



EMPLOYMENT TRIBUNALS

Claimant: Miss D Drofti

Respondent: Deli Solutions Limited

Heard at: Manchester

On: 9 July 2021 (reading day)
12-16 July 2021

Before: Employment Judge Leach
Ms K Fulton
Mr A Gill

REPRESENTATION:

Claimant: In person
Ms Lindsay (Interpreter)

Respondent: Mr R Bhatt of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed.
2. The claimant was not automatically unfairly dismissed pursuant to section 103A Employment Rights Act 1996 ("ERA").
3. The respondent did not directly discriminate against the claimant because of her race, contrary to section 13 Equality Act 2010.
4. The claimant was not subject to harassment (protected characteristic of race) contrary to section 26 Equality Act 2010 ("EqA").
5. The claimant was not wrongfully dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Quality Assurance Supervisor until her dismissal on 23 October 2019. The claimant claims that dismissal was unfair and, further, that the principal reason for the dismissal was that she had made protected disclosures.
2. The claimant also alleges that her dismissal was in breach of contract as she received no notice or payment in lieu of notice (wrongful dismissal).
3. The claimant also brings complaints under the Equality Act 2010, being complaints of direct discrimination and of harassment. The relevant protected characteristic for the purposes of the claims under the Equality Act 2010 ("EqA") is race. The claimant is of Hungarian nationality.

The Issues

4. The parties had agreed a List of Issues which we repeat below:

1. *The claims before the Tribunal are:*

- a. *Ordinary unfair dismissal, contrary to s94(1)'Employment Rights Act 1996 ("ERA 1996");*
- b. *Automatic unfair dismissal for making a protected disclosure, contrary to l03A ERA 1996;*
- c. *Direct Discrimination because of race as defined by s13 Equality Act 2010 ("EA 2010"), contrary to s39(2)(d) EA 2010;*
- d. *Wrongful dismissal;*
- e. *Racial harassment as defined by 327 EA 2010, contrary to s40(l)(a) EA 2010.*

A. ORDINARY UNFAIR DISMISSAL

2. *Whether the Respondent's dismissal of the Claimant amounted to an unfair dismissal contrary to s.94(1) ERA, having regard to the following:*

- a. *Was the Claimant dismissed for a potentially fair reason (conduct) pursuant to s98(2)(b) ERA?*
- b. *If so, in the circumstances was dismissal for conduct within the range of reasonable responses available to a reasonable employer in accordance with equity and the substantial merits of the case, pursuant to s.98(4) ERA?*

3. *In the event the Respondent has shown the dismissal was for the reason of conduct, the Tribunal in approaching issue at paragraph 2(b) above will need to consider the following:*

a. *Did the Respondent carry out a reasonable investigation in all the circumstances of the case (i.e giving the Respondent reasonable grounds for believing in the alleged misconduct)?*

b. *was the decision to dismiss the Claimant and the procedure followed to reach that decision within the range of reasonable responses open to the Respondent?*

B. AUTOMATIC UNFAIR DISMISSAL (WHISTLEBLOWING) (S 103A ERA 1996)

4. *Is the 4 October 2019 Email a qualifying disclosure in accordance with s43B ERA 1996?*

a. *The Claimant reasonably believed that the Respondent had failed, was failing to, was likely to fail to comply with the following legal obligation: that the Claimant's manager was subjecting her to harassment and singling her out for criticism because of her race.*

b. *The Claimant to specify the public interest in which it is said that the disclosure was made.*

5. *If so, was the reason or principal reason for the Claimant's dismissal the fact that the Claimant made the protected disclosure referred to above?*

C. DIRECT RACE DISCRIMINATION (s13 EA)

6. *Was the Claimant treated less favourably by the Respondent?*

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

8. *With respect to paragraph 6. The acts of less favourable treatment alleged by the Claimant are*

a. *her dismissal (which includes refusal to reinstate on appeal) .*

b. *the decision not to allow the claimant to move to a fixed single shift work arrangement in order that she could attend a course at a local college.*

9. *With respect to the issue of whether or not any less favourable treatment has been suffered, the Claimant (who is Hungarian) relies upon the following comparator/s:*

a. *Aleksandra Glinka who is Polish;*

b. *Szymon Golubek who is Polish.*

10. *Did the Claimant's actions in sending the three documents (Training Certificate, Photographs and Witness Statement) amount to gross misconduct"?*

11. *If so, the Claimant is in repudiatory breach of contract.*

12. *Did the Respondent dismiss the Claimant because of her actions as stated at paragraph 10?*

E. RACIAL HARASSMENT (s27 EA 2010)

13. *The Claimant relies upon the following alleged acts as unwanted conduct:*

a. *On 26 August 2019 Daniel Adams informing the Claimant that her nails are not short enough;*

b. *On 27 August 2019 Daniel Adams asking the Claimant to show him her nails and not asking others such as Agnieszka Matuszyk to do the same; and*

c. *On 2 October 2019 Daniel Adams following the Claimant and asking her to obtain prior approval from him before making a phone call during work hours.*

14. *If the Claimant was subjected to unwanted conduct, was it related to her race?*

15. *Did the conduct complained of have the prohibited purpose or effect?*

F POLKEY/CHAGGER/CONTRIBUTORY FAULT

In the event that the Tribunal finds the dismissal is unfair/unlawful, it will have to consider these further issues.

16. *Is the Claimant guilty of any 'contributory' fault, and if so what percentage reduction should be made to the basic (under s. 122(2) ERA) and/or compensatory awards (under s.123(6) ERA)*

17. *Should any 'Polkey' reduction be made under s.123(l) ERA to any compensatory award?*

18. *Should any reductions be made pursuant to Abbey National plc v Chagger [2010] ICR 397 in respect of the likelihood of dismissal in any event?*

G. LIMITATION

19. *Are all, or some, of the Claimant's claims out of time?*

20. 20. Do the acts alleged amount to conduct extending over a period within the meaning of s123(3)(a) EA 2010?

21. If not, is it just and equitable to extend time?

The Hearing

5. The case was listed for six days. The first day was set aside as a reading day.

6. We heard from the respondent's witnesses over days two, three and the morning of day four. We heard from:

- (1) Danial Adams ("DA"). DA was a Quality Manager until September 2019 when he was promoted to a Manufacturing Project Manager. DA is the person who the claimant alleges subjected her to racial harassment.
- (2) Jonathan Cook ("JC"). JC is the HR Manager for the respondent and its wider group of companies.
- (3) Aaron Cramsie ("AC"). AC is the Procurement Manager who heard and decided on disciplinary allegations against 3 of the claimant's colleagues who had been accused of bribery.
- (4) Mariusz Kurkiewicz ("MK"). MK is the Quality Assurance Manager and a line manager of the claimant.
- (5) Jasmine Thomas ("JT"). JT was formerly a Technical Manager of the respondent but is not now employed by the respondent. JT was the person who chaired the disciplinary hearing concerning the claimant, and who decided that the claimant should be dismissed.
- (6) Donato Ventricelli ("DV"). DV is Head of UK Manufacturing of the respondent's group of companies. DV heard and decided the claimant's appeal against dismissal.
- (7) Chris Walsh ("CW"). CW is a Production Manager who conducted the investigation into allegations of misconduct against the claimant.

