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# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms Leigh Best**

**Respondent:** **Embark on Raw Ltd.**

**Heard at:** **East London Hearing Centre (by Cloud Video Platform)**

**On:** **27, 28 and 29 October 2021 and (in chambers) 30 November 2021**

**Before:** **Employment Judge B Elgot**

**Members:** **Mr R Blanco**
**Mr M L Wood**

**Representation:**

**For the Claimant:** **Ms W Miller, Counsel**

**For the Respondent:** **Ms P Hall, Legal Consultant**

***This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.***

**The Tribunal having reserved its decision now gives unanimous judgment as follows:-**

# RESERVED JUDGMENT

1. The complaint of unfair dismissal SUCCEEDS. The Claimant was dismissed under section 103A Employment Rights Act 1996 (the 1996 Act) for the automatically unfair reason that she made qualifying protected disclosures.

2. The claim under section 47B of the 1996 Act (Unlawful Detriment) that the Claimant was subjected to detriment by acts of the Respondent done on the ground that she made protected disclosures also SUCCEEDS.

3. The claim of harassment under section 26 Equality Act 2010 (the 2010 Act) related to the protected characteristics of age and sex also SUCCEEDS.

4. The complaint of victimisation under section 27 of the 2010 Act SUCCEEDS.

5. The remedy to which the Claimant is entitled will be determined at a separate remedy hearing conducted via CVP and listed for one day on 31 January 2022.

6. Case management orders in relation to the Remedy Hearing will be sent out.

7. Reasons for the Judgment are attached.

# REASONS

1. The Claimant worked as a sales assistant for the Respondent's small business which employs six persons including a part time work experience trainee aged 14 (Joe Murphy). The owners and directors of the business are David and Andrea Fletcher both of whom gave evidence in these proceedings. The Respondent's business since 2014 is to sell raw food for cats and dogs from a unit on Whitesbridge Farm Industrial Estate near Billericay in Essex. The shop was permitted to stay open throughout lockdowns because it is classed as an essential business.

2. The Claimant was employed from 29 January 2019 until her dismissal on 11 May 2020 on a 'zero hours' contract although it is not in dispute that she regularly worked 'full time' hours every week. She does not have the two-year qualifying period of employment required by section 108 of the 1996 Act to entitle her to the right not to be unfairly dismissed. The Respondent contends that she was dismissed for reasons relating to her conduct briefly summarised as rude and confrontational communication with co-workers and managers. However we have decided that she was dismissed for the principal reason that she made protected disclosures, sometimes called whistleblowing, during the early part of the covid 19 pandemic of highly contagious disease in March-May 2020.

3. The Claimant gave evidence on her own behalf and the other witness for the Respondent was Ms Katie Footer, Sales Assistant, who began working for the Respondent on 1 August 2019 and is still employed by the company. The names of the other employees at the relevant time are Nick Mower (Delivery Driver) Jordan Dickinson, Jake Francis and Joe Murphy.

4. There is an agreed bundle of documents collated and prepared by the Respondent. In accordance with the usual practice of the Employment Tribunal we read only those documents in the bundle to which our attention was specifically directed by the parties, their representatives and the witnesses. We had the benefit of oral closing submissions from both representatives.

5. At a Preliminary Hearing on 20 November 2020 the parties agreed, with the guidance of Regional Employment Judge Taylor, a List of Issues which is found at pages 215-216 of the bundle. We have used that List as a comprehensive summary of the questions we are required to decide in this case.

6. It has not been necessary to decide whether the Claimant was dismissed under section 100 of the 1996 Act for an automatically unfair reason related to health and safety because we are certain that the reason for dismissal is her whistleblowing.

7. Section 43B of the 1996 Act sets out the definition of a disclosure qualifying for protection:-

*'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-*

*(d) that the health and safety of any individual has been, is being, or is likely to be endangered.'*

8. Ms Miller told us that the Claimant relies only on sub sub section (d) and not upon sub sub section (b) which refers to failure by the Respondent to comply with any*' legal obligation'.* We have therefore not addressed in these Reasons any of the arguments made on behalf of the Respondent that any particular covid 19 restrictions or regulations were not mandatory and/or statutory and that therefore the Claimant cannot reasonably have believed that a '*legal obligation'* had been or was being breached or was likely to be the subject of a failure to comply. That is not the Claimant's case; she relies on disclosures as defined in section 43B(1)(d) relating to health and safety.

