EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss Alda Simoes		De Sede UK Limited

Heard at: London Central Employment Tribunal

On: 17, 18 October 2019

Before: Employment Judge Adkin (sitting alone)

Representations

For the Claimant: Claimant in person
For the Respondent: Mr T. Perry, Counsel

JUDGMENT

The judgment of the Tribunal is that the Respondent did not automatically unfairly dismissal the Claimant pursuant to sections 103A or 104 of the Employment Rights Act 1996 and these claims are dismissed.

REASONS

1. By a claim presented on 9 November 2018 the Claimant complained that her dismissal on 17 August 2018 was automatically unfair as a result of trying to assert her statutory rights under the Working Time Regulations 1998. She also brought a claim of "whistleblowing", which was clarified to be a claim under section 103A of the Employment Rights Act 1996.

The Issues

2. The issues in this case were as follows:

   2.1. It was agreed that the Claimant was notified of her termination on 10 August 2018, and was paid notice until 17 August 2018, which she was not required to work.

   2.2. Did the Claimant allege that the Respondent had breached a relevant statutory right pursuant to section 104(1)(b) of the Employment Right Act 1996 ("ERA")?

   2.3. If so, was this the sole or principal reason for dismissal so as to make the automatically unfair under section 104 ERA?

   2.4. Did the Claimant make disclosures qualifying for protection under section 43B of the Employment Rights Act 1996, specifically:

      2.4.1. Raising her concerns about the Respondent's marketing ideas, specifically creating graffiti logos and abandoning one of the Respondent's chairs in a public space which the Claimant believed would amount to a criminal offence, potentially falling under s.43B(1)(a).

      2.4.2. Raising her concerns about the absence of security tags in expensive bags, leading to the endangering of individuals' health and safety, potentially falling under s.43B(1)(d).

      2.4.3. That the Respondent was about to breach Working Time Regulations [also relied on for the section 104 claim above] was a breach of legal obligation, or alternatively endangering of individuals' health and safety, potentially falling under s.43B(1)(b) or (d).

   2.5. If so, were any of these matters the sole or principal reason for dismissal making the dismissal unfair under section 103A ERA?

3. Although the section 104 was reasonably clear from the claim form the section 103A claim was less so and was clarified on the first day of the hearing. The Respondent's witnesses gave oral evidence on this claim in answer to supplementary questions from Mr Perry.

The Evidence

4. For the Claimant the Tribunal heard from the Claimant herself. A witness statement from Mr Ariel Krupowies was relied upon. This statement was not challenged by the Respondent and Mr Krupowies did not give evidence

5. For the Respondent the Tribunal heard evidence from the dismissing manager Mr Damien Breitner and from Ms Monika Walser, CEO of the Respondent.

The Law

6. Section 43B of the Employment Rights Act 1996 ("ERA") provides

> "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 the health or safety of any individual has been, is being or is likely to be endangered

7. Section 43C:

> 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

8. Section 103A provides:

> 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

9. Section 104 provides:

> 104 Assertion of statutory right.
>
> (1) 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—
>
> (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
>
> (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
>
> (2) It is immaterial for the purposes of subsection (1)—
>
> (a) whether or not the employee has the right, or
>
> (b) whether or not the right has been infringed;
>
> but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
>
> (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
>
> (4) The following are relevant statutory rights for the purposes of this section—
>
> …
>
> (d) the rights conferred by the Working Time Regulations 1998

10. The Working Time Regulations 1998 provide:

> Weekly rest period
>
> 11.—(1) Subject to paragraph (2), an adult worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.
>
> (2) If his employer so determines, an adult worker shall be entitled to either—
>
> (a) two uninterrupted rest periods each of not less than 24 hours in each 14-day period during which he works for his employer; or
>
> (b) one uninterrupted rest period of not less than 48 hours in each such 14-day period,
>
> in place of the entitlement provided for in paragraph (1)