7. The claimant gave evidence on days four and five. English is not the claimant's first language but her understanding of English is very good as is her spoken English. The Tribunal had the benefit of a Hungarian interpreter, Ms Broderick (on day 2) and Ms Lindsay (days 3-6). It was decided that Ms Lindsay should translate all questions put to the claimant by Mr Bhatt of counsel. The responses given to the claimant's questions were also all translated. The claimant was also able to have the benefit of translation where she found a particular question or answer difficult to phrase in English.

8. Whilst it is likely that the extensive interpretation was unnecessary, given the claimant's good command of English, adopting this process ensured that the

claimant was able to understand everything that was said. We are grateful to Ms Lindsay for her contribution to the fairness of the hearing.

9. The parties had agreed a List of Issues (see above). The parties had also prepared and handed up a paginated bundle of documents. The bundle numbered 269 pages. There was just one document that the claimant did not agree to being included in the bundle. This was an Employment Tribunal Judgment in another case that had been brought against the respondent by Mr Attila Nagy. It was not in dispute that Mr Nagy was at all relevant times the claimant's fiancé. It was the respondent's position that Mr Nagy's claim had some relevance to the claimant's circumstances. Whilst the claimant objected to this Judgment being included in the bundle of documents, we noted that it was a publicly available document and the respondent was able to refer to this document to the extent that they considered to be relevant to the issues in this case. On that basis, it was retained in the bundle.

Findings of Fact

The Respondent

10. The respondent is a food business based in Clitheroe, Lancashire. It is part of a larger group of businesses but in Clitheroe it employs approximately 250 employees.

11. The respondent produces and supplies delicatessen type products, including olives, cooked meats and cheeses.

12. In addition, it is developing vegan, plant-based products which are designed as meat replacements. At the relevant times these products were in a stage of development, as was a new production process and machinery. The respondent was keen to maintain confidentiality over these new product lines and production processes. For example, Mr Cook (the group HR Manager) noted that he did not have access to the production area where these products were being developed.

13. A significant proportion of the respondent's workforce comprises non-UK EU nationals, particularly Polish workers but also other nationalities inside and outside of the EU including Czech and Romanian workers, Hungarian workers such as the claimant, as well as workers of South Asian nationality or national origin.

14. We accept the evidence from the respondent's witnesses that the respondent's workforce at Clitheroe includes family members (for example, parents and children) working together alongside each other.

The Claimant

15. The claimant is of Hungarian nationality. She was employed by the respondent for approximately four years.

16. In 2018, the claimant was promoted by the respondent from a Production Operative to a Quality Assurance ("QA") Supervisor. Initially the claimant was provided with the opportunity of a QA supervisor role to cover maternity leave, and then the claimant was successful in being permanently promoted to this position. At that stage the claimant signed a new contract of employment (dated 4 November

2018 at pages 84-95). It is this document to which we refer when referencing the contract of employment.

17. The QA supervisor role does not involve the supervision of employees. Its focus is on the maintenance of standards, and to this extent it requires providing employees with directions. A job description for the role at pages 239-241 includes the following responsibilities:

- *Following the Health and Safety (“H & S”) procedures, ensure employees understand and adhere to them and all potential hazards are observed and reported;*
- *Drive and monitor factory hygiene and quality standards and be the Product quality champion covering everything from specs to aesthetics of the product;*
- *Raise and communicate internal non conformances, observations and concessions to the team;*
- *Work with production to ensure paperwork is correct and traceability is maintained.*

Data Protection Obligations

18. Paragraph 23 of the claimant's contract of employment (page 95) states as follows:

“Data Protection

23.1 You confirm that you have read and understood the company’s Data Protection Policy. It does not form part of your contract of employment. The company may change its Data Protection Policy at any time and will notify you of any changes.

23.2 You shall comply with the Data Protection Policy when handling personal data in the course of employment, including personal data relating to any employee, customer, client, supplier or agent of the company.”

19. A briefing on new data protection legislation (GDPR) was given to employees, including the claimant, in August 2018. The claimant signed to confirm her attendance. The briefing sheet (page 112) notes as follows:

“Please find attached the new Data Protection Policy and Data Retention Policy.”

20. The claimant's evidence about this briefing is that she did not understand it because it was provided in Polish by an employee who just asked her to sign confirmation of her attendance and also, the trainer could not speak English. We do not accept this. We note as follows:

- (1) An HR person was named as the briefer. We accept the evidence of JC that this person (Kasia Minor) speaks good English.
- (2) A number of names of attendees noted on the briefing sheet (CW and DA are just two examples) are clearly not Polish names and would not have been fitted from a briefing in Polish.
- (3) The claimant did not claim at either disciplinary or appeal hearing (see below) that she did not understand her obligations under the Data Protection Policy.

21. The claimant has tried to give the impression that this update was conducted in Polish (or if not, in English but by someone who spoke little English) and as such she did not understand what was expected of her. We do not accept that. We find that the claimant was provided with information explaining what was expected of her and was also provided with a copy of the new Data Protection Policy. The claimant understood the terms of this policy.

22. The Data Protection Policy issued in 2018 includes a number of expected provisions, being:

- (1) Explaining what information is covered by personal data;
- (2) The policy's statement for the respondent;
- (3) An explanation of how the respondent will use personal data;
- (4) Data protection responsibilities applicable to the respondent.

23. There is also a section headed "General Responsibilities". Under this heading it is noted that all employees are required to comply with the policy, and the company's Data Security and Data Retention policies. We note the following instructions:

- (1) *You should only access personal data covered by this policy if you need it for the work you do for, or on behalf of, the company, and only if you are authorised to do so. You should only use the data for the specified lawful purpose for which it was obtained.*
- (2) *You should not share personal data informally.*
- (3) *You should keep personal data secure and not share it with unauthorised people.*
- (4) *You should not make unnecessary copies of personal data and should keep and dispose of any copy securely.*
- (5) *Do not save personal data to your own personal computers or other devices.*
- (6) *You should not take personal data away from the company premises without authorisation from your line manager or the DPO.*

- (7) *Any deliberate or negligent breach of this policy by you may result in disciplinary action being taken against you in accordance with our disciplinary procedure.*
- (8) *All...employees have a responsibility to inform their business unit leads and the data protection officer of any new use of personal data, as soon as reasonably practicable, after it has been identified.*

24. There is further reference in the respondent's employee handbook to data protection, including the following section (pages 129 and 130):

"You are responsible for ensuring that any personal data that you hold and/or process as part of your job role is stored securely.

