



EMPLOYMENT TRIBUNALS

Claimant: Miss A Gray

Respondent: X-Pharm Ltd t/a Touchwood Pharmacy

Heard at: London South, by video

On: 8, 9, 10, 11 and 12 December 2025

Before: Employment Judge Cawthray
Mr. C Wilby
Ms. G Mitchell

Representation

Claimant: Mr. Adewumi, Consultant

Respondent: Mr. Pickard, Counsel

JUDGMENT having been delivered to the parties orally on 12 December 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure on the same day, the following reasons are provided:

REASONS

Background, evidence and procedure

1. At the start of the hearing the Employment Judge asks the parties if any adjustments were required. Due to anxiety, the Claimant requested regular breaks, and the Employment Judge explained that regular breaks would be taken but a break could be requested at any time, as required.
2. Although the Claimant was not professionally represented at the time she submitted her claim form, she had been professionally represented since before the Case Management Preliminary Hearing that took place on 16 July 2025.
3. The parties had submitted an agreed bundle and a separate list of issues. The parties were told that the Tribunal must be directed to any documents in the bundle that it was required to read.

4. The Claimant had provided a written witness statement for herself and her sister, Latoya Gray.
5. The Respondent had provided witness statements for each of its witnesses: Mr. Sehmi, Mr. Dhaliwal, Mr. Vickers and Mr. McCarthy.
6. All of the witnesses swore on a holy book or gave an affirmation.
7. At the start of the hearing the Employment Judge read out each of the allegations in the list of issues. The Claimant's representative sought to add some additional wording to issues 21.2 (as numbered in the list of issues and reflected below). The Respondent, after consideration, agreed. The Claimant's representative also said that for the purposes of the direct race discrimination complaint she was seeking to rely on two named comparators, Zoe Vassel and Jade Davies. Neither of these had been set out in the list of issues, which referred to a hypothetical compactor. The Respondent's representative said, after taking instructions, that it would be able to deal with Zoe Vassel as a named comparator and the Claimant's representative confirmed that the Claimant would move forward with reliance on Zoe Vassel only for the purposes of a named comparator.
8. Almost the entire morning was spent discussing the issues, with the parties breaking to take instructions.
9. Before any evidence was started the Claimant's representative confirmed that the list of issues as set out below encompassed all the allegations that the Claimant was pursuing.

Issues

10. The issues use the numbering as set out in the separate and clean list of issue document that was provided for the final hearing.

Jurisdiction

1. Have the Claimant's claims of race discrimination been brought within three months of the acts complained of, taking into account the effect of the 'stop the clock' provisions in respect of early conciliation? (EqA 2010, ss 123(1)(a) and 140B))
2. In respect of the Claimant's complaints which are based on the Respondent's failure to do something, when is the Respondent to be treated as having decided those things? (EqA 2010, s 123(4))
3. In respect of any complaints which are out of time, do they form part of a continuing act, taken together with acts which are in time? (EqA 2010, s 123(3)(a))

4. If the complaints were not submitted in time, would it be just and equitable to extend time? (EqA 2010, s 123(1)(b))

Direct Race Discrimination

5. The Claimant describes herself as a “black woman of Jamaican ethnic origin and of Jamaican/British nationality”.

6. Did the Respondent treat the Claimant less favourably than it treats or would have treated others? (Equality Act 2010 s13) (the alleged acts of less favourable treatment are set out at 8-11 below).

7. If there was less favourable treatment, was this because of the Claimant's race?

8. Further specifically, did the Respondent prior to giving the Claimant notice of dismissal on 7 February 2024 fail completely to follow its:

8.1. Disciplinary procedure;

8.2. Probationary Policy as contained in the Staff Handbook.

(Relevant to ACAS code of Practice, paras 20 -29)

9. Further, specifically, did the Respondent fail to follow its own grievance procedure in response to the claimant's grievance of 29 February 2024 in that the grievance was dismissed out of hand by an email of 25 June 2024 and the grievance was not in fact treated as a grievance under the Respondent's procedure at all (ACAS code of Practice, paras 38 -46)

10. Further, specifically, did the Respondent dismiss the Claimant?

11. If so, would the Respondent have acted differently towards a hypothetical comparator who did not share the Claimant's race? The Claimant, at the start of the final hearing identified Zoe Vassel as a named comparator that she wished to rely on. The Respondent was content to continue.

12. Are there facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant? (EqA 2010, s 136(2))

13. If so, has the Respondent shown that it did not discriminate against the Claimant? (EqA 2010, s 136(3))

Indirect Race Discrimination

14. Did the Respondent have a PCP of not having internal policies and procedures promoting proper procedures and supplying clear guidance on preventing discrimination? (s19(1) Equality Act 2010)

15. Did the Respondent apply the PCP to the Claimant?

16. Did that PCP apply to persons that were not of the Claimant's racial group? (s19(2) Equality Act 2010). At the start of the final hearing the Claimant clarified that the Claimant's racial group was black people of Jamaican origin

17. Would people of the Claimant's racial group be put a particular disadvantage by this PCP, namely would they be **at higher risk of discrimination and be more likely to be dismissed?** (s19(2) Equality Act 2010)

18. Was the Claimant subject to this disadvantage? (s19(2) Equality Act 2010)

19. Was this a proportionate means of achieving a legitimate aim? (s19(2) Equality Act 2010)

Whistleblowing Detriment

20. Did the Claimant make a protected disclosure to Mr Gurdev on 24 January 2024?

(Employment Rights Act 1996 s43B):

20.1. What did the Claimant say? The Claimant says that she told Mr Gurdev in the course of phone call that Mr McCarthy had bullied Zoe, accused her of being a liar, made a comment about her weight and reduced her to tears.

20.2. Did the claimant disclose information?

20.3. Did the claimant believe the disclosure was in the public interest?

20.4. Was the belief reasonable?

20.5. Did the claimant believe that that disclosure tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject. The legal obligation relied on by the claimant is the obligation of mutual trust and confidence.

21. Was the Claimant subject to detriment because of this disclosure as set out in her Particulars of Claim? (Employment Rights Act 1996 s47B)-

21.1. Arbitrarily changing her day off on 30 January 2024.

21.2 providing management with a negative report that the Claimant was unable to change her day off, in relation to her refusal to join a WhatsApp group, cleaning demands and talking ban prior to the dismissal meeting on 7 February 2024

At the start of the final hearing the Claimant confirmed that Mr. McCarthy carried out the allege detriment.

Automatic Unfair Dismissal

22. Did the Claimant make a protected disclosure to Mr Gurdev on 24 January 2024? (Employment Rights Act 1996 s43B).

23. Was the reason or principal reason for the Claimant's dismissal this protected disclosure? (Employment Rights Act 1996 103A).

24. Was the reason or principal reason for the Claimant's dismissal that she attended a disciplinary hearing in support of her colleague Zoe Vassel on 24 January 2024 as referred to in paragraph 14 of the claimant's voluntary further and better particulars (Employment Relations Act 1999 s12).

Findings of fact

11. The findings of fact are made on the balance of probabilities considering all the evidence presented as necessary to determine issues. All of the documents to which the Tribunal were referred were considered in full, but it is not proportionate to copy the content of longer documents within these reasons.

Background

12. The Claimant started employment on 27 June 2022 as a Pharmacy Assistant.

13. The Respondent operates a chain of pharmacies, and the Claimant was based at the Sydenham Road branch ("Wise Branch").

14. The Claimant was issued with a contract of employment. The relevant provisions for the purposes of this claim are set out below:

"PROBATIONARY PERIOD All new employees are subject to a probationary period of 24 months. During this time your progress and development will be monitored. In the event of progress being unsatisfactory, your employment may be terminated either during or at the end of the probationary period."

15. The contractual clause in relation to Job Title reads:

"You are employed as a Pharmacy Assistant and to perform such other duties as may from time to time be required of you [to include your obligations as Responsible Pharmacist under the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2008]. These duties are not limited or fixed and you may be required to take on additional responsibilities as our needs change."

16. The Claimant worked 34 hours per week. Following discussion with her former line manager, Ms. Jouichat, the Claimant did not work on Mondays in order to be able to provide care services for her sister. In relation to working hours the contract states:

"HOURS OF WORK Your hours of work amount to 34 hours per week. Hours are as indicated on the staff rota. The distribution of these hours will be dependent upon the needs of the business and may be liable to change. We may in the future need to adjust our opening hours in order to meet our business or contractual responsibilities and we reserve the right to vary your hours for operational reasons. Any changes will be agreed mutually but you will be required to show flexibility to enable us to deliver appropriate pharmaceutical services to the community we serve."

17. The contract refers to the Staff Handbook and states:

"RULES AND PROCEDURES Your attention is drawn to the Staff Handbook (which contains various rules and procedures). The Staff Handbook does not form part of your contract of employment with the Company. For the avoidance of doubt, if there is any conflict between this written statement of particulars of employment and the Staff Handbook, this written statement of particulars of employment will prevail."

Policies and procedures

18. The Respondent has a Staff Handbook, at paginated page 186, which contains various policies including one on equal opportunities.

19. The Staff Handbook contains information about the probationary period set out.

"Probationary Period

The probationary period of employment is designed for you to have an opportunity to become accustomed to working at our company and to begin to fulfil the

expectations of your role. During your probation period you will have regular meetings with the pharmacist/manager. These meetings will be used to track your progress and provide an opportunity to discuss any issues of concern that you, or we, may have.

