accept her evidence that the events in question were detrimental to her mental health
97.4. We do not consider that this was the most serious sort of conduct and so the award was not in the higher band;
97.5. Taking all the facts as we have found them into account we consider that the middle of the middle band is the correct placing of the award.

98. In respect of aggravated damages, we made an award of £2,000 because we considered that the respondent's behaviour in conducting this case was high handed and unnecessarily oppressive in that both witnesses repeated claims that claimant was to blame for the situation and these assertions were the basis of the respondent's defence. However, IC could only give one failing of the claimant and that was turning her body camera on during the incident with MH. AC repeatedly and forcefully repeated in his evidence, including in cross examination, that the claimant was at fault for the situation with MH. When AC was asked questions about what actions the claimant should have taken and how she was at fault the Tribunal found that the examples given were generic and they were not available to the claimant. The witnesses had simply relied on a comment made by NG that the claimant was a poor manager and could not handle MH but they had not identified the failings or what she could have done. NG was not asked at any point what was good management of MH and what was bad management, his statement was accepted and then relied on as the basis of the respondent's case. The respondent had not considered if the criticism was accurate or fair and had not considered what the claimant could actually have done in the situation rather than make some general comments. This meant that they attacked the claimant's competency without foundation. The respondent had simply not carried out the actions needed to establish that the claimant could be legitimately criticized but despite this during the litigation the respondent forcefully repeated unfounded, unevidenced and uninvestigated criticisms of the claimant. This went beyond mere a normal defence.

99. In respect of interest we applied the rate of 8% from the midpoint of the first and last act which has been taken by agreement as 1 June 2022.

Approved by Judge Bartlett

_____

Date: 7 June 2024

Amended date 27 August 2025

JUDGMENT SENT TO THE PARTIES ON
14/8/2024

FOR THE TRIBUNAL OFFICE

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