You must ensure that personal information is not disclosed, either orally or in writing or via web pages or by any other means, accidentally or otherwise, to any unauthorised third party.

You should note that unauthorised disclosure may result in action under the disciplinary procedure, which may include dismissal for gross misconduct."

25. The respondent's internet Policy includes notification to employees that internet, email and telephone systems and usage may be monitored and that where policy breaches are found, disciplinary action taken (page 67)

Respondent's policies concerning mobile phone usage

26. The respondent's Computer and Electronic Devices Policy includes the following (page 127):

"Personal Mobiles

You are permitted reasonable use of your personal mobile phone providing this does not interfere with the performance of your duties or cause any disruption to others.

You are not permitted in any circumstance to use your phone for the taking, recording or sharing of images.

You must not use mobile phones whilst undertaking any task where safety is a consideration and the use of the phone might interfere with the level of concentration required to undertake the task safely.

Failure to comply with any aspect of this procedure may result in action being taken against you under the disciplinary procedure, which may result in a disciplinary warning or dismissal, depending on the circumstances."

27. Paragraph 7.6 of the Hygiene Site Operating Procedure (page 81) provides as follows:

“Mobile phones must not be taken into the factory unless used by an auditor at the discretion of the site manager.”

28. We note and accept the evidence provided by the respondent that the prohibition of mobile phones on the site was:

- (1) for hygiene reasons;
- (2) for business confidentiality reasons;
- (3) because the screens of mobile phones are glass and therefore there is food contamination risk in the even that a phone is dropped or damaged.

Disciplinary and Grievance procedures

29. The respondent’s Grievance Procedure is contained in the Employee Handbook. It is at page 138 . It encourages informal resolution of grievances and also provides a framework for resolving grievances through a formal process .

30. The Disciplinary procedure is also at page 138 (through to 141). It provides a non-exhaustive list of examples of gross misconduct and also includes the following: *“any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust ad confidence necessary to continue the employment relationship will constitute gross misconduct.”*

31. There is a right of appeal in both grievance and disciplinary procedures.

The Bribery Incident

32. This arose from a request by the claimant in June 2019 that her fiancé, Mr Nagy, be allowed to change shifts so that the claimant and Mr Nagy could see more of each other.

33. The claimant asked two Production Supervisors, being Adam Vyroubal (“AV”) and Andrzej Hubisz (“AH”) whether they would arrange for Mr Nagy to change shifts. It is not disputed that they replied to the claimant that they would if she gave them each a bottle of whiskey.

34. Following this AV and the claimant spoke with Kinga Bakalarz (“KB”) who was more senior. They told KB about the proposal that the claimant provide AV and AH with a bottle of whiskey, and KB’s response was that the claimant should provide KB with a bottle of whiskey also.

35. Although these comments were made in early June 2019, the claimant did not raise a complaint about them until 9 August 2019. This was after a number of complaints had been received about Mr Nagy’s behaviour, and the respondent had informed the agency through which Mr Nagy was engaged not to return to work at

the respondent site. We find that this was not coincidental. The “whiskey” comments were not an issue for the claimant at the time they were made. They became an issue following the respondent’s decision that Mr Nagy should not continue working at their factory.

36. The claimant's complaint about the whiskey incident is at page 143.

37. Following the raising of this complaint the matter was investigated by the respondent. We heard from Aaron Cramsie (“AC”) about the issue. AC chaired disciplinary hearings when allegations of misconduct against AV, AH and KB were heard.

38. AC concluded that the comments about requiring a bottle of whiskey were knowingly made as a joke and, furthermore, that the claimant knew that it was a joke. Even so, AC decided that it was an ill-advised joke and issued each of the three individuals with a verbal warning, which was confirmed in writing.

39. Having considered the circumstances and heard the evidence of Mr Cramsie we are satisfied that he chaired the disciplinary hearings in a fair and responsible manner and the outcomes of verbal warnings were fair and reasonable in the circumstances.

40. The claimant's complaint about the whiskey incident was also treated as a grievance. A grievance meeting with the claimant did not take place until 10 September 2019 even though the claimant reported the incident on 9 August 2019. Both parties have referred us to the terms of the respondent’s grievance policy, which provides:

“It is the company’s intention to consider all grievances as soon as possible and a meeting will be held usually within five working days of you raising the grievance or as soon as reasonably practicable. The meeting will enable you to give full details.” (Page 138)

41. As the claimant notes, the meeting took a calendar month to arrange and hold. The respondent’s reason why it took so long was that the person that would deal with the grievance (DV) was on holiday for much of this time, and September was the earliest date that the meeting could be arranged.

Nails Incident (26 August 2019)

42. It is not disputed that DA spoke with the claimant about the length of her nails. He did this because the claimant's nails were too long for the respondent’s working environment. We note that clause 6.1 of the Hygiene Site Operating Procedure (page 80) states:

“Fingernails must be kept short and clean at all times.”

43. The claimant accepted in evidence that her nails, whilst not excessively long from an everyday perspective, were too long for that working environment. Even so, the claimant stated that DA picked on her and did not raise issues of nail length with other employees. The claimant names one other employee, Agnieszka Matuszyk (“AM”). The claimant says that she specifically referred to AM when DA spoke with

her about the length of her nails. DA's evidence was that he cannot recall the claimant referring to AM but that he does recall speaking with other workers about nail length, including a more difficult discussion with another employee called Ms Stolarska.

44. We accept DA's evidence on this point. We find DA to be a diligent manager committed to the respondent's business. We note that DA was promoted in September 2019. Hygiene is very important in this environment. There was no reason why DA would not speak with any employee (of any nationality) about inappropriate nail length. The respondent's operating procedure is clear. Furthermore, DA's interpretation of this part of the operating procedure is also clear, and he told us that he regarded nails as too long when the nails could be seen when looking at a hand from a palm up position. We find that where he saw nails that did not comply with his interpretation, that he spoke with the individual concerned, whatever their race.

Almond Cake

45. On 5 September 2019 the claimant reported to DA that a cake containing almonds had been found in respondent's canteen. It is accepted by both parties that it is forbidden to bring food containing nuts onto the respondent site. The email was sent by the claimant at 18:42 and stated as follows:

"Hi, please see attached picture about a cake which has been brought to site and consumed in the canteen. The incident was reported by Shirley Essex. The cake contains almond. Someone brought in a lot of cakes and also the mentioned one. When I went to canteen I have found only two slices, the rest of them have already been consumed."

46. DA replied that same evening at 21:33:

"Thanks for highlighting this Dora, we will raise this at the 10.00am and follow this up. Dan" (the claimant's first name is Dora).