In the event that your progress and performance is not as expected, any shortcomings will be discussed with you and you will be given assistance so that you can achieve satisfactory performance. Before your appointment can be confirmed, you must demonstrate that you are capable of performing the duties of the post satisfactorily and have the required standard of conduct and attendance."

20. At paginated page 187 there is information on whistle blowing. It reads

"Whistleblowing

Whistleblowing occurs when an employee provides certain types of information to the employer, usually about illegal or dishonest practices. The Public Interest Disclosure Act 1988 protects the employee from being dismissed or penalised as a result of disclosing that information.

The company seeks to ensure that all of its operations are carried out compliantly and legally and would encourage any employee who, in good faith, believes that there is evidence of illegal or dishonest practice to make a disclosure under the protection of this Act. Full information is contained in the Whistleblowing Policy."

21. The Staff Handbook also contains sections on Disciplinary Matters and grievances. Section 5 of the Staff Handbook contains a number of policies, including Disciplinary and Dismissal, Discrimination, Bullying and Harassment and Equal Opportunities. The contents of those policies were considered in full, as starting at pages 196, 197 and 201.

22. The Grievance Policy and Procedure at page 395 of the Bundle set out the process of making and dealing with a grievance. This is the same policy as included in the Bundle, but in larger font.

23. The Whistleblowing Policy that starts at page 396 of the Bundle sets out disclosure that are covered by the policy. A bullying culture is listed under one of the potential legitimate disclosures. It sets out:

"The policy is not intended for issues relating to employees' concerns about alleged breaches of employee contract issues or grievances, for which there are separate established procedures in place. If an employee is not sure whether their concern is covered by this policy, they should discuss this with their line manager or pharmacy owner. Where the subject of the issue is the line manager or pharmacy owner the employee should seek advice from Protect telephone advice line on 020 3117 2520 or Speak Up Direct (NHS whistleblowing helpline) on 08000 724725"

24. The policy goes on to set out the process for raising and dealing with a whistleblowing concern.

25. There is no written provision in the Staff Handbook to say that the Disciplinary and Dismissal section does not apply to employees in their probation period.

26. There is no written provision in the Grievance Policy and Procedure that states that it does not apply to former employees. However, it does refer to “employee”.
27. The Respondent does not operate a structured probationary review system. It does not schedule or hold formal or regular probation review meetings with staff. However, Mr. Sehmi visited branches and observed staff on a regular basis.

Chronological findings

28. The Claimant was based at the Wise Branch. From around May 2023, following the departure of Ms. Sophia Jouichat, the Wise Branch was operating without a permanent manager, which resulted in some difficulties with the delivery of services. The Wise Branch was experiencing a high number of dispensing issues and complaints. The Respondent’s management did not attribute the issues to the Claimant or any other member of staff based at the branch but considered the issues were due to a break down in systems.
29. In September 2023 the Claimant completed a vaccination training course to enable her to deliver certain vaccinations, for example flu and covid. The course was paid for by the Respondent. The Claimant started administering those vaccinations.
30. The Claimant developed some concerns about administering the vaccinations, both in relation to remuneration and more generally in relation to her liability to administer and potential consequences.
31. On 4 October 2023 the Claimant message Mr. Farook Ahmed, Director, in relation to vaccination administration. The message exchange reads:

“Hi Farook, just thought I would ask you as I don’t know who else to ask...do you know when we do flu and covid jabs are we paid for each one we administer? If so how much and would it be paid through our wages?”.
32. Mr. Ahmed replied:

“Hi. No all xtra (flu, NMS, BP etc) r part of r pharmacy contract and nobody is paid any extra for them including the pharmacists.”
33. The Claimant replied by sending links to some documents she had found and asked for clarification.
34. The Respondent’s management team, Mr. Ahmed, Mr. Dhaliwal and Mr. Sehmi discussed the matter. On 6 October 2023 Mr. Sehmi, Director and Superintendent Pharmacist, called the Claimant. They had a conversation that lasted approximately 15 minutes.
35. Mr. Sehmi considered that the Claimant’s concern about administering the vaccines was about payment. His evidence is that during the call he told her that administering the vaccines was part of her job and should be done without further payment. In his witness statement he says the Claimant

said that if she was not getting further money she would refuse to do vaccinations.

36. The Claimant's evidence is that in addition to payment she sought to explain her concerns about liability for the vaccinations. She considered that Mr. Sehmi ranted at her and that at the end of the call Mr. Sehmi said that she should reconsider her role as new services would be coming and there would be no additional payment and stated that if the Claimant did not wish to continue administering vaccines she should tell management. She considered she had been given an option and following the call told the locum manager that she no longer wished to administer vaccines that she had to sign her name to. She considered the matter was resolved and did not undertake any more vaccinations.
37. Mr. Sehmi formed a view at that time, following the conversation about vaccinations, that he could not work with the Claimant. Mr. Sehmi did not follow up with the Claimant about this matter in anyway. He did not document or set out in writing any concerns about this matter or the Claimant's approach. He did not take any action at the time.
38. Mr. Dhaliwal was also aware of this matter, having discussed it with Mr. Sehmi and Mr. Ahmed, but he did not raise it with the Claimant or document the matter.
39. The issue was not discussed or dealt with further at the time. The Respondent's management's focus was on the failings of the branch more widely and the concern was addressing improvements in the branch and at the time, in relation to the issues at the Wise Branch the oral evidence of Mr. Dhaliwal, which the Tribunal accepted was that is *"had to choose their battles"* and the priority was sorting out dispensing and not vaccinations in the failing store.
40. In or around January 2024 the Respondent determined that Mr. Peter McCarthy would act as the Pharmacy Manager at the Wise Branch. He was substantively based at a different branch, and the intention was that he would be working at the Wise Branch for eight weeks with the aim of addressing the issues and difficulties the branch had been experiencing and bringing in standard procedures and processes. Mr. McCarthy was considered to be meticulous and process driven and best equipped to try and resolve the failings at Wise Branch.
41. On 24 January 2024 Mr. McCarthy attended the Wise Branch to meet staff. He was not working that day but planned to pop in to introduce himself to the staff.
42. On arrival he considered that the store was in a mess and in particular noticed a significant number of owing scripts (over 100). When Mr. McCarthy raised the owings with staff he considered that Ms. Zoe Vassel, Accuracy Checking Technician, rolled her eyes and turned her back to him in response to what he was saying. Mr. McCarthy asked to speak with Ms. Vassel in the consultation room. He had a conversation with her. Ms. Vassel became upset and left.
43. The Claimant's evidence is that as she was leaving the branch for her lunch break she saw Ms. Zoe Vassel leave the consultation room where

she had been talking to Mr. McCarthy visibly upset. The Claimant asked if she was ok and Ms. Vassel said that Mr. McCarthy had called her a liar and that she was the problem at the Wise Branch. Mr. McCarthy overheard the account and said he had not said those things.

44. The Claimant then left the shop with Ms. Vassel and tried to console her. Ms. Vassel's daughter Amanda was also working in the Wise Branch and she also left.

The Claimant says, in her witness statement, at the end of paragraphs 18 and 19:

"I advised her that she should report the matter to the bosses. She then gave me here phone to call Mr. Sehmi, as Ms. Vassel was unable to speak through her upset.

I explained to Mr. Sehmi that I was with Ms. Vassel who was really upset and crying because of the way Mr. McCarthy accused her of being a liar and that she was "the problem" at the Wise store. I also informed him that we had left the pharmacy and were outside where Ms. Vassel's daughter Ms Amanda Vassel had joined us. Ms Vassel then took the phone when she had calmed down to explain further..."

45. The Claimant also gives accounts of the events of 24 January 2024 in her appeal letter of 14 February 2024 and her grievance letter dated 29 February 2024. All the accounts have been considered in full, including that set out in Zoe Vassel's grievance letter, and the Tribunal note that there are slight variations.
46. Mr. Sehmi's account is, as set out in his witness statement, is that the Claimant never raised an allegation that Mr. McCarthy had bullied Ms. Vassel or called her a liar. In oral evidence Mr. Sehmi said that he spoke with Ms. Vassel on 24 January 2024. He does not recall specifically speaking to the Claimant but accepted she may have been in the background and he may have spoken to the Claimant. He understood that there had been a disagreement between Ms. Vassel and Mr. McCarthy. He told Ms. Vassel that he would contact Mr. McCarthy.
47. Mr. Sehmi called Mr. McCarthy and asked him to resolve the matter. He understood the matter was then addressed and resolved between Mr. McCarthy and Ms. Vassel.
48. Mr. McCarthy's account is that after Ms. Vassel left the consultation room and store upset he phoned Mr. Dhaliwal to talk through what had happened. He says that Mr. Sehmi then called him and told him to speak with Ms. Vassel to sort things out.
49. Taking all of the above into account, the Tribunal find that, on balance of probabilities, that the Claimant did speak, in brief to Mr. Sehmi, because Ms. Vassel was upset and that she told him Ms. Vassel was upset because she thought Mr. McCarthy called her a liar and was the problem in the store. We do not find that the Claimant told Mr. Sehmi that McCarthy had bullied Ms. Vassel or that she made any comment to Mr. Sehmi about weight.