11. As to the application of section 104, in the case of *Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare)* [2019] IRLR 512 (UKEAT/0142/18/JOJ) the Employment Appeal Tribunal (HHJ Richardson) said as follows:

> 27. In my judgment the starting point must be the language of s 104 itself. Read naturally, s 104(1)(b) requires an allegation by the employee that there has been an infringement of a statutory right. An allegation that there may be a breach in the future is not sufficient. The thrust of the allegation must be, 'you have infringed my right,' not merely 'you will infringe my right.'
>
> 28. It is true that s 104(1)(b) read naturally in this way does not provide as much protection as it could. The same can be said of s 104(1)(a). Here the employer's reason must be that the employee has brought proceedings against the employer of a particular kind. I cannot see any normal canon of construction whereby it would suffice if the reason were that the employee proposed to bring such proceedings.
>
> 29. In these respects, s 104 is more narrowly drafted than other members of the same family of provisions. The drafting techniques in the family are not always precisely the same and I do not need to go through the provisions individually. However, in contradistinction to s 104(1)(a) other provisions are often drafted so that the employer's reason may relate to proposed proceedings as well as actual proceedings or proposed action as well as actual action; see for example s 104A–104E. In practice these provisions will sometimes give protection where s 104 does not since they apply to cases of proposed action as well as actual action.
>
> 30. Section 104 was one of the first of this family of provisions. It was inserted into the Employment Protection (Consolidation) Act 1978 by the Trade Union Reform and Enforcement of Rights Act 1993. But it was not the first. The 1978 Act already contained a provision, s 58, which rendered automatically unfair dismissal related to Trade Union membership, defined to include not only actual but proposed action: see s 58 of the Employment Protection Consolidation Act 1978.
>
> 31. In my judgment ss 104(1)(a) and (b) must be given their natural meaning. It is true that they could both have been drafted to afford wider protection; but it is not possible within ordinary canons of construction to interpret them as if they did. It would, for example, be impossible to know what criterion to apply in s 104(1)(b). Would it be sufficient for the employee to allege that an infringement may take place or would the allegation have to encompass a threat of infringement or a proposal to infringe or an intention to infringe?"

12. Where a claimant has insufficient service to bring an ordinary unfair dismissal claim the burden is on them he or she will acquire the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason

— *Smith v Hayle Town Council* [1978] ICR 996, CA, and *Ross v Eddie Stobart Ltd* EAT 0068/13.

The Facts

13. There are quite a number of factual disputes between the parties about a number of the events in the Claimant's short period of employment with the Respondent. It has not been necessary for me to resolve many of these disputes of fact.

14. I have only in this decision resolved those disputes of fact which it seems necessary to identify whether or not the claims succeed.

15. On 29 June 2018, the Claimant commenced working as a sales assistant for the Respondent which operated a concession in Harrods department store selling, among other things, luxury furniture.

16. *Marketing ideas* - at some point in July 2018 although the precise date is unclear, marketing discussions took place, and various ideas were discussed by employees of the Respondent which the Claimant expressed concerns about. At one stage, Ms Monica Walser, CEO, suggested that one of the Respondent's luxury chairs could be dropped somewhere in central London as a marketing stunt. In respect of this suggestion the Claimant raised a concern that this would be some sort of offence.

17. Also in July 2018 Mr Breitner suggested that the Respondent's logo could be graffitied as a way of getting some brand recognition. Mr Breitner accepted in his evidence that he did make a suggestion about a type of "clean" graffiti, creating the image of the Respondent's logo by using a pressure washer and template. This would leave an image in the background dirt and would not therefore be a criminal action. This particular feature of his proposal was not appreciated by the Claimant who felt that an act of vandalism was being proposed. I find that these ideas were raised and I find that the Claimant raised concerns about them.