9. By reference to that definition we are satisfied in this case that not only did the Claimant make disclosures of 'information' but also that the disclosures were in the 'public interest'. We do not accept the Respondent's submission made robustly by Ms Hall that the Claimant had only 'obsessive' personal concerns, that she was worried only about her own welfare and her own physical and mental health. We have set out our detailed findings below as to the timing, content and nature of the disclosures and we find that the Claimant made those disclosures in the reasonable belief that during the early course of the covid 19 pandemic she was intervening to protect herself, her family, her close friends and contacts, the customers and suppliers of the Respondent's business and the wider public.

10. By reference to the definition in section 43B it is also pertinent for us to reiterate that the Claimant does not need to show that her disclosures about health and safety were unequivocally and objectively accurate in every degree. She is required to show only that she had a '*reasonable belief*' that the information she disclosed '*tended to show'* the endangerment of health and safety. There is of course both a subjective and an objective test of this statutory component.

11. The Respondent has no Whistleblowing Policy or Guide available to its employees and we have seen no copy Disciplinary or Grievance policies. It is a small company with limited administrative, human resources and access to legal advice. However

Mrs Andrea Fletcher was able to send out a fully drafted zero hours contract to the Claimant on 27 January 2019 and the Respondent was able to formulate a business response to the covid 19 guidance and regulations. Mrs Fletcher told us that she has responsibility for employee matters and we are certain that she had sufficient resources to search on-line for the widely available guidance in relation to disciplinary conduct matters.

12. The significant issue or question in this case is not whether the Respondent acted sufficiently in reacting to the Claimant's whistleblowing by taking steps, for example, to devise and enforce covid-safe practices and procedures as it says it did; we refer to paragraph 27 in Mrs Fletcher's statement. The Respondent has understandably been anxious to vindicate its actions and to assert that it behaved responsibly and safely during the pandemic and emphasises that it responded promptly and conscientiously to the Claimant's concerns. However the key question which we must ask ourselves is whether, when the Claimant made qualifying disclosures, no matter what the Respondent's practical responses, did the Respondent dismiss her and subject her to detriment because she made those disclosures? It is the causal link between the whistleblowing and the dismissal and between the disclosures and the detriment which is the main issue in this part of these proceedings.

11. In relation to this causal link we have reminded ourselves that the Respondent's persistent allegations that the Claimant over-reacted to the pandemic and its potential consequences and that she became obsessive, paranoid and irrational in relation to safety precautions in the work environment are only relevant in our decision as to whether her belief in endangerment to health and safety was reasonable and whether the Respondent when faced with her whistleblowing allegations decided to dismiss her for that principal reason and whether the Respondent, when it imposed detriment, was materially influenced by the fact that she made protected disclosures.

13. <u>Disciplinary Record</u> The Respondent's witness Mrs Fletcher refers in her witness statement to a history of alleged inappropriate conduct and dysfunctional working relationships by the Claimant throughout her short employment. There is no written evidence in the bundle of any verbal or written disciplinary warnings, formal or informal, given to the Claimant. It was not put to the Claimant in cross examination, by reference to paragraphs 16 and 18 of Mrs Fletcher's witness statement, that she had received a verbal warning on 29 January 2020 or that she had been reprimanded on 15 February 2020. The messages in the bundle on page 56 dated 29 January 2020 are not a disciplinary warning. It is unclear whether in taking the decision to dismiss her on 11 May 2020 the Claimant's alleged disciplinary record was taken into account.

13 <u>Protected Disclosures</u>

When the seriousness of the global covid 19 pandemic became obvious in March 2020, and shortly before the national 'lockdown' on 23 March 2020 the Respondent took proactive steps to research and publish comprehensive covid safe policies. It gave initial instructions to staff by WhatsApp message on 14 March 2020 as can be seen on page 57 of the bundle. It sent hygiene reassurance to its customers on 13 and 16 March 2020 on pages 63-64. Page 63 refers to' *washing our hands regularly*