50. Mr. McCarthy's evidence, which the Tribunal accept, is that he was not aware of the Claimant speaking with Mr. Sehmi on 24 January 2024 and that he understood that Ms. Vassel had spoken Mr. Sehmi.
51. Mr. Dhailwal's evidence, which is accepted, is that he was not aware of the Claimant speaking to Mr. Sehmi but knew that there had been a flashpoint between Ms. Vassel and Mr. McCarthy due to his discussions with Mr. McCarthy.
52. After the Claimant and Ms. Vassel, and Amanda Vassel, returned to the store Mr. McCarthy asked Ms. Vassel to speak with him. Ms. Vassel asked if the Claimant could sit in and Mr. McCarthy said yes and had no issues with her sitting in the room. Mr. McCarthy and Ms. Vassel discussed the earlier events and Mr. McCarthy apologised for any upset. Ms. Vassel became calm and the Claimant left the room and Ms. Vassel and Mr. McCarthy continued their discussion. Mr. McCarthy considered the matter with Ms. Vassel was resolved. Mr. McCarthy has since reflected that he could have waited to raise concerns until he officially started the following week.
53. The Claimant, in cross examination, accepted that the meeting between Ms. Zoe Vassal and Mr. McCarthy on 24 January 2024 was a one-to-one meeting and not a disciplinary meeting.
54. The Claimant was not due to work on Monday 29 January 2024, as Monday was her usual non-working day.
55. The Claimant's daughter was unwell in the week commencing 29 January 2024.
56. On Tuesday 30 January 2024 the Claimant messaged Mr. McCarthy, firstly at 08:24 to inform him that her daughter was unwell and she was attending the GP.
57. Mr. McCarthy replied to the Claimant's text message at 20:06 and the Claimant responded at 22:08 with an update and to say she would be in contact in the morning.
58. At 08:05am on Wednesday 31 January 2024 the Claimant contacted Mr. McCarthy about her daughter still being unwell.
59. The messages are amicable in tone.

On 1 February 2024 at 07:02am the Claimant messaged Mr. McCarthy and explained her daughter was still unwell and asked if she could bring her to see him. Mr. McCarthy agreed and the Claimant attended the Wise Branch with her daughter and Mr. McCarthy examined her daughter's ear. Whilst at the Wise Branch the Claimant agreed to work later that day, as she could see it was busy in store.

60. Whilst at work on 1 February 2024 Mr. McCarthy asked the Claimant if she could work on a Monday. Mr. McCarthy considered Mondays were the busiest day and as the Claimant did not work on a Monday he asked her if she may be able to swap days. At the point of asking he did not know that the Claimant had caring commitments on Mondays. The Claimant

explained that she would not be able to work on a Monday due to her caring commitments.

61. Also on 1 February 2024, Mr. Mc Carthy asked the Claimant to Hoover the next day. The Claimant told Mr. Mc Carthy that she doubted there would be any time to Hoover as there was much to catch up on and the shop would be short staffed, but that she would pass on the message as she was not sure if she would be in as her daughter was still unwell.
62. On 5 February 2024 Mr. McCarthy sent the Claimant a message asking her to join a WhatsApp group chat for pharmacy as he was having difficulty adding her. He wished to set a store group up for communications. The Claimant was not at work as she was looking after her daughter who was still unwell.
63. On 6 February 2024 the Claimant returned to work after being away due to her daughter being unwell. She was speaking with a colleague, Jade Davies, whilst unpacking deliveries. On all the evidence heard, the Tribunal found that Mr. McCarthy asked the Claimant and Jade Davies to talk less, as he wanted to ensure staff focused during busy times. The Tribunal noted that the Claimant considered there was a recording in which she says Mr. McCarthy mimicked her but there was no evidence before the Tribunal for such a conclusion to be reached.
64. Later on 6 February 2024 Mr. McCarthy asked the Claimant about her WhatsApp. The Claimant's evidence is that she told him that her settings do not allow group invites and she did not wish to join the group and would not feel left out and wished to communicate via direct messages. Mr. McCarthy's evidence is that the Claimant told him she did not do WhatsApp. The Tribunal, based on all the evidence, find that the Claimant did not join the WhatsApp group.
65. Also on 6 February 2024 Mr. McCarthy asked the Claimant to clean the back of the store, which includes the kitchen and toilet. Mr. McCarthy was seeking to establish a regular cleaning system and had asked other staff to clean. The Claimant said that she did not wish to clean and did not consider it part of her role. Mr. McCarthy's evidence is that other staff were asked and did participate in cleaning, albeit reluctantly, but the Claimant was the only member that refused. Mr. McCarthy used a cleaning rota at his own branch and undertook cleaning duties himself.
66. Mr. McCarthy was feeding back information about the Wise Branch generally to Mr. Sehmi and Mr. Dhaliwal. He reported and feedback matters relating to a number of staff, including the Claimant. This was in the context of Mr. McCarthy being deployed to the branch with the aim of achieving a rapid turnaround in the branches performance after a considerable period without management. In relation to the Claimant, Mr. McCarthy reported the matters at paragraph 16 of his witness statement, as copied below:

Refused to participate in shared responsibilities such as the cleaning rota;
Refused to join the team WhatsApp group;
Was generally negative and obstructive towards efforts to improve the branch;

Resisted basic operational changes such as order checking procedures; Walked out of the branch without permission, which I considered to be unprofessional.

67. Mr. McCarthy was not aware that the Claimant was still in her probation period.
68. Mr. McCarthy did not make any recommendation that the Claimant be dismissed.
69. Neither Mr. Dhaliwal nor Mr. Sehmi discussed the reports made to them by Mr. McCarthy with the Claimant.
70. Mr. Mr. Dhaliwal and Mr. Sehmi made the decision that the Claimant should not pass her probation period. They formed the view, based on their perception of the Claimant's approach to vaccination in October 2023 and the feedback from Mr. McCarthy, that the Claimant was not suitable for the role.
71. The decision to dismiss the Claimant was not made by Mr. McCarthy.
72. Mr. Dhaliwal told Mr. McCarthy to tell the Claimant that her probation period was being brought to an end and that her employment was being ended.
73. On 7 February 2024 Mr. McCarthy spoke with the Claimant and told her that her employment was ending, that she would be paid for one weeks' notice and she did not need to work her notice. The Claimant was not given any notice of the meeting and was not told it was a probationary review meeting.
74. Within the meeting Mr. McCarthy said: "*We don't think you are the best fit for the position*". The Claimant asked for further information but no detail about the reason was provided. Mr. McCarthy was told what to say to the Claimant by Mr. Dhaliwal.
75. Prior to her dismissal on 7 February 2024 the Respondent had not raised any issues with the Claimant regarding her conduct of performance at work.
76. On 7 February 2024 Zoe Vassel was suspended. Her letter of suspension referred to Ms Vassel's attitude towards Mr. McCarthy and her leaving the pharmacy on 24 January 2024 without permission. Mr. Dhaliwal had recommended and asked by Mr. McCarthy to take action.
77. Also on 7 February 2024, Amanda Vassel, who worked on a zero hours arrangement was told that there was no requirement for her to work as there were no hours available for her. Mr. Dhaliwal's evidence, which the Tribunal accept, is that the store needed experienced staff and Amanda was a school child and they didn't consider it an appropriate store at the time. At some point around June 2024 Amanda Vassel recommenced working at Wise Branch when a new manager was in place.

78. There is a document called a probationary review form in the bundle. It has a date of 31 January 2024 on it. However, the content of the form details events that took place after 31 January 2024. Mr. Sehmi's oral evidence was that the date was a typo and that he completed it a couple of weeks after the Claimant's employment was ended. In view of the contents, the Tribunal found that the form was not completed until at least 7 February 2024.

79. The Respondent did not share the form with the Claimant, it was only disclosed during these proceedings. The form was a document that is used for internal purposes to record the brief reasons why the Respondent deemed the Claimant had failed her probation period. In the body of the form it states:

"Dear Trupti

After consideration, I believe that Alexis Gray is not suited to her role in the pharmacy and have therefore failed her probationary period. The reasons are set out below.

- Refusing to Vaccinate: Alexis was trained by the company to be able to vaccinate patients. She asked to be paid per vaccination, as if on a contract basis. We refused to pay per vaccination and explained that delivery of NHS services are part and parcel of employment. She refused to vaccinate any further.*
- Cleaning: The temporary manager asked her to partake in the branch cleaning rota, alongside all other staff. She refused and does not believe it is part of her job.*
- Flexibility; Changing business requirements: Alexis was asked she was able to change her working days to suit business requirements, she was unable to due to commitments.*

I do not believe Alexis is suited to working in an NHS pharmacy. Branch staff are required to be dynamic and response to the various changing requirements of our NHS contract."

80. Mr. Sehmi and Mr. Dhaliwal were not aware of the Claimant's care responsibilities and that she did not work on a Monday at the date of dismissal.

81. On 8 February 2024 Ms Trupti Vickers (HR Manager/Payroll), on Mr. Dhaliwal's instruction sent the Claimant a letter confirming dismissal. The letter states:

"Following your recent meeting with Peter, I regret to inform you, inline with your contract of employment, that you have failed your probationary period and as a result, we have no choice but to terminate your employment with Touchwood Pharmacy.

Peter was bought in to help bring the branch back to a steady and even keel and we feel let down by your behavior towards him and expected much more professionalism and positive conduct when we needed it most. Instead, there have been multiple incidents which we deem to be wholly unacceptable.

After carefully considering these incidents and our concerns, we have drawn the conclusion that is it reasonable for you to be dismissed from Touchwood

Pharmacy by reason of failed probation. As you have under two years' service and are within your 24 months probationary period, we are exercising our right to amend our process and not follow a complete disciplinary process.