18. *Security tags in bags* - there seems to be a dispute about the exact date that this allegation occurred. The Claimant suggests that the bags which are the subject of her allegation arrived in the second week of July 2018, whereas the Respondent suggests it was the first week of July. That dispute is not material for present purposes. I find that a friction of some sort developed between the security team in the Harrods store and the Respondent's management and specifically, Monica Walser, the CEO. The Respondent wanted valuable handbags bags which were part of their stock left in and around their furniture as part of their display. For the purposes of this display, the Respondent did not want security tags in the bags as would be usual for stock. Some of the bags were valuable. One of them was reputedly worth as much as £140,000. This was of concern to Harrod's security who thought it might be a target for thieves. The genesis of this concern, according to the Claimant's witness statement appears to have come from an "undercover" Harrods security officer who approached her and who considered this lack of

security arrangements dangerous. The Claimant confirmed to this officer that there was no security tag.

19. As a result of this concern, the Claimant added security tags with the permission of her line manager Mr Breitner. The Harrods security team considered these tags were not sufficient. As a result the security team appears to have made direct contact with Ms Walser. There was a disagreement between the Harrods security team, and Ms Walser about how to deal with this. Or at least, the security team raised concerns and Ms Walser did not respond to them. The Claimant's only role, as set out her witness statement, which I accept, was to add the tags and to tell Mr Breitner that she had mentioned the matter to Harrod security that there was no tag. It is the Claimant's concern that as a result of her involvement in this matter Ms Walser had something against her.

20. *Working Time Regulations* - on 10 July 2018, the Claimant was consulted about working in the period 28 July – 7 August 2018. This was to cover for Mr Breitner, the manager, who was himself new to the organisation and who had pre-booked holiday running from July into August. She was asked to work on two days which otherwise would have been rest days. The Respondent says, although that this is in dispute, that the Claimant agreed at this stage. I understand from the Claimant's oral evidence that she understood in general that she was going to have to cover Mr Breitner. It seems that she had not appreciated that this would mean working 14 days without a break.

21. I find that the Claimant only realised at a later stage that she was being asked to work long period of time because she only tended to check her rota up one week in advance.

22. It is clear that on 20 July 2018 the Claimant raised that she was being asked to work 14 days. On that date she complained about the expectation that she should work 14 days in a row. She told Mr Breitner that she felt that she was being treated like a slave. The Claimant was planning to spend some time with her son and planning to take him to Alton Towers. It was for this reason in part that she was particularly upset.

23. Mr Breitner declined to engage temporary staff on the basis that they would not know the Respondent's products. Mr Breitner did ask Harrods to provide staff, which they declined to do. On 22 July 2018 Mr Breitner offered the Claimant the opportunity to swap a couple of her days off by text message, to break up the lengthy period she was being asked to work without a break. The Claimant declined, because she needed to take the day off that was already in the rota.

24. On 27 July 2018 there was a team meeting. This was the last day that Mr Breitner worked before he went on a period of annual leave. Again on this date the Claimant raised that she was not happy. Mr Breitner told the Claimant he would not be able to go on holiday if she was absent. Mr Breitner's account is that the Claimant shouted and banged the table and walked off returning 30 minutes later. The Claimant does not accept his version of events. It is clear that she did become tearful and walked to the next concession. Mr Breitner followed her. The Claimant asked him for some time so that she could compose herself. The Claimant then spoke to a Harrods manager about the period she was being asked to work without

a break. This manager told her about ACAS. The Claimant then spoke to ACAS and was told that this was potentially a constructive dismissal situation given an apparent breach of the Working Time Regulations.

25. To the extent that there was a conflict I accept the Claimant's evidence. In summary the Claimant was very upset and raised the question of the length of time that she was being asked to work.

26. I find that at the time she did reasonably believe that this amounted to a breach of the Working Time Regulations 1998, specifically regulation 11. I acknowledge that the Respondent argues that working 14 days consecutively might not, construing the provisions strictly amount to a breach. Whether or not there was a breach is beside the point. I accept that the Claimant raised the matter in good faith and was reasonably clear that there was a breach.