47. The reference to "the 10.00am" was to a morning briefing the next day.

48. At the Tribunal hearing the claimant alleged that she also told DA who had brought the cake onto the site, but he did not discipline those individuals. There is no written record that she did so and DA is clear that she did not provide him with the names of the individuals responsible. We prefer DA's evidence on this point. We do not find that this information was provided by the claimant in September 2019. We note that even though the almond cake incident was raised by the claimant subsequently (particularly at her disciplinary appeal when talking about inconsistency of treatment), the claimant did not name the individuals who had brought the cake in.

49. DA's evidence (which we accept) is that he is sure that he did issue a reminder to staff at the 10.00am meeting the following day. DA was not himself responsible for investigating the matter. We accept his evidence that he was not further involved and did not know whether anybody had been identified and spoken to about the incident.

50. The claimant's version of events is that an employee called Paulina and her mother (also employed there) had brought cakes in for colleagues following the tragic and sudden death of Paulina's sister. They brought cakes in to thank colleagues for the support that they and their family had received following this tragedy. We note that the cake in question is a packet of Bakewell slices and that some way down the long list of ingredients on this packet there is a reference to almonds.

51. Whilst on balance we find that the respondent was not aware of the person or persons who had brought the cake onto the premises, even had the respondent been aware, the decision to issue a general warning on this occasion rather than take disciplinary action against mother and daughter in these circumstances, would be a difficult one to criticise.

The claimant's phone use

52. We heard evidence about the claimant's phone use from:

- (1) The claimant;
- (2) DA;
- (3) MK.

53. We find that there were occasions when the claimant was spoken to about excessive phone usage in the workplace. She was spoken to about this because managers believed that she was using her phone too frequently.

54. The respondent has policies relating to phone usage (see above).

55. The claimant in the course of her evidence questioned what is meant by "reasonable use". We agree that it is a fair question. It will depend upon the particular employer, an employee's job role, the circumstances on any particular day, and so on. Here, the discussion with the claimant about perceived excessive use was just that: a discussion. There was no reference or threat of disciplinary action, for example.

56. At the time when DA raised phone usage with the claimant she was on a call behind a locked door. He and others had been looking for her for work purposes. This particular phone usage took all of the claimant's time and meant that she was effectively away from her workplace/desk. DA informed the claimant at that time that if she wanted to make a private call away from others, she should notify someone first. We note particularly that:

- (1) DA did not threaten the claimant with any disciplinary action, as we have notified above;
- (2) DA did not say that the claimant could not make private calls, in a private room away from the workplace;

- (3) DA's instruction to the claimant was simply to let people know where she was. He provided this instruction after he and others had taken some time looking for the claimant.

Claimant's email dated 4 October 2019 (disclosure)

57. The claimant claims that the document attached to an email from her dated 4 October 2019 amounts to a protected disclosure for the purposes of Part IV A Employment Rights Act 1996. On that basis it is appropriate that we set out the whole of this attachment (page 153):

"At 26 August I was working in the AM shift when Daniel Adams came to me that my nails are not short enough. I apologised and I have asked him to address it also for Aga Matuszyk due to her nails are much longer than mine, he said that he will tell her also. I cut my nails extra short. On the next day when Daniel came in around 8-9 o'clock he came to me straightaway and asked me to show my nails to him, but he asked this only from me. My nails were fine, but Aga Matuszyk and many other workers' nails were the same, they did not cut. I felt myself humiliated; due to an issue has been address only to me and no-one else. I heard that once Daniel Adams saw a couple of weeks ago that one of the production operative, Ewa Wasilevska, was putting make-up on her eyes in the changing area downstairs and she put the make-up back to her pocket and went back to work, however Daniel did not say anything for this.

At the end of last week I had a conversation with my manager, Marius Kurkiewicz, about phone usage. He told me that someone said I use my phone too much (for playing games?). He cannot say who said and will monitor it in the next couple of days. Marius said I can use my phone for calls and messages. I told him that I don't play any games on my phone. I also explained him that I am entitled for 30 minutes break, I eat my sandwich in 3-4 minutes, therefore I still have 26-27 minutes for phone calls and messages. He said that's fine.

At Wednesday (2 October) I went into the hygiene changing room and I got a notification on my phone in the meantime that I had a missed call. I called the number back and after about 15 seconds Daniel Adams (Manufacturing Project Manager) came into this room due to he was following me. I hung up the phone and he said that if I want to make any phone calls/use my phone first I need to ask him. I wanted to be professional and said ok, sorry, however I was scared because he is not my manager anymore and he was following me. I cried and felt myself humiliated, due to he said this only to me and no-one else and it was not the first time that he addresses an issue just to me."

58. The claimant sent the email to a manager called Laura Chadwick of the respondent's HR department (who we did not hear from) and also an email address operated by the respondent, specifically for whistleblowing.

59. We comment below on the claimant's contention that this amounted to a protected disclosure. We note here that the claimant considers that it is a protected

disclosure because it was sent to the respondent's whistleblowing email address. That information was provided in response to a question about whether the claimant had a reasonable belief that it was in the public interest.

60. We also note that the claimant accepted on being questioned that the issues raised relate only to the claimant (which obviously they do), and the email was treated as a grievance. The respondent held a grievance meeting with the claimant on 11 October 2019 (see below).

Training provided by the respondent to the claimant

61. We were impressed by the respondent's commitment to training employees. Training included English language training for those employees for whom English is not their first language. The claimant was the beneficiary of substantial training throughout her employment with the respondent. We accept JT's evidence that this included:

- (1) Hygiene Level 2 training in 2015;
- (2) Pest awareness training in October 2016;
- (3) Food Safety Level 2 in October 2017;
- (4) First Aider training May 2018;
- (5) Fire Marshall training in June 2018;
- (6) Internal "Train the Trainer" training in April 2018;
- (7) Hygiene training in June 2019;
- (8) BRC V8 conversion training 7 February 2019.

62. We note that this training was conducted during working hours and the claimant was released from her duty in order to complete this training. We also note that the claimant received the benefit of training in English and Maths which, whilst outside of working hours, was provided at no cost to her:

- (1) English Entry 3 (Modules) January 2018 and November 2018;
- (2) Mathematics Entry 3 – November 2018;
- (3) Mathematics Level 1 – December 2018;
- (4) English Level 1 – January 2019.

63. We accept JT and the respondent generally was supportive of the claimant undertaking training.

64. In September 2019 the claimant asked for a change in shift arrangements so that she could attend a course that she had identified at a local Education College. The bundle did not contain any documentary evidence about this course. We heard evidence from the claimant and JT that the course was about leadership skills. It

was not directly related to the claimant's role. We accept that the claimant was not employed to manage or lead a team, but we do accept that may well have been an ambition of hers. The claimant wanted a change to her shift pattern so that she could attend the course in November and December of that year. She made this request to JT in September 2019.