Your employment will be terminated on 14th February 2024, which marks the end of your one-week notice period. However, you do not need to come to work / work your notice period making this your last work day date.

We will process your final payslip, including any overtime pay, deductions, and any holidays owed to you, in accordance with company policy.

We understand that this may come as disappointing news, and we want to thank you for your efforts during your time at Touchwood Pharmacy. We wish you the best of luck in your future endeavours.

If you have any questions or require further information regarding the termination process or your final payslip, please do not hesitate to reach out to the HR department at payroll@touchwoodpharmacy.com.

Once again, thank you for your contributions, and we wish you success in your future career."

82. On 12 February 2024 Ms. Zoe Vassel submitted a grievance regarding Mr. McCarthy. Within her grievance she set out her concerns regarding Mr. McCarthy's behaviour in the Wise Branch and her account of the events on 24 January 2024.

83. On 14 February 2024 the Claimant submitted an appeal against the decision to dismiss her. She sent a detailed email to Manesha Thuduwage, HR, and asked for clarification about the reason she was dismissed. Within it she says there has been victimised and discrimination was at play. The letter also states:

"I am therefore of the opinion that my contract has been terminated for none of the reasons stated in your letter but more-so due to personal reasons following one incident that occurred before Peter starting at the Wise branch, and a few minor disagreements had with Peter in the short 1.5 days that I worked with him, as outlined below;"

84. On 21 February 2024 Ms. Vickers replied to the Claimant's email of 14 February 2024. Although Ms. Vickers replied, the content was produced by Mr. Dhaliwal, having taken HR advice. Mr. Dhaliwal believed that as the Claimant was not employed for two years' and was still in her probation period the Respondent could end her employment, whilst she was still in the contractual probation period, without following any policy or meeting the Claimant. He had determined that no meeting or process was necessary.

85. The email is brief and is set out in full below.

"Dear Alexis

Thank you for your email of the 14th February which I have reviewed. It is not our policy to go into detail about decisions relating to ending employee probationary

periods and we do not offer a right of appeal to the decision. I can say that the decision was a corporate one made by more than one person as it was felt you were not the type of employee that Touchwood see as an ideal fit. Peter was simply enacting the decision that was already made following feedback about the way in which you conduct yourself. We do not intend to correspond further on this matter but do wish you all the best for the future and we are sorry it did not work out. Your reference will simply state your start date, end date and job title. We will not provide the reason for termination, so you are free to explain your exit as you wish to future employers.

Let me know if you get a response."

86. On 29 February 2024 the Claimant submitted a formal grievance about her dismissal and lack of information. Within the grievance letter the Claimant set out she felt she was being dismissed for malicious and personal reasons and referred to the following: vaccination matters, dealings with Mr. McCarty on 24 January 2024 and phone call with Mr. Sehmi, discussion with Mr. McCarthy regarding changing working days. The Claimant does not reference discrimination in her grievance.

87. At the point at which she submitted her grievance the Claimant's employment had ended. The Respondent considered that it was not necessary to respond to her grievance in detail as the Claimant was no longer an employee and because the content did not change the Respondent's decision that she had failed her probation period. No grievance investigation took place.

88. Ms. Vickers replied, again following instruction from Mr. Dhaliwal and the Respondent's HR advisor on 7 March 2024 and stated:

"I write further to your email attaching a grievance in relation to the ending of your employment with us.

Having fully reviewed the contents of your letter I can confirm that we have already investigated and responded to the points you raised, and we will therefore not be responding formally to your complaint. During our recent correspondence we explained our position and responded to your concerns. I appreciate you may not agree with our decision, but it was one we were entitled to make. We have carefully considered the issue and believe the matter is now closed.

I am sorry that you are unable to accept our position, but we genuinely wish you all the best in the future."

89. On 12 February 2024 the Respondent advertised dispensing shifts in the Wise Branch.

90. Ms. Zoe Vassel met with Mr. Dhaliwal as part of her grievance process on 24 February 2024. Zoe Vassel was one of the Respondent's longest serving employees and had worked at the Respondent for 17 years. Mr. Dhaliwal explained that the Wise Branch needed significant changes and that Mr. McCarthy had been brought in to try and improve the branch. Ms. Vassel was given the option to remain working at the Wise Branch under

Mr. McCarthy's management or to move to another branch where there was a vacancy. Ms. Vassel remains employed by the Respondent.

91. The Claimant contacted ACAS for the purposes of early conciliation on 20 March 2024. Early Conciliation ended on 1 May 2024. The Claimant submitted her ET1 on 2 May 2024.

92. On 17 July 2024 the Claimant made a data subject access request and received a response on 1 October 2024.

The Law

93. A summary of the guiding legal principles are set out below. The case law referenced by the parties in submissions was also considered.

Time limits

94. Section 123 of the Equality Act 2010 sets out the time limit for bringing discrimination and victimisation claims in the Tribunal. It states:

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

95. It provides that complaints of discrimination should be presented within three months of the act complained of:

(1) Subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

b. *such other period as the Employment Tribunal thinks just and equitable.*"

96. An act will be regarded as extending over a period if an employer has an "ongoing situation" or a "continuing state of affairs" which can be contrasted with a "succession of unconnected or isolated specific acts": *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530 at [52]. When considering whether separate incidents form part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents" (*Aziz v FDA* 2010 EWCA Civ 304, CA).

97. Section 123(1)(b) provides that where a discrimination claim is *prima facie* out of time it may still be brought "*within such other period as the Tribunal thinks is just and equitable*". This provides a broader discretion than the reasonably practicable test for other claims, such as unfair dismissal.

98. The time for presenting a claim is extended for the duration of ACAS Early Conciliation.

99. However, where the ACAS EC process was started after the primary time limit had already expired the ACAS "freezing" of the time limits does not operate to assist a Claimant (*Pearce v Bank of America* EAT 0067/19).

100. Time limits should be adhered to strictly (relevant case being *Robertson v Bexley Community Centre* 2003 EWCA Civ 576.)

101. The burden of proof is on the Claimant.

102. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble* [1997] IRLR 336, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*:-

"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

a. *the length of and reasons for the delay;*

b. *the extent to which the cogency of the evidence is likely to be affected by the delay;*

c. *the extent to which the party sued had cooperated with any request for information;*

d. *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*

e. *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*"

103. However, this list of factors is a guide, not a legal requirement. The relevance of the factors depends on the particular case.

104. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194 the Court of Appeal noted that the tribunal has a wide discretion and the Tribunal was not restricted to a specified list of factors.

105. The most important part of the exercise is to consider the length and reasons for the delay and balance the respective prejudice to the parties.

106. In *Robertson –v- Bexley Community Centre (T/A Leisure Link)* 2003 [IRLR 434] the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

107. Subsequently in *Chief Constable of Lincolnshire -v- Caston* [2010] IRLR 327 the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

108. In *Department of Constitutional Affairs -v- Jones* [2008] IRLR 128 the Court emphasised that the guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. Other factors may be relevant too. At paragraph 50 Hill LJ said:-

"The factors which have to be taken into account depend on the facts, and the self directions which need to be given must be tailored to the facts of the case as found".

109. In *Concentrix CVG Intelligent Contact Ltd v Obi* [2022] EAT 149 the Employment Appeal Tribunal rejected the respondent's argument that the claimant's failure to provide an explanation for the delay meant that the tribunal must reach the conclusion that time could not be extended. However, the tribunal had erred in only taking into account the forensic prejudice to the respondent in the one day that the claimant had delayed in

bringing her claim rather than the whole period of eight months over which the conduct extending took place.

Direct discrimination

110. Section 13 Equality Act 2010 states:

13 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

111. Section 136 of the Equality Act 2010 states:

136 Burden of proof

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Education Tribunal for Wales;

(f) the First-tier Tribunal for Scotland Health and Education Chamber.

112. Under section 13(1) of the Equality Act 2010 read with section 9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others.
113. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.
114. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as they were. (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).
115. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL).
116. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.
117. There are two stages to the burden of proof test as set out in section 136 of the Equality Act 2010.

Stage 1: There must be primary facts from which the tribunal could decide – in the absence of any other explanation, that discrimination took place. The burden of proof is on the claimant (*Ayodele v (1) Citylink Ltd (2) Napier* [2018] IRLR 114, CA; *Royal Mail Group Ltd v Efoji* [2021] UKSC 22). This is sometimes referred to as proving a prima facie case. If this happens, the burden of proof shifts to the respondent.

Stage 2: The respondent must then prove that it did not discriminate against the claimant.

118. In other words, 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 race, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.
119. The burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board* [2012] IRLR 870, SC.)
120. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that

they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

121. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts 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.'*
122. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof. (*The Solicitors Regulation Authority v Mitchell* UKEAT/0497/12.)
123. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim *'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".'* He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'*. It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.
124. In *Amnesty International v Ahmed* UKEAT/0447/08/ZT the EAT stated, paragraph 36, *"...the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)..."*.
125. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425.
126. The Tribunal must consider the EHRC Statutory Code of Practice.

Indirect discrimination

127. The definition of Indirect Discrimination is set out in section 19 of the Equality Act 2010:

(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 subsection (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.

128. In respect of indirect discrimination, the burden is on the Claimant to show that there was a PCP, that it disadvantaged the protected class generally, and that the general disadvantage also created a particular disadvantage to the claimant. If the Claimant satisfies that burden, the burden is then on the Respondent to show that the PCP was a proportionate means of achieving a legitimate aim (*Dziedziak v Future Electronics Ltd* EAT 0271/11).