27. *Champagne dispute* - there is a dispute about a bottle of champagne in relation to events on 27 July. It has been necessary to consider this conflict in more details, because Mr Breitner's evidence is that this was a significant part of his decision to dismiss. The Claimant disputes his account.

28. Mr Breitner says that the Claimant took a bottle of "bubbly" and later he smelt alcohol on her. The Claimant admits that she may have had had a bottle of champagne in her hand at this time, but says that this would be normal as part of client entertainment. She says that there are bottles of champagne in fridges available for this purpose. She denies drinking champagne.

29. There is no documentary evidence absolutely contemporary to this event. The documentary evidence can be summarised as follows:

    29.1. In a hand written diary note which Mr Breitner used as an aide memoir in preparation for a call with his manager Ms Walser on 27 July the day of the alleged incident, he recorded "Meeting issue Alda – walked away. Not prof[essional] – lack of leads + order". There is no reference to champagne nor alcohol at all in this note.

    29.2. In an email on 9 August 2018 Mr Breitner wrote to Semhar Afaworki, an employee of Harrods in the following terms "Following up on our discussion. The event happened on Friday, 27 July, I saw Alda taking a bottle from within the Timothy Houlton fridge and did smell alcohol when she returned and spoke to me. At the time I did not confront her. However this has been noticed by others [sic] staff members. I cannot remember the exact time but it happened after our meeting. Alda left at 6pm."

    29.3. In a further email on 9 August 2018 Mr Breitner wrote to Semhar Afaworki "It was mentioned by Nooshin and another staff but would prefer not to involve him. At that time I saw Alda taking the bottle from the fridge, I was with Julien and he both saw it. I even made a remark at that precise time"

    29.4. Julien Mitchell, another Harrods employee, substantiated this allegation to a limited extent in an email sent on 9 August "Yes can confirm

I saw Alda with a bottle in her hand, however it was unclear to me whether she was moving it or actually pouring from it. Either way Damien [i.e. Mr Breitner] did notice and commented on how strange her behaviour at the time seemed."

29.5. There is no reference to alcohol in the termination letter of 10 August 2018. In fairness no reference is given to the reason for dismissal at all. There is a reference to the fact that this dismissal is within the probationary period.

29.6. In the dismissal meeting on 10 August 2018 (discussed further below) there was no reference to alcohol.

29.7. There is no reference to alcohol in the Respondent's Grounds of Resistance. Mr Breitner says that he completed this in a hurry.

30. I find that Mr Breitner did witness the Claimant with a bottle of champagne on 27 July. He says it was absolutely forbidden to drink alcohol on the shop floor. I have not been shown any policy document that prohibits employees handling alcohol for client entertainment purposes. Whether or not there was a strict policy, I accept the Claimant's evidence that in the context of client hospitality, in practice it was not particularly unusual for her to have a champagne bottle in her hand.

31. Mr Breitner says that the Claimant was acting strangely. She was plainly upset.

32. I note that Mr Breitner neither challenged the Claimant at the time nor even mentioned the matter on 27 July and 10 August.

33. I find that as early as 27 July Mr Breitner was already contemplating some sort of disciplinary action against the Claimant. Any matter of significance it seems to me would be highly likely to be recorded for his conversation with Ms Walser later in the day on 27 July. That he did not suggests it is unlikely that he attached particular significance to his observation of the Claimant with the Champagne bottle at the time. Mr Breitner took no action against the Claimant, but allowed her to carry on working until this return.

34. I doubt based on the observation on 27 July that Mr Breitner had a basis to take disciplinary action in relation to alcohol.

35. *Subsequent events & dismissal* - from 28 July 2018 Mr Breitner was absent until 7 August 2018.