65. A change in the shift arrangements would have meant placing the claimant on a single shift and would have caused some inconvenience to other employees, particularly the two other production supervisors. JT noted that the period for which the claimant was requesting a change was in the run-up to Christmas, which was an extremely busy period for the respondent business. JT did not agree to put the claimant on a single shift in this period. However, she noted that if the claimant made the request during a quieter period of the year she would agree to it.

66. The claimant contrasts her position with her comparator, Szymon Golubek ("SG"). The claimant states that SG was allowed to work on a fixed shift arrangement in order to attend a course.

67. The bundle of documents did not contain any evidence about the arrangements made to enable SG to attend the course. JT provided evidence on the matter. We accept her evidence, which notes:

"Szymon Golubek did request and was allowed to attend training. He had requested English lessons which were business critical and arranged through the business. Szymon Golubek did change to a more static shift whilst completing the English lessons, however this was deliberately organised at a time outside of the company's busy period."

68. The claimant claims that the English course was for a 12 month period. Whilst we have no documentary evidence in relation to the English course, it would be surprising if it had lasted precisely 12 months. Generally courses would last for around an academic year (for example September to June) and would also include time off over the Christmas period and Easter period.

Allegations of misconduct against the claimant

69. It is relevant to note here some background allegations which concerned the activities of a perceived competitor of the respondent.

70. A previous director had joined or set up a potentially competitive business nearby. His wife still worked for the respondent. This previous director had made a number of unwise comments at a Christmas event over the 2017/18 festive period and the respondent was concerned that this previous director wanted to "poach" staff away from the respondent business. The respondent learned of approaches that this previous director was making to employees in the summer of 2019 and was being particularly vigilant in order to protect its own business interests from this competitor.

71. JC also noted (and we accept) also at this time the respondent had implemented a state-of-the-art high-speed production line and was developing vegan products.

72. We accept that the directors and senior managers were at (as described by JC) “a relatively high state of alert.” It was decided that some employees that they considered might pose some risk (for example leaking information to the previous director’s business) should be monitored to the extent permitted by the respondent’s policies.

73. At this stage the monitoring was fairly low key. The respondent decided to monitor emails sent from a work to a personal email address of a member of staff, and then only focussing on emails with attachments as the respondent considered that was the most likely way for confidential information to be leaked out of the business.

74. At around the beginning of October 2019 JT was informed, by a co-worker, that there was a concern that the claimant was carrying out work for the competitor business set up by the previous director. JT did not have any information to substantiate this, nor did she have any information to disprove it. JT informed JC of what she had been told and the decision was taken to monitor the claimant's emails to the limited extent noted above.

75. On 10 October 2019 the claimant sent an email from her work email address to her personal email address. The email had four attachments:

- (1) A training certificate relating to another employee which named that employee and her qualification;
- (2) A witness statement made by KB concerning another employee. The witness statement referred to an incident when some food product was dropped, and it appears from the statement that not all of the expected hygiene processes were then followed;
- (3) Two photos which show employees engaged in what appears to be prankish behaviour within the respondent’s production area. They appear to be pretending to or about to eat the respondent’s product. Their mouths, and in one case uncovered facial hair (a beard) are close to food products. It would be the type of conduct, if the claimant was properly carrying out her role, she would be putting a stop to.

76. The respondent reviewed this email and its contents and arranged a meeting with the claimant on 11 October. That meeting was held by JT. The outcome of the meeting was that the claimant was suspended on full pay.

Disciplinary Investigation

77. The disciplinary investigation was carried out by Chris Walsh (“CW”). We note that:

- (1) He reviewed the claimant's email of 10 October sent from her work email address to her personal email address and attachments;
- (2) He reviewed the respondent’s Data Protection policy;
- (3) He interviewed the claimant;

- (4) He interviewed another employee because the claimant had informed CW that the other employee downloaded photographs.

78. We set out below the claimant's explanation about the attachments, as these explanations have been broadly consistent throughout the internal processes and at the Tribunal:

- (1) The claimant did not mean to attach the witness statement of KB. It was there by accident.
- (2) The photos were for a photobook that she was compiling for a friend and former employee of the respondent.
- (3) The qualification certificate was for a course and qualification that the claimant said she wanted to attend and attain, and she believed that the respondent should have provided her with the opportunity to do this.

79. In relation to the photos, the claimant also showed CW four or five other photos on her personal mobile phone as evidence of having put together a collection for a photobook. Although Mr Walsh noted that the photos that the claimant had emailed herself were potentially incriminating, the claimant denied that she wanted to do anything untoward with them. She admitted that the actions of the employees in the photos were wrong, and that if she saw employees behave in that way she would tell them to stop. The claimant at this stage noted that another employee, Aleksandra Glinka ("AG") had created a photobook for an employee who had left, and she was simply doing the same as AG had done.

80. CW interviewed AG. CW found that AG had collected photos from a range of individuals to compile a photobook. Individuals provided personal photos for AG to use and shared with AG the cost of the photobook. The photos were collected into a folder on the respondent's IT system and then downloaded onto a USB stick in order for AG to then arrange the creation of a photobook.

81. Further evidence was provided by the respondent's witnesses about the photobook arranged by AG. We accept that it was generally known within the business at the time that AG was creating this photobook, that it had been put together, and it was on display in the respondent's premises for people to view, write messages and sign. The costs were shared between a number of colleagues. Nothing was hidden.

82. We also accept the evidence of CW that he himself viewed the photobook at the time (although not as part of his investigation as the photobook had by that stage been sent to the former employee). CW's clear recollection was that the photobook comprised photos of personal events such as a wedding. We accept CW's evidence that to the best of his recollection the photos did not include any photos from within the respondent's factory or company premises. Given the respondent's strict policy on mobile phone presence within production areas and its focus on confidentiality, we find that had CW or any other manager identified photos taken within the production areas, that would have been raised as a concern at the time the photobook was being displayed.

83. CW informed AG that if she was going to extract personal documents from the respondent's systems in the future she should obtain consent from the respondent to avoid potential misunderstandings, and further that the best policy would be not to store anything personal on the respondent's system in the first place.

84. Mr Walsh was not satisfied with the explanations provided by the claimant. He noted:

- (1) The witness statement was stored in a completely different area of the respondent's system than where the photos had been stored, and he was not satisfied with the explanation that this statement was accidentally attached to the email;
- (2) The photos appeared to be very different to those provided to and used by AG;
- (3) The content of the photos, taken out of context, could be detrimental to the respondent, who had some concern about the claimant's true intention of taking the photos.

85. CW's investigation report (pages 196-197) recommended that a disciplinary hearing be held.

Grievance Hearing – 11 October 2019

86. JT chaired this hearing. The notes of the hearing are at pages 186-191.

87. JT discussed the claimant's complaints with her. In this hearing the claimant informed JT that she wanted the complaints dealt with informally. We note that the claimant made no reference to her having been treated less favourably due to her race (her Hungarian nationality).