*with hot soapy water and antibacterial gel'*. On 20 March 2020 the Respondent imposed a maximum of three customers in the shop at any one time, it increased its home delivery options and by the end of March 2020 it devised a system whereby customers were served from behind a doorway barrier. Social distancing measures between staff are reiterated in a memorandum on page 68. We conclude that the disclosures made by the Claimant were not complaints that the Respondent had failed to initiate and implement covid safety procedures. Indeed she made a point in a Facebook post dated on or around 25 March 2020 (page 71 of the bundle) of thanking the Respondent for establishing structures and guidelines which were designed to protect its staff and customers. However the Claimant's concerns were that these procedures were not actually implemented and enforced in practice. She was extremely worried that neither the management nor the staff were consistently following the relevant rules and were thus endangering not only her health and safety but also that of others. The Claimant gave information which was specific in relation to named individuals, location, dates and times, background circumstances and details of those incidents which she reasonably believed tended to show endangerment to health and safety. She had that belief because, she said, the Respondent's guidance and covid-discipline was being ignored and/or flouted by her co- workers and managers. Her protected disclosures were as follows:-

13.1 She told Mr David Fletcher that he ought to be isolating when his daughter Darcy Fletcher had covid-like symptoms in mid-March 2020, that he should not come to the shop, and should not give another employee a lift to and from work. We reiterate that it matters not that it eventually transpired that Ms Darcy Fletcher was thankfully not infected with the covid virus and that Mr Fletcher did self -isolate for two weeks from 11th to 24th April 2020 not least upon the insistence of the Site Manager of the estate where the shop is situated. The question for the tribunal is how did the Respondent's employment relationship with the Claimant alter as a result of her disclosures?

13.2 She repeatedly asked for a hot water supply in the shop itself rather than having to go out to the freezer unit behind the shop. This request was not just for covid 19 hygiene but because her job involved handling raw meat and blood spillages.

13.3 She exhibited significant concern that in particular her colleagues Katy, Jordan, Jake and Joe were not complying with the Respondent's requirement to wear a face covering and were consistently failing to follow the Respondent's instructions to socially distance from her and from each other. She expressed extreme anxiety and stress regarding the situation she observed including coughing by one of her colleagues who was not wearing a mask at the time. On page 74 of the bundle the Claimant's response to Mrs Fletcher's request for any 'feedback that could help make it run more smoothly' contains four suggestions including 'Most importantly…..Social Distancing, can you please remind all staff the importance of keeping their distance especially in the shop when talking to each other'. The Respondent sent out a reminder about the importance of social distancing and the wearing of masks and gloves. The message was sent via WhatsApp to a group apparently consisting only of Dave

Fletcher),Katie(Footer),Nick(Mower) and the Claimant. It is unclear whether it was communicated to other employees. However on 21 April 2020 Mr Fletcher's longer and sternly worded follow up What's App imposing a strict limit of ' maximum 4 people in the shop at any one time' (employees) does refer to a copy having been sent to 'Jordan and Jake on there whatsapp group' (sic). It is not clear how Joe Murphy was contacted. There is no evidence that the Respondent investigated or followed up, on an individual or collective basis, whether its staff were actually compliant in practice. Mrs Fletcher referred in her oral evidence to regular conversations by telephone and to messages sent to the Claimant's co-workers 'all the time' but was unable to supply any detailed documented evidence of when this dialogue occurred and what was said. No witness was able to corroborate her assertions in this respect.

13.4 The Claimant persisted in her complaints that her colleagues were not compliant. Thus at Page 77 on or around 21 April 2020 the Claimant asks whether Joe is 'in their convo'[conversation] and informs the Respondent that Joe and Jordan are in the shop together and 'Jordan keeps coughing in the shop, no mask on !'.She ends her first message with a blunt comment which the Respondent perceived as a threat- 'I've told Alan[her husband] tonight if I get ill then I've only caught it from work'. She ends her disclosure by stating 'Please speak to the others as it seems only me that's worried about the situation Andrea, maybe as I'm the only adult there but seriously it's a worrying situation in the shop'.

14. The Respondent's response to this disclosure in messages on pages 78 and 79 is to denigrate and down play the Claimant's concerns as 'unfair' and to argumentatively point out to her that she goes to other shops such as the local farm shop 'Barleylands' where she is just as much at risk. The Respondent challenges the Claimant's perceptions in an occasionally contemptuous way. The Respondent's messages exhibit irritation and a tendency to blame the Claimant herself for 'paranoia' and over reaction. Page 79 requests her to be '*realistic and not paranoid'*. At page 100 she is again referred to as 'paranoid'. The Respondent tried to minimise the situation; suggesting to the Claimant that the '*social distancing is a guide under workplace rulings, it says 'where possible… we are doing the best that we can and we are not breaking any rules. Masks are not required but we do it as an extra measure'.* The outcome is that the health and safety precautions which the Claimant brings to its attention are dismissed by the Respondent as 'only' guidance.