36. Mr Breitner emailed Monica Walser at 16:03 on 9 August, saying "I will terminate Alda's probation tomorrow at 12h30, giving her a week [sic] notice and ask her to be away from the business during that time. Her store approval will be removed thereafter."

37. On 10 August, a meeting took place between Mr Breitner and the Claimant. The Claimant says Mr Breitner asked her if she was happy. The Respondent's account is not dissimilar. What Mr Breitner says is that he wasn't able to get into detail of reasons for the dismissal before the Claimant became upset and left.

38. The reasons now given to the Tribunal for the decision to dismiss are behaviour, performance, and what he described in oral evidence as "the alcohol problem", which I have dealt with above.

39. The letter of dismissal, dated 10 August 2018, page 34 did not refer to any of these specific problems. It simply said that the employment relationship is terminated during the probationary period.

40. The Claimant then went on a period of garden leave and her employment ended on 17 August.

SUBMISSIONS

41. I heard oral submissions from both parties. The Claimant presented a written submission headed 'Claimant's Substantive Closing Submissions as Advanced' which was a generic written submission dealing with automatic unfair dismissal, whistleblowing and detriment.

42. One of the Claimant's central submissions, with which I had considerable sympathy was that she should not lose the protection of section 104 ERA as a result of a 'technicality'. She also suggested that by 27 July the Respondent was already in breach of the Working Team Regulations as her uninterrupted absence had already commenced.

CONCLUSIONS

43. That there was a dismissal in this case is admitted.

44. **Issue 2.2 -** Did the Claimant allege that the Respondent had breached a relevant statutory right pursuant to section 104(1)(b) of the Employment Right Act 1996 ("ERA")?

45. The statutory right asserted by the Claimant under section 104 is the Working Time Regulations.

46. For the purposes of this claim I do not need to determine whether or not there was actually a breach. I do find that the Claimant's language on 27 July was not highly technical.

47. On 27 July she was clearly complaining about being required to work 14 days straight and that she did understand, by virtue of her conversation with ACAS that this was a breach of the Working Time Regulations.

48. **Issue 2.3 -** If so, was this the sole or principal reason for dismissal so as to make the automatically unfair under section 104 ERA?

49. The Respondent submits that section 104(1)(B) operates in a very particular way. They refer to the authorities. The first is *Mennell v Newell and Wright (transport contractors) Ltd* [1997] IRLR 519 and more recently the case of *Spaceman v ISS Mediclean Ltd (trading as ISS facility service healthcare)* [2019] IRLR 512.

50. The relevant part of the *Spaceman* judgement, which is a decision of the EAT is at paragraph 27-31 where it says that in my judgement, the starting point must be the language of section 104 itself read naturally. I have set out an extract above.

51. In summary, in order to engage the protection of section 104, it seems that a Claimant must complain about a breach of statutory right which has already taken place i.e. it must be a historic breach.

52. The Claimant engaged with this argument and responded to it in her submissions. She says that at the time of her complaint raised on 27 July 2018, the 14 day period of work had commenced, and therefore the breach had already occurred. I refer back to the wording of section 104(1)(b) "alleged that the employer had infringed right of his which is a statutory right". As at 27 July, the allegation about breach was an one that was being made on a forward-looking basis i.e. the employee in this case was saying there is going to be a breach.

53. I accept the submission put on behalf of the Respondent that no breach had crystallised at 27 July.

54. As has been observed in the *Spaceman* case, this is a surprisingly narrow scope for this particular right. Unfortunately for the Claimant I have concluded that, based on the facts in this case following the dicta in *Spaceman* the section 104 claim must fail.

55. If I am wrong about the operation of section 104. I have dealt with causation further below.

56. **Issue 2.4 -** Did the Claimant make disclosures qualifying for protection under section 43B of the Employment Rights Act 1996, specifically:

57. **Issue 2.4.1 -** Raising her concerns about the Respondent's marketing ideas, specifically creating graffiti logos and abandoning one of the Respondent's chairs in a public space which the Claimant believed would amount to a criminal offence, potentially falling under s.43B(1)(a).