129. The ECHR Code of Practice provides that the phrase "provision, criterion or practice" should be construed widely.

130. When considering the pool for comparison, there must be no material difference between the circumstances relating to each case (s.23(1)). The ECHR Code says this regarding the pool for comparison:

"The pool for comparison should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively" (ECHR Code para 4.18).

131. The phrase "particular disadvantage" means essentially the same thing as "detriment" (ECHR Code para 4.9). The word "particular" does not refer to any serious, obvious or particularly significant disadvantage, but rather denotes that it is persons of a particular protected characteristics who are disadvantaged.

132. The requirement for group disadvantage may be satisfied by means of a hypothetical group, rather than a group of actual comparators within the Respondent's workforce. That is inherent within the wording of section 19(2)(b). See the words of Sedley LJ in *Eweida v British Airways plc* [2010] EWCA Civ 80 (para 19):

"It is also possible that the meaning and effect of the formula differ depending on the form of discrimination alleged: it may be relatively

simple, and within the legislative purpose, to aggregate a single female employee with a hypothetical group of other female staff in order to gauge adverse impact, but forensically difficult, even impossible, to do the same for a solitary believer whose fellow-believers elsewhere in society may accord different degrees of importance to the same manifestation of faith.”

133. Group disadvantage may be demonstrated by means of statistics, although that is not the only means by which it may be established (ECHR Code paras 4.12 and 4.21 – 4.22). It may also be established by means of either lay or expert evidence. It may even be established by the evidence of the claimant (and anyone else in the group) alone (*Games v University of Kent* [2015] IRLR 202). The position was summarised by the EAT in the case of *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699:

- “a. There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected *in limine* ;
- b. Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;
- c. The disadvantage may be inherent in the PCP in question; and/or
- d. The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken.”

134. The Tribunal may also take judicial notice of group disadvantage. The EAT in *Dobson* summarised the principles relevant to drawing judicial notice:

- “a. There are two broad categories of matters of which judicial notice may be taken: (i) facts that “are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry”; and (ii) other matters that “may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources”.
- b. The Court *must* take judicial notice of matters directed by statute and of matters that have been “so noticed by the well-established practice or precedents of the courts”:
- c. However, beyond that, the Court has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence;

d. The party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry.”

135. The burden of establishing objective justification rests on the Respondent. The test is an objective one, for the Tribunal. The justification must be considered at the point when the PCP was applied to the Claimant.

136. In performing the balancing exercise, the Tribunal must consider the discriminatory effect on persons who share the relevant protected characteristic (rather than merely the claimant). This may involve hardship suffered by the claimant, provided proper attention is paid to the question of how typical those hardships are of others who are adversely affected (*University of Manchester v Jones* [1993] ICR 474 CA).

Protected Disclosures

137. The relevant sections of the Employment Rights Act 1996 are set out below:

43A Meaning of “protected disclosure”

43A Meaning of “protected disclosure” 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.

43B Disclosures qualifying for protection.

(1) In this Part a “qualifying disclosure” means 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, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

138. The Claimant must prove that they have made a protected disclosure.

139. The necessary components of a qualifying disclosure to an employer were summarised helpfully by HHJ Auerbach in *Williams v Michelle Brown AM* (UKEAT/0044/19/00):

“9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.”

140. There must be a disclosure of information. The disclosure must contain facts, not simply make an allegation. A disclosure can be made orally and in writing. It makes no difference if the recipient is already aware of the information provided.

141. The case of *Cavendish Munro Professional Risks Management Limited - v- Geduld* [2010] ICR 325 makes clear, there is a need to convey facts, and not just make an allegation. An opinion does not equate to information (*Goode -v- Marks and Spencers PLC EAT 0442/09*).

142. The Employment Appeal Tribunal in the case of *Kilraine -v London Borough of Wandsworth UK EAT/0260/15* warned that tribunals should take care when deciding if the alleged disclosure was providing information as in practice information and allegations are often intertwined and the fact that information is also an allegation is not relevant.

143. The information disclosed must tend to show the alleged wrongdoing in section 43B and therefore requires sufficient factual content.

144. A communication asking for information or making inquiry is unlikely to be conveying information.
145. The Claimant must have a reasonable belief that the disclosure is made in the public interest.
146. There is no definition of public interest in the legislation. A matter that is of “public interest” is not necessarily the same as one that interests the public.
147. The focus is on whether the worker/employee reasonably believed that the disclosure was in the public interest.
148. In *Chesterton Global Limited and others -v- Nurmohamed* [2017] EWCA 979 the Court of Appeal made a number of useful observations when dealing with the issue of public interest. It made the point that simply considering whether more than one person’s interest was served by a public disclosure was a mechanistic view and required the making of artificial distinctions. The Court of Appeal said that instead a Tribunal should consider four relevant factors. It reiterated that Employment Tribunals should be cautious when making a decision about what “is in the public interest” when dealing with a personal interest issue because *“the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle blowers – even, where more than one worker is involved. But I am not prepared to say never.”*
149. The four factors that the Tribunal should consider when looking at public interest are:
- The numbers in the group whose interests are affected;
 - The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
 - The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
 - The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer, in terms of the size of its relevant community i.e. staff, suppliers and clients, the more obviously should a disclosure about its activities engage the public interest, though this point should not be taken too far.
150. There can be more than one reasonable view as to whether a disclosure has been made in the public interest, and the Tribunal should not substitute its view for that of the Claimant; it must consider whether the

Claimant subjectively believed the disclosure was in the public interest, and whether that belief was reasonable. *Chesterton* established that the necessary belief is that the disclosure is made in the public interest; the particular reasons why the worker believes that to so be is not of the essence. Also, while the worker must have a reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – the Court of Appeal doubted whether it need be any part of the worker's motivation.

151. The Employment Appeal Tribunal in *Dobbie v. Felton (t/a Feltons Solicitors)* [2021] IRLR 679 provided further guidance on the meaning of “in the public interest”, particularly at paragraphs 27-30. Disclosures about certain subjects are, by their nature, likely to be “made in the public interest” (see paragraphs 30-31). 30. The question of the reasonable beliefs of the Claimant needs to be determined.

152. The Claimant must show that they have a reasonable belief that the “information disclosed tends to show”. The case of *Soh v Imperial College of Science Technology and Medicine* EAT 0350/14 it was confirmed that there is a distinction between a worker saying “I believe X is true” and “I believe that this information tends to show that X is true”.

153. The test of reasonable belief is objective and subjective. The case of *Phoenix House Ltd v Stockman* [2017] ICR 84 explains that a judgment must firstly be made as to whether the Claimant's belief was reasonable and secondly whether objectively, on the perceived facts, there was a reasonable belief in the truth of the complaints.

154. The test for assessing whether the worker has a reasonable belief is a low threshold, but the Claimant's belief must be based on some evidence – rumours and unfounded suspicions are not enough to establish reasonable belief.

155. There can be a qualifying disclosure even if the facts relied upon turn out to be wrong.

156. In cases dealing with a number of alleged disclosures it is necessary to look at them individually.

Protected disclosure detriment

157. The relevant sections relating to protected disclosure detriment of the Employment Rights Act 1996 are set out below:

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

48 Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G.

(1XA) A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of section 44(1A).

(1YA) A shop worker may present a complaint to an employment tribunal that he or she has been subjected to a detriment in contravention of section 45ZA.

(1ZA) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 45A.

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(1AA) An agency worker may present a complaint to an employment tribunal that the agency worker has been subjected to a detriment in contravention of section 47C(5) by the temporary work agency or the hirer.

(1B) A person may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47D.

(2) On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(2A) On a complaint under subsection (1AA) it is for the temporary work agency or (as the case may be) the hirer to show the ground on which any act, or deliberate failure to act, was done.

(3) *An employment tribunal shall not consider a complaint under this section unless it is presented—*

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the “date of the act” means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

(5) In this section and section 49 any reference to the employer includes—

(a) where a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3)).

(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

(6) In this section and section 49 the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/93)—

- “agency worker”;*
- “hirer”;*
- “temporary work agency”.*

158. Workers who have been found to have made a qualifying disclosure are protected from detriment on the ground that the worker made a protected disclosure.

159. The burden of proof for the protected disclosure detriment claim is that the claimant must prove that they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities.

160. The case of *London Borough of Harrow v Knight* 2003 IRLR 140 EAT set out the correct approach to apply under section 47B(1) and section 47B(1A) which is:

- the claimant must have made a protected disclosure and they must have suffered a detriment
- the employer/worker/agent must have subjected the claimant to that detriment by some act/deliberate failure to act and
- the act or deliberate failure to act must be done on the ground that the claimant made a protected disclosure.

161. Detriment has the same meaning as in discrimination law – being put to a disadvantage.

162. In the case of *Blackbay Ventures Ltd v Gahir* [2014] ICR 747 the Employment Appeal Tribunal gave guidance about the definition of the word “detriment”. In paragraph 84 of the judgment, reference was made to the speech of Lord Hoffmann in *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065 quoting in turn Brightman LJ in *Ministry of Defence v Jeremiah* [1980] ICR 13, 31 “a detriment exists if a reasonable worker would or might take the view that the [treatment] is was in all the circumstances to his detriment.”

163. In paragraph 85 of *Blackbay*, the opinion of Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 was quoted which also referred to Brightman LJ’s formulation, Lord Hope adding, “An unjustified sense of grievance cannot amount to ‘detriment’”. Mr Kemp relied upon the case of *Jesudason v Alder Hey Children’s NHS Foundation Trust* [2020] ICR 1226, but it makes the same point as the cases cited above that the threshold for a detriment is not high, adding in paragraph 28:

“28 Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.”