15. The Claimant's reasonable belief in the endangerment to health and safety is evidenced by the fact that she was present in the shop and observed and noted the actions of her colleagues. She writes at page 80 '*Andrea they don't just walk past they congregate in the shop, touching each other, they don't act any different to normal. I'm there I see it'.* She makes similar disclosures in her messages at pages 79 and 80.

16. Mrs Fletcher was working exclusively from home. Mr Fletcher had isolated and was away from the shop between 11th and 24th April 2020.He thereafter attended to work in the shop only part time. There was no appointed manager in the shop full time to enforce the Respondent's covid safety rules. Mr and Mrs Fletcher are certain, as

they express on page 79, that they had every reason to completely trust the actions of the Claimant's co-workers '*those youngsters only come to work, they don't go shopping or meet with friends'* and as a consequence they discounted her serious concerns by writing '*you just need to relax and stop digging the youngsters'* (see page 80, 21 April 2020). There is no documented investigation of the Claimant's allegations; there is no evidence from the Respondent that any steps were taken to interview the other five employees or speak to them individually or collectively to find out if the Claimant's anxieties were in fact justified. On the contrary the Respondent entirely believed the co-workers' complaints that they were the ones being treated badly by Mrs Best.

17. Ms Footer gave evidence that on 23 April 2020 she lodged a complaint about the Claimant by telephoning Mrs Andrea Fletcher. Ms Footer was certain in her oral evidence that the substance of the complaint, which she says she made on her own behalf and on behalf of Jordan Dickinson, Jake Francis and Joe Murphy, was the way the Claimant persistently and volubly 'harangued' her and her colleagues '*treated me and the other employees as kids and wanted to boss us around'* about their alleged failures to wear masks and socially distance. Ms Footer confirmed in response to cross-examination that, in relation to covid safety compliance, the Claimant '*did constantly go on about it'* and that she was annoyed at the Claimant for making allegations of non-compliance against her. She made it clear to the Respondent that she and the other employees would not tolerate this behaviour from the Claimant and that some or all of them were considering leaving the Respondent's employment.

18. As a direct consequence of Ms Footer's complaint Mrs Fletcher asked the Claimant to call her at 10 am on the following day 24 April 2020; Mrs Fletcher's witness statement at page 39 says '*At this point I concluded that the Claimant's behaviour had to be addressed formally'* but she did not tell the Claimant of this conclusion. The Claimant made the call from her car in order to maintain privacy. Mrs Fletcher did not visit the shop and there is no evidence that she made further enquiries, undertook additional interviews and conducted any further investigation into Ms Footer's complaints or threats to resign. We have heard no evidence and seen no documents which give any information about the complaints made by any employee except Ms Footer.

19. There is a transcription of a recording of this telephone conversation (58 minutes) on pages 82-120 of the bundle. At the commencement of the meeting its subject matter is immediately introduced '*we obviously have a bit of a dire situation at work. And we feel you have created a bit of a divide in the business, in your words and your actions to other people'*. Mrs Fletcher makes specific reference to the offence caused by the Claimant's contention that if she catches covid it will be from work; she refers to that remark as being '*the cherry on the cake*' in the context of the Claimant having *'ranted off'* and '*said things that didn't need to be said'.*

20. The Claimant almost immediately replied at page 85 that she was herself offended because '*I was repeatedly asking them to keep their distance okay? It's not hard. I kept telling them, 'don't all come in to the shop and congregate. I kept telling them...no one listens. No one.'* She makes it clear that she is very stressed and anxious, having a 'meltdown' about the covid 19 pandemic and its potential health and safety impact upon her and others including her two sisters and a nephew. She described herself as *' petrified'.* In other words the Claimant gave an immediate

primary explanation of her behaviour and she reiterated her concerns that she had observed her colleagues frequently failing to act safely in the face of the pandemic by congregating together 'messing around' and not socially distancing; that there were too many employees in the shop close together at any one time.