58. The first alleged protected disclosures related to marketing ideas. The first related to graffiti. I consider in this case that the Claimant did reasonably believe, and that there was an act of vandalism that was being proposed, which it was in the public interest to raise, and which would fall within section 43B(1)(a) of the Employment Rights Act 1996 ("ERA").

59. It may be that this was based on a misunderstanding. But that does not matter for the purposes of the law which is based on reasonable belief. The fact that the Respondent's manager Mr Breiner had in mind something that was not illegal does not take away from the fact that this was a protected disclosure.

60. The difficulty with this her disclosure, however, is that as the Claimant I think very realistically acknowledged in her oral evidence this on its own was not a reason for her dismissal. It follows that this could not be the principal reason for her dismissal. This part of the claim fails on causation and cannot succeed.

61. Similarly, with regard to the chair being left in Central London. I accept that the Claimants raised concerns about this. I accept that she considered that this was some sort of criminal act. But again, I do not find that this was causative of the dismissal and I do not find that it did motivate the employer in the circumstances to dismiss.

62. **Issue 2.4.2 -** Raising her concerns about the absence of security tags in expensive bags, leading to the endangering of individuals' health and safety, potentially falling under s.43B(1)(d).

63. The second category of alleged protected disclosure relates to the security tags and the valuable bags being left in the Respondent's concession in Harrods.

64. The Claimant identified that this fell under criminal offence or health and safety (i.e. section 43B(1)(b) or 43B(1)(d)), which I shall refer to as relevant failures. What she said was that this would endanger the health and safety of others. She explained that security guards would be affected if these valuable bags became a target for robbery.

65. I find that the Claimant did reasonably believe that this was a potential health and safety problem and/or potential criminal one and there was a public interest element to it, which she believed in, which was that this was potentially going to affect the safety of security guards, not simply herself.

66. What is less clear, however is what disclosure of information tending to show a relevant failure was actually made in this case. The Claimant's own account seems that initially someone from the Harrods security team approached her and that he proceeded to tell her how dangerous it was. The initiative came from Harrods security. It seems then that the friction which developed between Harrods security team and the Respondent really was between a difference of approach between Harrods security and the marketing plan of Monica Walser which was to have these valuable bags appear as if they had just been left, rather than obviously part of a display.

67. What the Claimant says in her statement is at the time she had such a good relationship with Damien [Breitner] she told him it was her that told Harrods security. Reading the Claimant's witness statement at paragraph 11 and 12 it is clear that she told the security officer that there was no security tag in response to his question about the apparent absence of a tag. This does not appear to be a disclosure to the employer at all.

68. I have considered that it might argued in the alternative that this is a disclosure to another responsible person falling under section 43C(1)(b)(ii), although whether or not Harrods had legal responsibility for security tags attaching to the Respondent's bags is unclear.

69. I have considered causation. I acknowledge that this friction with Harrods security might have been enough to cause some annoyance to Monica Walser.

70. Was this enough to be the sole or principal reason for the Claimant's dismissal? The Claimant's involvement in this matter appears to be comparatively minor. The

impetuous both initially and subsequently appears to have come from Harrods security rather than the Claimant. I do not consider that the evidence or reasonable inference supports a conclusion that the Claimant's role in this incident whether considered under section 43C(1)(a) or 43C(1)(b)(ii) was the sole or principle reason for dismissal.

71. **Issue 2.4.3 -** That the Respondent was about to breach Working Time Regulations [also relied on for the section 104 claim above] was a breach of legal obligation, or alternatively endangering of individuals' health and safety, potentially falling under s.43B(1)(b) or (d).