88. JT followed this meeting by speaking with DA. We accept that DA was upset on hearing of the complaints against him, and in the course of the discussion he stated to JT that he could not understand what he had done wrong and that he did want everyone to feel comfortable and happy at work.

89. JT told DA that no further action would be taken, but she offered to mediate between DA and the claimant. JT's grievance outcome letter dated 23 October 2019 (page 164) includes the following:

"After the hearing and subsequent adjournment having concluded the investigation into your informal grievance I gave my decision, which is as follows.

During the grievance hearing as an outcome you requested that we speak to Dan informally. Dan was spoken to on the same day and was made aware of how you felt after these events. Dan will be more aware of his actions going forward and at this stage, no formal action has been taken.

I trust the above resolves your concerns and look forward to your response confirming the same. Should this not be the case you are advised that you have the right of appeal against my decision.”

90. We note that the claimant did not appeal against the grievance decision although she had, by the stage that the letter been sent, been dismissed from her employment (see below).

Disciplinary Hearing

91. This was held on 23 October 2019, the same date as the grievance outcome letter. The notes of the meeting are at pages 200-204.

92. JT chaired the disciplinary hearing. The claimant attended. She had been provided with a right to attend with a representative but did not do so. Sian Nutter also attended in her capacity as HR representative and notetaker.

93. JT went through the allegations with the claimant. She noted particularly the location of the witness statement, “S Drive: production: archive: Kinga B”. She questioned the claimant on this issue and how the claimant could have attached the statement accidentally. JT also viewed the photos on the claimant's personal mobile phone that the claimant said she had collected for a photobook. JT noted that the other photos were of the respondent's production areas, and she queried this. The claimant accepted that the purpose of the photos was not for a work purpose.

94. JT also questioned the claimant about data protection. Whilst the claimant in this Tribunal hearing has suggested that she was not aware of the obligations on her, the notes of the disciplinary hearing (which we find to be accurate) record that she accepted that she signed a document concerning data protection, and in response to JT commenting that breach of data protection was gross misconduct and asking for the claimant's response to this, the claimant stated that she knew that she had breached GDPR and she had nothing to add.

95. JT decided to dismiss the claimant for gross misconduct. We accept that the dismissal letter (dated 23 October 2019) accurately records JT's reasons for dismissal, and we note the following extract from this letter:

“After the hearing and subsequent adjournment, Jasmine gave her decision which is as follows...

- *You have admitted to sending personal documents from your work email address to your personal email address, namely two photos of an employee, a training certificate and a witness statement.*
- *You have failed to provide an acceptable explanation for sending the witness statement, which was found in a different folder to which you originally stated in the investigation stage.*
- *The documents you sent could pose a potential threat to the business and the intent of you removing the witness statement from the business till remains unclear.*

- *In doing so you breached General Data Protection Regulations (“GDPR”) and for that reason Jasmine considers your actions amount to gross misconduct.”*

Appeal

96. The claimant was offered a right of appeal, which she exercised. We note the terms of her appeal as follows:

“I am hereby writing this appeal letter to request the management of our company to reconsider my dismissal. I have always tried my best to put in good efforts to fulfil my job responsibilities as accurately and professionally as possible. Now I clearly understand that I breached the GDPR, however I was not meant to harm the company nor its reputation, because I strongly respect the company.

Regarding the witness statement, it was stated that I have failed to provide an acceptable explanation, however as I told them on disciplinary interviews I have sent it out accidentally. I had more folders opened on my computer while I was sending the other three documents and it was not for purpose to send that document out. After my initial interview, I have deleted the unread email from my private email account. I was looking after some information about qualifications which I could achieve. I have opened that folder also (named Kinga Bakalarz) because I knew that she was working in the HR department for a few months.

Once again I would like to apologise for everyone who was affected in my investigation. I cannot emphasise more, how much I regret it.

I would request you to consider my previous performance records and my last appraisal proved that the company was happy with my performance.”

97. The appeal was heard by DV. We find that DV looked carefully into the claimant's appeal. One issue that he looked into (even though it was not brought up by the claimant herself) related to another employee (who was referred to at the Tribunal as “employee A”). Employee A had also been dismissed, earlier in 2019, for a GDPR breach, in that that employee had sent personal information out from the company without the consent of the data subject. He had shared personal data from the respondent's system by putting it on a Facebook page.

98. DV heard employee A's appeal at the time and he overturned the dismissal. The reason he did so was because the person with whom employee A shared the information (the data subject's ex-wife) already had the information being shared. In those circumstances DV replaced the dismissal with a final written warning.

99. At the appeal hearing the claimant raised the issue of the almond cake. She had not raised this at the disciplinary hearing or in her appeal letter. She brought up this issue to contrast the company's position, where she is dismissed for gross misconduct and yet when other employees commit serious disciplinary offences, no action is taken. The claimant did not mention the names of the individual she says

brought the almond cake in. We note, as mentioned above, that the first time she mentioned these names was at this Tribunal hearing.

100. The claimant also referred to the bribery incident, as noted above. Again, this was referred to, to support the claimant's argument of inconsistent treatment. We find that DV provided the claimant with a reasonable opportunity to raise all points that she wished by way of appeal.

101. DV rejected the claimant's appeal. The historical cases that the claimant had brought up to try to use as comparison were not comparable. DV also noted that he was satisfied that the matter was dealt with properly and thoroughly at the disciplinary hearing stage.

Claim by Mr Nagy

102. As noted above, the respondent terminated Mr Nagy's engagement on 6 August 2019. The respondent's position is that this is significant and relevant to the claimant's claims, and it is necessary that we make a number of findings of fact:

- (1) The claimant had not raised any grievance or other complaint about the termination of her fiancé's engagement.
- (2) The respondent ended Mr Nagy's engagement because of concerns about his conduct. KB (the author of the witness statement which the claimant claims was accidentally attached to her email) had raised a grievance about Mr Nagy's conduct towards her which KB claimed amounted to sexual harassment.
- (3) Mr Nagy brought Employment Tribunal proceedings against the respondent and against KB personally in which he alleged race discrimination against both. Prior to doing so he was engaged in ACAS early conciliation between 13 September 2019 and 3 October 2019, the claim against both potential respondents then being entered on 1 November 2019.
- (4) The claimant's email of 10 October 2019 fell within the middle of these events.
- (5) KB was also one of the employees who had jokingly asked for a bottle of whiskey
- (6) One of the two employees appearing in the photos the claimant sent to her personal email account, was another of the employees engaged in the bribery incident.
- (7) JT was not aware at the disciplinary hearing stage that KB had made allegations of sexual harassment against the claimant's fiancé.