164. In paragraph 98 of *Blackbay*, tribunals were reminded that: “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 to the date of the act or deliberate failure to act relied on 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.”

165. There must be a causal link between the fact of making the disclosure and the decision of the employer to subject the worker to detriment. In the case of *Aspinall v MSI Mech Forge Ltd* EAT 891/01 it used the wording adopted in the discrimination case of *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065 HL where it stated that it had to be causative in the sense of being ‘the real reason, the core reason....the motive for the treatment complained of’.

166. It must be proved that the wrongdoer knew about the disclosure, and the mental process of the decision maker must be considered.

167. If a Claimant proves they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities. The Respondent then has the burden of proving the reason for the detrimental treatment if the Claimant meets the threshold. The Tribunal does not have to find in favour of the Claimant by default.

168. A Tribunal may, where there is an absence of direct evidence, need to draw inferences as to the real reason the employer acted as they did. Inferences drawn must be justified by the facts found.

Automatic unfair dismissal - section 103A

169. Section 103A of the Employment Rights Act 1996 states:

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

170. The burden is on the claimant to show that the principal reason for dismissal was the protected disclosure.
171. Section 103A indicates that there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.
172. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. Lord Justice Elias confirmed in *Feccitt and ors v NHS Manchester (Public Concerns at Work intervening)* 2021 ICR 372 CA that the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B of the Employment Rights Act 1996. The latter 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, whereas section 103A requires the disclosure to be the primary motivation for a dismissal.
173. If the protected disclosure was merely a subsidiary reason, the claim will fail.
174. A Tribunal needs to consider two questions: firstly, what is the reason for dismissal, and secondly whether a disclosure was protected. The question of whether the principal reason for dismissal was a protected disclosure is a question of fact for the Tribunal to make. In cases of multiple disclosures, the approach is to ask whether the disclosures, taken as a whole, were the principal reason for dismissal.
175. Where an employee has less than two years' service the employee has the burden of showing, on the balance of probabilities, that the reason for dismissal was for an automatically unfair reason.
176. A tribunal may draw inferences from facts established by evidence, but is not obliged to do so.

Automatically Unfair Dismissal – section 12 Employment Rights Act 1999

177. The relevant statutory provisions are set out below.

12 Detriment and dismissal.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he—

(a) exercised or sought to exercise the right under section 10(2A), (2B) or (4), or

(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

(2) Section 48 of the Employment Rights Act 1996 shall apply in relation to contraventions of subsection (1) above as it applies in relation to contraventions of certain sections of that Act.

(3) A worker who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—

(a) exercised or sought to exercise the right under section 10(2A), (2B) or (4), or

(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

(4) Sections 108 and 109 of that Act (qualifying period of employment and upper age limit) shall not apply in relation to subsection (3) above.

(5) Sections 128 to 132 of that Act (interim relief) shall apply in relation to dismissal for the reason specified in subsection (3)(a) or (b) above as they apply in relation to dismissal for a reason specified in section 128(1)(b) of that Act.

(6) In the application of Chapter II of Part X of that Act in relation to subsection (3) above, a reference to an employee shall be taken as a reference to a worker.

(7) References in this section to a worker having accompanied or sought to accompany another worker include references to his having exercised or sought to exercise any of the powers conferred by section 10(2A) or (2B).

10 Right to be accompanied.

(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a) is chosen by the worker; and

(b) is within subsection (3).

(2B) The employer must permit the worker's companion to—

(a) address the hearing in order to do any or all of the following—

(i) put the worker's case;

(ii) sum up that case;

(iii) respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing.

(2C) Subsection (2B) does not require the employer to permit the worker's companion to—

(a) answer questions on behalf of the worker;

(b) address the hearing if the worker indicates at it that he does not wish his companion to do so; or

(c) use the powers conferred by that subsection in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.

(3) A person is within this subsection if he is—

(a) employed by a trade union of which he is an official within the meaning of sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992,

(b) an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or

(c) another of the employer's workers.

(4) If—

(a) a worker has a right under this section to be accompanied at a hearing,

(b) his chosen companion will not be available at the time proposed for the hearing by the employer, and

(c) the worker proposes an alternative time which satisfies subsection (5), the employer must postpone the hearing to the time proposed by the worker.

(5) An alternative time must—

(a) be reasonable, and

(b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

(6) An employer shall permit a worker to take time off during working hours for the purpose of accompanying another of the employer's workers in accordance with a request under subsection (1)(b).

(7) Sections 168(3) and (4), 169 and 171 to 173 of the Trade Union and Labour Relations (Consolidation) Act 1992 (time off for carrying out trade union duties) shall apply in relation to subsection (6) above as they apply in relation to section 168(1) of that Act.

13 Interpretation.

(1) In sections 10 to 12 and this section "worker" means an individual who is—

(a) a worker within the meaning of section 230(3) of the Employment Rights Act 1996,

(b) an agency worker,

(c) a home worker,

(d) a person in Crown employment within the meaning of section 191 of that Act, other than a member of the naval, military, air or reserve forces of the Crown, or

(e) employed as a relevant member of the House of Lords staff or the House of Commons staff within the meaning of section 194(6) or 195(5) of that Act.

(2) In subsection (1) "agency worker" means an individual who—

(a) is supplied by a person ("the agent") to do work for another ("the principal") by arrangement between the agent and the principal,

(b) is not a party to a worker's contract, within the meaning of section 230(3) of that Act, relating to that work, and

(c) is not a party to a contract relating to that work under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any professional or business undertaking carried on by the individual;

and, for the purposes of sections 10 to 12, both the agent and the principal are employers of an agency worker.

(3) In subsection (1) "home worker" means an individual who—

(a) contracts with a person, for the purposes of the person's business, for the execution of work to be done in a place not under the person's control or management, and

(b) is not a party to a contract relating to that work under which the work is to be executed for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any professional or business undertaking carried on by the individual;

and, for the purposes of sections 10 to 12, the person mentioned in paragraph (a) is the home worker's employer.

(4) For the purposes of section 10 a disciplinary hearing is a hearing which could result in—

(a) the administration of a formal warning to a worker by his employer,

(b) the taking of some other action in respect of a worker by his employer, or

(c) the confirmation of a warning issued or some other action taken.

(5) For the purposes of section 10 a grievance hearing is a hearing which concerns the performance of a duty by an employer in relation to a worker.

(6) For the purposes of section 10(5)(b) in its application to a part of Great Britain a working day is a day other than—

(a) a Saturday or a Sunday,

(b) Christmas Day or Good Friday, or

(c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in that part of Great Britain

Conclusions

178. The Tribunal applied the law to the findings of fact to reach its unanimous conclusions on each of the complaints brought by the Claimant.

179. The Tribunal considered the issues as set out in the list of issues only, as agreed at the start of the hearing.

180. It was necessary for the Tribunal to keep in mind that it was not considering a complaint of unfair dismissal under section 98 of the Employment Rights Act 1996.

Direct Race Discrimination

181. The Claimant describes herself as a “black woman of Jamaican ethnic origin and of Jamaican/British nationality”.

182. At the start of the hearing the Claimant’s representative said she was seeking to rely on Ms. Zoe Vassel and Jade Davies as named comparator. No named comparators had been identified at the Case Management Preliminary Hearing and the Claimant had not raised or specified them within the clean and updated list of issues.

183. Both parties took instructions and addressed the Tribunal at the start of this hearing. The Claimant’s representative confirmed that the Claimant wished to rely on Ms. Zoe Vassel, who is white, as a named comparator and a hypothetical comparator in the alternative, in relation to each allegation of direct race discrimination. The Respondent was content that it was able to deal with the direct discrimination complaint with Ms. Vassel being relied on.

184. Zoe Vassel is white. She had worked at the Respondent for approximately 17 years at the time of the alleged discrimination. She was a supervisor. She was not in her probation period. The Tribunal do not consider she was in materially the same or similar circumstances as the Claimant.

185. The Claimant alleges that she has been subjected to less favourable treatment because of race as set out in underlined text below.

- Did the Respondent prior to giving the Claimant notice of dismissal on 7 February 2024 fail completely to follow its:

Disciplinary procedure;

Probationary Policy as contained in the Staff Handbook.

(Relevant to ACAS code of Practice, paras 20 -29)

- Did the Respondent fail to follow its own grievance procedure in response to the claimant’s grievance of 29 February 2024 in that the grievance was dismissed out of hand by an email of 25 June 2024 and the grievance was not in fact treated as a grievance under the Respondent’s procedure at all (ACAS code of Practice, paras 38 -46)

- Did the Respondent dismiss the Claimant?

186. The Tribunal considered each allegation as framed.

187. The Tribunal considered whether there were any inferences that shifted the burden of proof in relation to the direct discrimination complaint.

188. We considered all the evidence, and the context of the situation. However, the Tribunal did not consider there to be any adverse inference that shifted the burden of proof in relation to any of the three allegations.