72. This alleged protected disclosure related to the concerns raised on 27 July about the number of consecutive days to be worked. By clear implication this related to a breach of the Working Time Regulations. I accept that the Claimant had a reasonable belief that her complaint in respect of these matters related to both breach of legal obligation and endangering of individuals' health and safety, namely her own.

73. The difficulty for the Claimant on this part of the claim is the requirement that it be made in the public interest. She honestly acknowledged in her oral evidence and that this was not a matter of public interest. What she said it was "it was to do with me". The Claimant seemed puzzled during her evidence when she was asked about why this should be a matter of public interest. I was satisfied that she understood the concept, but did not see why it would apply to this alleged protected disclosure of hers.

74. I have allowed for the fact that the threshold for public interest is low in view of authority on this point (e.g. *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* 2018 ICR 731, CA).

75. I have no basis to consider the belief of the Claimant at the material time on 27 July contained the essential ingredient of public interest when in the course of this hearing she is so clear that she did not consider this to be a matter of public interest.

76. I have dealt with causation in respect of this third protected disclosure below.

77. Therefore, it follows that the protected disclosure claimed the section 103A, must fail in its entirety.

78. **Issue 2.5 -** If so, were any of these matters the sole or principal reason for dismissal making the dismissal unfair under section 103A ERA?

79. This claim must fail for the reasons given above.

Causation (in the alternative)

80. I have considered, in the alternative, the question of causation if I am wrong about the section 104 claim or alternatively the third protected disclosure in the section 103A claim. What were the reasons for the dismissal?

81. In this case I have considered the motivation and the thought process of Mr Breitner as far as I can. Based on the evidence I find that there were several reasons for the dismissal. I rely in part on Mr Breitner's note on page 45 which was written on 27 July. He had a concern about the lack of sales leads and a lack of orders. Given that the Claimant had been employed for such a short period I do not consider that this in itself would have led to dismissal on 10 August. He was concerned about the Claimant's conduct on 27 July. I accept based on his evidence that Mr Breitner had some concerns about her engagement with the team. He found her unhelpful about some of his marketing ideas for example approaching partner organisations. He described a lack of enthusiasm. I do not accept that the alleged alcohol 'issue' was motivating him in the way that he subsequently alleged.

82. I find that the complaint on 27 July about the expectation that she work 14 days was certainly one of the reasons why Mr Breitner dismissed her. This was plainly a (reasonable) matter of concern to her from 20 July onward once she fully understood what she was being asked to do. Matters came to a head on 27 July.

83. *Manner of disclosure* - I have considered the point raised by the Respondent that a disclosure that is protected under statute (e.g. a protected disclosure, protected act in a claim victimisation) may in some circumstances be distinguished from the manner of the disclosure. The argument is that an employer may in some circumstances legitimately and lawfully react to the manner in which a disclosure has been made rather than the content of the disclosure itself. This distinction has been considered in a number of appellate cases, such as *Panayiotou v Kernaghan* 2014 UKEAT/0436/13 or *Martin v Devonshires Solicitors* [2011] ICR 352, EAT. The EAT gave the example of a genuine complaint of discrimination couched in terms of violent racial abuse or accompanied with threats of violence or made by ringing the managing director at home in the middle of the night as conduct which might be distinguished from the disclosure itself. In other words it would have to be something out of the ordinary about the manner of disclosure.

84. In my assessment there was nothing exceptional about the manner of the disclosure in this case on 27 July. The Claimant was undoubtedly upset. I do not consider however there was anything exceptional that she did which would enable the section 104 assertion and section 103A disclosure to be divorced from the manner of the assertion/disclosure. I conclude that the manner of the assertion/disclosure was integral to it.

85. There are multiple reasons for the dismissal in this case. I find that the principal reason why the Claimant was dismissed was Claimant's complaint about her working hours. For the reasons given earlier in this written reasons however both claims fail and are dismissed.

Employment Judge Adkin

Date14/11/2019

WRITTEN REASONS SENT TO THE PARTIES ON

.14/11/2019

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.