Admissions by the Claimant

103. It is appropriate that we record that the claimant accepted the following when being questioned:

- (1) The claimant breached the Data Protection Policy by sending herself three categories of document;
- (2) The breach was serious, given her role and the fact that she had access to confidential information;
- (3) The claimant is not critical of the respondent's decision to carry out a disciplinary investigation into these matters;
- (4) The claimant is not critical of the respondent having to suspend her;
- (5) The claimant does not criticise CW's investigation;
- (6) The claimant does not criticise JT's handling of the disciplinary meeting itself;
- (7) Rather, the claimant considers that the dismissal was not reasonable given her service, her assurance that she did not intend to cause any harm to the business, that she deleted the offending email, and further there were other individuals (not Hungarian) who were not dismissed for their misconduct.

Submissions

104. Both parties provided written submission documents which we considered. We are grateful to both and do not repeat the submissions here. They have helped inform our findings of fact above and our conclusions below.

The Law

Unfair Dismissal

105. The respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA. If the respondent fails to persuade the Employment Tribunal that it had a genuine belief in the reason and that it dismissed him for that reason, the dismissal will be unfair.

106. The reason for dismissal is a set of facts known to the respondent or a set of beliefs held by it, which caused it to dismiss the claimant.

107. If the respondent does persuade the Employment Tribunal that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

108. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including

the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

109. In considering the question of reasonableness of a dismissal, an Employment Tribunal should have regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303 EAT**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17 EAT**; **Foley v. Post Office, Midland Bank plc v. Madden [2000] IRLR 827 CA** and **Sainsbury's Supermarkets v. Hitt [2003] IRLR 23** ("Sainsbury")

110. In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief having carried out as much investigation in to the matter as was reasonable. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

111. The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure by which that decision was reached (Sainsbury).

112. As for consistency of treatment we note Mr Bhatt's reference to the following authorities:-

Hadjioannau v. Coral Casinos [1981] IRLR 352

Securicor Limited v. Smith [1989] IRLR 356

Paul v. East Surrey District Health authority [1995] IRLR 305 (Paul)

113. Perhaps the best summary of when arguments about inconsistent of treatment might be relevant to an unfair dismissal claim is at paragraph 24 of the Hadjioannau judgment. This notes 3 potentially relevant circumstances

"24. ... Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will be not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal. ... Thirdly ... evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct

with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.”

114. In relation to this third category (“truly parallel circumstances”) we note the caution expressed by the Court of Appeal in its judgment in Paul and the need for us to retain focus on the application of the statutory test (now at s98 ERA).

115. We also note (and have taken account of) the ACAS Code of Practice on Disciplinary and Grievance Procedures (ACAS Code) and the ACAS Guide on Discipline and Grievances at work 2015.

116. When determining compensation for unfair dismissal, employment tribunals must apply s123 ERA

“s123(1)the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

.....

S123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

117. Compensation is reduced under just and equitable principles under s123(1) in 2 broad categories of cases:-

- (1) Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.
- (2) Where it is just and equitable to apply a “Polkey” reduction (applying the case of **Polkey v. AE Dayton Services Limited [1988] AC 344**) to reflect the chance that the claimant would have been dismissed in any event.

Both categories potentially apply here.

118. Compensation is reduced under s123(6) where claimants actions caused or contributed to the dismissal. We note the guidance in the case of **Nelson v BBC [1980] ICR 110**.

119. Provisions providing for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant’s conduct before the dismissal.

Protected Disclosures

120. The claimant claims that she was dismissed on the grounds that she had made a protected disclosure. Section 47B Employment Rights Act 1996 (“ERA”) provides as follows:

“(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.”

121. Section 43A ERA - 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.”

122. Section 43B ERA– 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 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 of the preceding paragraphs has been or is likely to be deliberately concealed.”*

123. Section 43C ERA:

“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.”

124. Section 48(2) ERA: This section provides that on a complaint under these provisions:

“...it is for the employer to show the ground on which any act or deliberate failure to act was done.”

125. In considering whether there has been one or more qualifying disclosures in this case we have considered guidance provided by a number of cases including

- (1) Chesterton Global Limited v Nurmohamed [2017] IRLR 837 (“Chesterton”),
- (2) Parsons v Airplus International Limited UKEAT/0111/17.
- (3) Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 (“Korashi”);
- (4) Wharton v Leeds City Council EAT 0409/14;
- (5) Kilraine v London Borough of Wandsworth [2018] ICR 1850.
- (6) Kuzel v. Roche Products [2008] ICR 799 (“Kuzel v. Roche”)

126. Having regard to the terms of the ERA and the case law referred to above, the following is relevant:

- (1) The worker making a disclosure has to reasonably believe that it is made in the public interest and also has to reasonably believe that it “*tends to show*” one or more of the subject matters listed at 43B(a) to (f) ERA (see above).
- (2) The terms of section 43B ERA require a reasonable belief of *the worker making the disclosure* (our emphasis). This wording provides a mixed objective and subjective test. The test is not whether there is a reasonable belief on the part of a reasonable worker; rather the test is whether the particular worker making the disclosure has a reasonable belief.
- (3) The question whether a disclosure is in the public interest depends of the character of the interest served by it rather than simply on the numbers of people sharing the interest (Chesterton - paragraph 35).
- (4) The broad intent behind the public interest amendment at section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection afforded to whistleblowers.
- (5) The question as to whether the particular worker has a reasonable belief that there is or is not a disclosure in the public interest is a

question to be answered by the Tribunal on a consideration of all the circumstances of the particular case.

- (6) There must be some objective basis for the worker's belief in order for that belief to be reasonable. Some evidence is required; rumours, unfounded suspicions, uncorroborated allegations and the like will not be good enough to establish a reasonable belief (Korashi).
- (7) The information disclosed only has to "*tend to show*" one or more of the matters set out in (a) to (f) of section 43B. It does not have to prove the matter and information may, in the reasonable belief of the worker "*tend to show*" one or more of the matters at section 43B(a) to (f) even if the worker is in fact mistaken. (Kilraine)
- (8) Where a claimant relies on breach or likely breach of an unspecified legal obligation as the relevant failure, that claimant may have difficulty in persuading a Tribunal that his or her belief was reasonable (Kilraine).

Claims under the Equality Act 2010 (EA)

Harassment– section 26 EA

127. Section 26 (1) states:

“ A person (A) harasses another (B) if –

- (a) A engages in unwanted conduct relating to a relevant protected characteristic, and*
- (b) The conduct has the purpose or effect of*
 - (i) Violating B's dignity, or*
 - (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B*

128. The EAT decision in **Richmond Pharmacology Limited v. Dhaliwal [2009] IRLR 336** emphasised the need for Employment Tribunals when deciding allegations of harassment to look at three steps, namely:-

- b. Whether the respondent had engaged in unwanted conduct
- c. Whether the conduct had the purpose or effect of violating the claimant's dignity or creating an adverse environment
- d. Whether the conduct was on the grounds of the applicable protected characteristic?