189. It is the case that the Respondent did not hold any probation review meetings, did not undertake a disciplinary process and did not conduct a grievance investigation meeting. However, the backdrop to the decisions made by Mr. Sehmi and Mr. Dhaliwal is that the Wise Branch was considered to be failing, was experiencing a large number of dispensing errors and complaints, was without a manager and in January 2024 the Respondent put in place a manager with the aim of turning things around. The Tribunal also kept in mind the evidence that the Respondent does not hold formal or regular probation review meetings, but management assesses suitability and chose not to undertake any disciplinary process as the Claimant had less than two years' service and was still in her probation period. The Tribunal, in the allegations as framed, are not considering the right or wrongs of that approach but note the Respondent may benefit from reflection on best management of probation periods, especially long periods. There was no evidence of a discriminatory attitude or culture in the workplace.

190. Taking all the above into account, the Tribunal did not consider there were any adverse inferences that shifted the initial burden of proof.

191. The Tribunal considered each allegation of less favourable treatment in turn.

192. The first allegation of less favourable treatment is:

- Did the Respondent prior to giving the Claimant notice of dismissal on 7 February 2024 fail completely to follow its:

Disciplinary procedure;

Probationary Policy as contained in the Staff Handbook.

(Relevant to ACAS code of Practice, paras 20 -29)

193. As a matter of fact, the Respondent did not follow the disciplinary procedure before dismissing the Claimant. The allegation is framed as "fail completely to follow" and although the Tribunal considered the Respondent made a choice not to follow the disciplinary procedure rather than a failure, in fairness to the Claimant it went to consider as a failure.

194. In relation to the Probationary Policy, we noted that there are provisions in relation to the probation period in the contract of employment and the Staff Handbook, as set out above. The allegation appears to be based solely on the provisions in the Staff Handbook.
195. As set out in the contract of employment, the Staff Handbook and the Probation Policy within it is not contractual. The contract does not refer to any probation review meetings but refers to monitoring. The Policy refers to regular meetings with pharmacist/manager and shortcomings being discussed.
196. As per the facts, there was a discussion about vaccinations in October 2023, but this wasn't framed as a probation review meeting, and although management were considered suitability, meetings and feedback did not take place, and therefore factually, the Tribunal concluded that the Respondent had not followed the Probationary Policy, and considered this as a failure.
197. As set out above, the Tribunal did not consider there were any adverse inferences that shifted the burden of proof.
198. The Tribunal considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the failure to follow the disciplinary procedure and probationary policy was **'because of'** race.
199. The Tribunal concluded that there was not sufficient evidence to discharge the burden on the Claimant. There was no evidence from which the Tribunal could reasonably conclude that the Claimant's race was the reason why the Respondent did not follow its disciplinary procedure or probationary policy. Mr. Dhaliwal determined that it was not necessary to undertake any form of meeting or review or any other action under either policy as he considered it was not necessary. They formed a view that no action or process was needed to end her employment as she was in her probation period and had less than two years' service. He, on behalf of the Respondent, formed the view that nothing further was needed.
200. There was no evidence at all that race played any part in the decision making. There was no evidence at all that there was a racist culture at the Respondent.
201. The Tribunal noted that the allegation that the disciplinary procedure and probation policy were not followed was because of her race was not actually put to the Respondent's witnesses.
202. There is no prima facie case of race discrimination.
203. The Claimant has failed to show that the Respondent treated her less favourably than a hypothetical comparator. There is no evidence that a hypothetical comparator, a person who was also a Pharmacy

Assistant at the Wise Branch and in their probation period about whom the Respondent had similar concerns but was not black Jamaican would be treated any differently.

204. The Tribunal did not consider there to be something more in this case that shifted the burden of proof to the Respondent.

205. However, in case it was wrong on this, and the burden of proof shifted to the Respondent, the Tribunal considered whether there was a non-discriminatory explanation, namely that set out above, that Mr. Dhaliwal formed a view that no action or process was needed to end the Claimant's employment as she was in her probation period and had less than two years' service. He, on behalf of the Respondent, formed the view that nothing further was needed.

206. This complaint of direct race discrimination fails.

207. The second allegation is:

- Did the Respondent fail to follow its own grievance procedure in response to the claimant's grievance of 29 February 2024 in that the grievance was dismissed out of hand by an email of 25 June 2024 and the grievance was not in fact treated as a grievance under the Respondent's procedure at all (ACAS code of Practice, paras 38 -46)

208. The Tribunal considers that 25 June 2024 must be a typing error. The letter from the Respondent replying to the Claimant's grievance was sent on 7 March 2024. Although this error was not addressed in submissions, the Tribunal consider it a typo and continued consideration.

209. The Tribunal do not consider that the Respondent failed to follow its own grievance procedure. Based on the findings of fact, the Tribunal concluded that the Respondent, namely Mr. Dhaliwal, decided that it was not necessary to undertake a grievance process in response to the Claimant's grievance because the Claimant was no longer employed at the time of submission and he did not consider it would change the fact they had decided to end her probation period.

210. Although the Tribunal do not consider the allegation as framed, as a failure, to have happened and therefore the allegation fails at the first hurdle. However, for completeness the Tribunal considered the statutory tests on the basis of the decision not to follow the grievance procedure as a failure in any event.

211. As set out above, the Tribunal did not consider there were any adverse inferences that shifted the burden of proof.

212. The Tribunal considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the failure to follow the grievance procedure was **‘because of’** race.

213. The Tribunal concluded that there was not sufficient evidence to discharge the burden on the Claimant. There was no evidence from which the Tribunal could reasonably conclude that the Claimant’s race was the reason why the Respondent did not follow its grievance procedure. Mr. Dhaliwal determined that it was not necessary, as she was no longer an employee and he didn’t think any process would change the decision in relation to her probation.

214. There was no evidence at all that race played any part in the decision making. There was no evidence at all that there was a racist culture at the Respondent.

215. The Tribunal noted that the allegation that the grievance was not followed was because of her race was not actually put.

216. There is no prima facie case of race discrimination.

217. The Claimant has failed to show that the Respondent treated her less favourably than a hypothetical comparator. There is no evidence that a hypothetical comparator, a person who was also a Pharmacy Assistant at the Wise Branch and submitted a grievance after their employment ended but was not black Jamaican would be treated any differently.

218.

219. The Tribunal did not consider there to be something more in this case that shifted the burden of proof to the Respondent.

220.

221. However, in case it was wrong on this, and the burden of proof shifted to the Respondent, the Tribunal considered whether there was a non-discriminatory explanation, namely that set out above, which is Mr. Dhaliwal determined that it was not necessary, as she was no longer an employee and he didn’t think any process would change the decision in relation to her probation.

222. This complaint of direct race discrimination fails.

223. The third allegation of less favourable treatment is:

- Did the Respondent dismiss the Claimant?

224. It is agreed that the Claimant was dismissed.

225. As set out above, the Tribunal did not consider there were any adverse inferences that shifted the burden of proof.

226. The Tribunal considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the decision to dismiss the Claimant was **‘because of’** race.
227. The Tribunal concluded that there was not sufficient evidence to discharge the burden on the Claimant. There was no evidence from which the Tribunal could reasonably conclude that the Claimant’s race was the reason why her probation was ended and she was dismissed. The Tribunal considers that the Respondent, via Mr. Dhaliwal and Mr. Sehmi determined that the Claimant was not suitable for her role, based on their perception of the vaccination events in October 2023, the feedback from Mr. McCarthy and the context of the difficulties at the Wise Branch, and as she was still in her probation period they decided not to undergo any disciplinary procedures and end her employment. There was no evidence at all that race played any part in the decision making. There was no evidence at all that there was a racist culture at the Respondent.
228. The Tribunal noted that the allegation that she was dismissed because of her race was not actually put to the dismissing officers.
229. There is no prima facie case of race discrimination.
230. The Claimant has failed to show that the Respondent treated her less favourably than a hypothetical comparator. There is no evidence that a hypothetical comparator, a person who was also a Pharmacy Assistant at the Wise Branch and in their probation period about whom the Respondent had similar concerns but was not black Jamaican would be treated any differently.
- a.
231. The Tribunal did not consider there to be something more in this case that shifted the burden of proof to the Respondent.
- b.
232. However, in case it was wrong on this, and the burden of proof shifted to the Respondent, the Tribunal considered whether there was a non-discriminatory explanation, namely that set out above, which is the Respondent determined that the Claimant was not suitable for her role, based on their perception of the vaccination events in October 2023, the feedback from Mr. McCarthy and the context of the Wise Branch, and as she was still in her probation period they decided not to undergo any disciplinary procedures and end her employment.
233. This complaint of direct race discrimination fails.

Observation

234. For completeness, the Tribunal kept in mind throughout determination of the direct race discrimination complaint that that the Claimant did not have sufficient service for an unfair dismissal complaint.

235. The Tribunal did consider that the management of the Claimant's probation and lack of feedback for the Claimant was poorly managed, but poor management does not necessarily indicate there has been any discrimination, particularly in view of the oral evidence heard about general management of probation periods at the Respondent.

236. The Tribunal noted that 24 months is a long probationary period, and in view of no concerns having been raised with the Claimant previously the Tribunal can understand the Claimant's shock and upset at dismissal and also lack of any meetings and information. However, employers do dismiss without a formal process where an employee has short service. As an observation, the Tribunal noted the Respondent could have better communication and probation processes in place, but the Tribunal must consider the allegations specifically before it, by applying the law to the findings of fact

Indirect Race Discrimination

237. The Claimant alleges that the Respondent has a PCP of not having internal policies and procedures promoting proper procedures and supplying clear guidance on preventing discrimination.

238. She says the PCP put the racial group of black people of Jamaican origin at a particular disadvantage of particular disadvantage by this PCP, namely would they be at higher risk of discrimination and be more likely to be dismissed.