129. We have applied the 3 steps noted in Richmond Pharmacology.

Direct Discrimination – section 13 EA

130. Section 13 states:

“A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

131. An important question for us is whether the claimant’s race was an effective cause of the treatment which we find. As was made clear in the case of **O’Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question. We also note the following:-

131.1 the House of Lords in **Nagarajan v London Regional Transport 1999 ICR 877, HL**, held *“discrimination may be on racial grounds even if it is not the sole ground for the decision.....If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”*
(judgment of Lord Nicholls)

131.2 Paragraph 3.11 of the EHRC Employment Code which states that *‘the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause’*

Burden of Proof

132. We are required to apply the burden of proof provisions under section 136 EA when considering complaints raised under the EA.

133. Section 136 states:

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

(2) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has 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.”

134. We have also considered the guidance contained in the Court of Appeal’s decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance.

135. We are also clear that the wording of the statute itself, s136 EqA is the key reference in relation to burden of proof when reaching decisions about whether there has been a contravention of the EqA.

136. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassy v. Nomura International [2007 ICR 867]** where the following was noted in the judgment:

“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a

tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

Analysis and Conclusions

137. We have first considered whether the claimant’s email of 4 October 2019 amounts to a protected disclosure. We note that this grievance email:

- (1) makes no reference to discrimination (that is the legal obligation on which the claimant now relies);
- (2) concerns the claimant only.

138. The claimant may well have considered that by sending the email to an email equivalent of a whistleblowing hotline operated by the respondent would, for that reason alone, put her email in the category of a protected disclosure. It does not. It still needs to meet the definition of a qualifying disclosure and protected disclosure under the ERA. It does not meet that definition because:

- (1) the claimant did not have a reasonable belief that it tended to show that the respondent was failing to comply with a legal obligation not to discriminate against persons because of race (as defined in the Equality Act 2010); and
- (2) it was personal to the claimant only.
- (3) it was not in the claimant's reasonable belief made in the public interest;
- (4) it did not tend to show racial harassment.

139. This finding deals with all issues under the heading of B, “Automatic Unfair Dismissal”.

Ordinary Unfair Dismissal

140. We are satisfied that the claimant was dismissed for the potentially fair reason of conduct. JT genuinely believed that the claimant had misconducted herself, sending the email and attachments on 10 October 2019, and that this was the principal reason (the only reason) for the claimant's dismissal.

141. As for the investigation carried out, we note that the claimant did not criticise this. Even so it is for us, the Tribunal, to consider and decide on the reasonableness of the investigation.

142. For our part, we consider that some employers may have gone further in the investigation process. For example, other employers may have looked further into the origin of the photographs, whether the individuals in the photographs were aware of them and their purpose, However, we are satisfied that the extent of CW’s investigation fell within the range of reasonable responses (Sainsbury above).

143. We note that the claimant has no issue with the procedure followed, nor do we. We are satisfied that the claimant was aware of what was alleged against her and she had every opportunity of putting her points in her defence in response. The

claimant was provided with an opportunity of attending with an appropriate representative in accordance with her statutory rights to be accompanied. The procedure followed was compliant with the respondent's own disciplinary procedure and with the ACAS Code and ACAS Guide.

144. We have considered whether there has been inconsistency of treatment as the claimant has claimed. We do not find anything in the way that the respondent dealt with the Bribery incident or the Cake incident (the 2 matters raised by the claimant in her appeal) or its treatment of AG (the employee who arranged a photobook for a departing colleague) to give rise to any concern that the decision to dismiss the claimant was not within the range of reasonable responses. These other incidents are in no way truly parallel, they did not provide any indication that an employee would not be dismissed for breaching data protection obligations, they do not give any indication that the purported reason for dismissal was not the real reason.

145. Specifically in relation to AG and the photobook:-

145.1 AG engaged in an open, transparent process of collecting photos, collating a photobook and then displaying the book for all to see (including managers) and sign.

145.2 Colleagues contributed photos and by doing so provided their consent for their personal data to be used.

145.3 The photos were of social events outside of the work-place

145.4 There were no photos included of work production areas, taken in breach of the respondent's policies on photos and mobile phone usage.

Wrongful dismissal

146. We find that the claimant's conduct in finding, retrieving and sending the 3 categories of documents, amounted to gross misconduct. We do not accept the claimant's explanation about the photos being for use in a souvenir photo book being or having been compiled, particularly having regard to the content of the photos and the lack of any evidence at all (either at the internal disciplinary stage or at the Tribunal). We do not accept the claimant accidentally attached the statement compiled by KB, particularly having regard to its location in the respondent's IT system. We find that it is very telling that the statement in question was drafted by KB who had only recently raised a compliant about the claimant's fiancé and who was or was about to be a named respondent in Tribunal proceedings brought by her fiancé. We find that the claimant intended to email the documents (including the statement) to herself and that she did so, knowing this was in breach of her data protection obligations that she had been trained on and about which she was aware.

Claims of harassment (contrary to s27 EA).

147. As we have made clear in our findings of fact, we have no criticism of DA's actions in pointing out to the claimant that her nails were too long and ensuring that the claimant had taken corrective action. Whilst the conduct may have been unwanted by the claimant, it was not related to her race. We also conclude that it

was a reasonable management instruction and did not have the prohibited purpose or effect.

148. The same applies to the allegation that DA subjected the claimant to unlawful harassment by following her and asking that she obtain prior approval before making a phone call during work hours. As we have made clear in our findings of fact; DA was looking for the claimant, not following her, DA's request to the claimant was not to obtain prior approval before making a private call but to let others know where she was if required to go somewhere private to make a personal call. Again, whilst the conduct may have been unwanted by the claimant, it was not related to race. Further, it was a reasonable management instruction and did not have the prohibited purpose or effect.

Claims of Direct Race discrimination

149. The claimant claims that her dismissal amounts to direct discrimination (protected characteristic of race). She relies on 2 comparators:-

149.1 AG. As set out in our findings of fact and our conclusions on the unfair dismissal claim, we do not consider the circumstances concerning the claimant, found to have emailed photos of employees behaving inappropriately in the respondent's production areas to be comparable with the circumstances of AG arranging a photobook as a souvenir for a departing colleague.

149.2 SG. This comparison does not relate to the allegation of less favourable treatment in dismissing the claimant. Instead it relates to a difference in treatment concerning training arrangements. As we have made clear in our findings of fact, the claimant was not simply told that she was unable to attend the course she wanted to attend. She was simply told that the shift changes would not be made in the busy period running up to Christmas but that if the claimant asked for the change at a quieter time, in order to attend the course, then that would be granted.

150. Given the claimant's request for the shift change was (1) for a short period of a few weeks (up to a couple of months) and (2) specifically fell within a busy production time, we do not find the circumstances of SG to be comparable. Further, applying the judgment in the Madarassy case, there is nothing to indicate that the respondent has treated the claimant less favourably because of her race.

Employment Judge Leach

3 August 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

5 August 2021

FOR THE TRIBUNAL OFFICE

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