239. The first matter for consideration was whether the Respondent had the PCP.

240. In closing submissions the Claimant's representative twice sought to refer to the PCP differently to how is set out and referred to applying and maintaining policies and procedures. The Employment Judge reminded him that was not the PCP set out.

241. The Tribunal kept in mind that the Claimant has been professionally represented at and since the Case Management Preliminary Hearing and care was taken at the start of this hearing to go through the agreed list of issues, and no variation in relation to the PCP was sought.

242. The Tribunal considered the PCP as set out in the list of issues.

243. The burden is on the Claimant to establish that the Respondent has the PCP.

244. The Tribunal concluded the PCP was not established.

245. The Respondent has a staff handbook that sets out standards of behavior and contains a number of policies, including an Equal Opportunities policy, grievance policy and disciplinary policy.
246. The PCP as framed has not been made out, and therefore the indirect discrimination complaint does not continue.
247. As an observation, it is noted that the Tribunal heard evidence that the Respondent did undertake grievance process with Mr. Vassel.
248. The complaint of indirect discrimination fails.

Protected Disclosure

249. The Claimant alleges that she made a protected disclosure to Mr. Gurdev on 24 January 2024 in that she told Mr. Gurdev in the course of phone call that Mr. McCarthy had bullied Zoe, accused her of being a liar, made a comment about her weight and reduced her to tears.
250. The Tribunal found that the Claimant did speak to Mr. Sehmi on 24 January 2024. However, it did not find that she said all of the things as set out in the alleged protected disclosure.
251. The Tribunal found that the Claimant told Mr. Sehmi that Zoe Vassel was upset because she thought Mr. McCarthy called her a liar.
252. The Tribunal did not find that the Claimant told Mr. Sehmi that Mr. McCarthy had bullied Zoe Vassel or made a comment about her weight.
253. The Tribunal consider that telling him she was upset is similar to reducing to tears, but do not consider she used the phrase reduced to tears.
254. Accordingly, only part of the disclosure as alleged is found to have happened.
255. However, as part was found to have been said, the Tribunal went on to consider the next stage of the statutory test.
256. The next matter for consideration is whether the words said – namely that Zoe Vassel was upset because she thought Mr. McCarthy called her a liar - amounted to a disclosure of information.
257. On the findings, the Tribunal considered this to be closely balanced and considered if there was an actual conveyance of information, or whether the Claimant made an allegation, or indeed both. The information

conveyed has to relate to one of the specified categories of wrongdoing, in this case it is pleaded as a failure in relation to a legal obligation, the obligation of mutual trust and confidence.

258. The Tribunal considered the comment did contain facts – (1) that Zoe Vassel was upset and (2) that she thought Mr. McCarthy had called Zoe Vassel a liar.

259. The Tribunal next considered whether the Claimant had a reasonable belief that the information she gave Mr. Sehmi, as it found she did, was in the public interest.

260. The Tribunal kept in mind that the focus is on whether the Claimant reasonably believed that the disclosure was in the public interest, which is both subjective and objective, and the Tribunal must not substitute its view. It is not for the Tribunal to determine whether the disclosure was in the public interest, the question is the Claimant's belief.

261. The Tribunal had regard to the Chesterton factors.

Numbers

262. In relation to the numbers in group affected the Tribunal considered the only impacted and affected person was Ms. Zoe Vassel.

Nature of the interests affected and the extent to which they are affected by the wrong doing

263. The Tribunal found that Ms. Vassel left the meeting upset, it did not consider it necessary to make a precise finding on when Ms. Vassel started crying.

264. The evidence later emerges that matters appeared to settle after the subsequent conversation between the Claimant and Mr. McCarthy, however, this was of course not known to the Claimant at the time of the call to Mr. Sehmi.

265. The Tribunal considers the interests affected relate to Ms. Vassel alone, and her relationship with Mr. McCarthy, and the Tribunal do not consider the Claimant could have a reasonable belief that any other persons interests were affected. The Tribunal consider it was a discussion between two professionals, in a private room.

266. There is no evidence that the incident affected a wider group, including staff at the pharmacy or members of the public.

Nature of wrongdoing

267. At the time of the disclosure, the Claimant was aware of the circumstances, a one on one meeting and also that Mr. McCarthy had denied the account that was given by Ms. Vassel on her leaving the room.

268. The Tribunal note that the Claimant had worked with Ms. Vassel for 18 months and did not know Mr. McCarthy, but also that the Claimant had not witnessed exactly what was said, and therefore could not have reasonably formed an accurate view on what precisely was said.

Identity of the alleged wrongdoer

269. Mr. McCarthy was about to start at the Wise Branch as a new temporary manager and he holds position of trust, with staff and public.
270. The Tribunal was not directed to any evidence that at the time of the disclosure there were any complaints of other concerns about Mr. McCarthy to indicate any wider concern about his conduct in the workplace.
271. The Tribunal did not consider, taking into account the above factors, the Claimant had a reasonable belief that the information was in the public interest. Although some cases involving individual disputes can meet the threshold, the Tribunal did not consider this to be such a case.
272. The Tribunal considered whether the Claimant in reporting of Mr. McCarthy calling Ms. Vassel a liar, or that Ms. Vassel perceived that he had called her a liar, had a reasonable belief that the information tended to show that a legal obligation was being breached. The legal obligation relied on is the implied term of trust and confidence. The Tribunal did not consider that, on what the Claimant knew at the time, that her colleague was upset because she considered Mr. McCarthy had called her a liar in a private consultation room at a time when he was not yet in post at the Wise Branch, that the Claimant could have had a reasonable belief that this would amount to a breach of the implied term of trust and confidence between Zoe Vassel and the Respondent.
273. Taking all the above into account, the Tribunal do not consider the Claimant had a reasonable belief that the disclosure was in the public interest and that it tended to show a legal obligation was being breached.
274. The comments made by the Claimant to Mr. Sehmi do not amount to a protected disclosure in accordance with section 43B of the Employment Rights Act.
275. For completeness, the Tribunal noted that the Claimant has not alleged that any comments she made in October 2023 regarding vaccinations amounted to a protected disclosure.

Whistleblowing Detriment

276. As the Tribunal determined that the Claimant had not made a protected disclosure, the complaint of whistleblowing detriment cannot continue.
277. However, as an observation, the Tribunal noted that it was Mr. McCarthy who was alleged to have carried out the alleged detriment. The

Tribunal found that Mr. McCarthy had no knowledge of the alleged disclosure.

278. Further, the Claimant's position appeared to shift at the very end of closing submissions and the Claimant's representative said that the controlling mind behind the detriment was Mr. Sehmi and Mr. Dhaliwal. Again, as an observation, it was found that Mr. Dhaliwal was not aware of the comments made by the Claimant to Mr. Sehmi and further Mr. Sehmi himself could not recall any comments made by the Claimant, and he considered the incident was a workplace matter that was resolved between Mr. McCarthy and Ms. Vassel on the same day. There was no evidence at all to suggest that Mr. McCarthy was influenced in anyway when asking the Claimant about working days and when feeding back information, in view of his role to improve the branch and the fact he was feeding back about other staff and the branch.

Automatic Unfair Dismissal

Section 103A Employment Rights Act 1996

279. The Claimant alleges that the reason or principal reason for the Claimant's dismissal is the protected disclosure made to Mr. Sehmi on 24 January 2024.

280. As the Tribunal found that the Claimant did not make a protected disclosure this complaint did not continue.

281. However, again as an observation, the Tribunal has set out its findings on the reason why the Claimant was dismissed in relation to the direct race discrimination complaint. The Tribunal did not consider there was any evidence that the comments made to Mr. Sehmi on 24 January 2024 had any bearing on the decision to dismiss, as noted, they thought at that time the flashpoint between Mr. McCarthy and Ms. Vassel was resolved.

Section 12 – Employment Relations Act 1999

282. The Claimant also alleges that the reason or principal reason for the Claimant's dismissal was that she attended a disciplinary hearing in support of her colleague Zoe Vassel on 24 January 2024.

283. The relevant statutory provisions are set out in full above. It is section 12(3) that provides:

(3) A worker who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—

(a) exercised or sought to exercise the right under section 10(2A), (2B) or (4), or

(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

528. It is necessary to have regard to section 10(a), as repeated below:

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

529. Also, the definition of a disciplinary hearing as set out in section 13(4) must be kept in mind.

(4) For the purposes of section 10 a disciplinary hearing is a hearing which could result in—

(a) the administration of a formal warning to a worker by his employer,

(b) the taking of some other action in respect of a worker by his employer, or

(c) the confirmation of a warning issued or some other action taken.

528. The Tribunal does not consider that the Claimant attended a disciplinary hearing with Ms. Vassel. It concluded that she accompanied that Ms. Vassel to an informal one to one meeting between Mr. McCarthy and Ms. Vassel. The Tribunal does not consider there was any evidence to support a conclusion that the meeting on 24 January 2024, which was not prearranged or for any purpose other than to try and resolve Ms. Vassel's upset from earlier that day, was a disciplinary meeting falling in the definition of section 13(4).

529. The allegation fails.

530. The Tribunal observed that in any event, on the evidence it did not consider the fact the Claimant attended the first part of the discussion between Mr. McCarthy and Ms. Vassel had any bearing on Mr. Sehmi's and Mr. Dhaliwal decision to end the Claimant's probation period.

Time limits

528. As none of the allegations were upheld substantially, the Tribunal did not go on to consider time limits.

Approved by:

Employment Judge Cawthray

16 December 2025