21. In response to those reiterated disclosures Mrs Andrea Fletcher issued the Claimant with a 'verbal warning' which was not confirmed in writing or apparently set down in any cumulative disciplinary record. It is not clear what the warning is for. In fact the Grounds of Resistance at paragraph 20 deny that the Respondent issued a verbal warning on this date yet page 105 in the bundle refers explicitly to it and Mrs Fletcher confirmed its existence. The Claimant was not informed of the consequences of the warning and she was not notified of the availability of any appeal against this disciplinary sanction. The verbal warning was given without any prior notification to the Claimant that the meeting of the 24 April 2020 might potentially result in disciplinary action and the Claimant had no idea in advance of the disciplinary case she had to answer. She therefore was forced to respond to the allegations against her without any chance of preparation or assistance. The existence of a prior verbal warning was part of the reason given for the Claimant's dismissal seventeen days' later. Mrs Fletcher states that she will list everything that has been spoken about but no such list was disclosed in these proceedings. The list was used at the dismissal meeting on 11 May 2020 as appears from page 141 but the Claimant did not have a copy.

22. It was also made clear to the Claimant that she must '*get on with everybody or we'll have to call it a day'.* At page 96 Mrs Fletcher makes clear her position that the Claimant's 'attitude' is '*destroying everything…I don't know where we go from here…because so much damage has been done'.* Mr Fletcher expressed similar sentiments in his oral evidence.

23. We conclude that Ms Footer's complaint was that the Claimant was persistently criticising her co-workers about their failure to adhere to covid safety measures imposed by the Respondent, that the said workers threatened to leave the Respondent's employment if the Claimant was not stopped, that the Claimant threatened to expose her workplace as the source of any illness she contracted and that the Respondent felt the very existence of its business to be threatened. Therefore without further investigation of the employee complaints and/or previous actions of the other employees the Respondent imposed detriment and eventually dismissed the Claimant as a direct result of her protected disclosures and the consequences of those complaints in terms of working relationships. No independent intervention such as mediation was attempted. The co-workers were believed and the Claimant was identified as the source of all the relevant '*alienation'* at work. Mr Fletcher described her in his verbal evidence as '*fixated with what they* [co-workers] *were doing and Katie was sick of her'*

24. Mr David Fletcher gave oral evidence that, upon hearing Mrs Fletcher's account of the '*awful conversation'* between her and the Claimant on 24 April 2020 he made up his mind and told his wife that '*it's time to let her go now…they can't work with her and I can't work with her, we have to let her go'*. He did not, according to paragraph 25 of his witness statement, appreciate that any disciplinary sanction had already been imposed in the form of a verbal warning. Mr Fletcher himself described to us that he was faced with a situation where either Mrs Best was dismissed or he would lose all or a substantial number of his other workers and the business would

collapse. He considered no other alternatives because he said '*three staff would walk out and then I would not have a business*. He said that he '*gave Andrea* [Fletcher] *reasons why we should not continue to employ her'.*

25. The Claimant, with the agreement of Mrs Fletcher, decided to take two weeks' off. She was, during that time, absent first with covid symptoms and then with certified stress related illness and anxiety for the period from 24 April to 11 May 2020. She was due to return to work on Tuesday 12 May 2020 but prior to her return a meeting was arranged, at the request of the Claimant, between her and Mr and Mrs Fletcher at 11 am. Page 123 confirms the relevant course of events. We do not agree that this meeting was, as pleaded in the Grounds of Resistance at paragraph 24, instigated by the Respondent '*to continue the conversation they had started on 24 April 2020'*. Indeed this meeting is later described in contradictory text at paragraph 26 as a '*formal meeting'.* This is the meeting at which the Claimant was dismissed. It was a meeting which was non-compliant with the ACAS Code on Disciplinary and Grievance Procedures. The Claimant was not properly invited to a disciplinary meeting by the Respondent, she had no notice of the disciplinary allegations made against her and therefore no opportunity to prepare a response by way of her defence, explanation or mitigation. She was offered the chance to be accompanied at the meeting by her husband, as she requested, but in fact he did not attend. She requested but was given no copy of her previous warning. Mr Fletcher refers in paragraph 25 of his statement to the Claimant's '*ongoing misbehaviour in the workplace'* as being the reason for the disciplinary meeting but this misbehaviour cannot have occurred in the period between 24 April and 11 May 2020 because the Claimant was not at work.

26. We refer to paragraphs 92-93 of the Claimant's witness statement which we find gives an accurate summary of the Claimant's state of mind and state of knowledge when attending the 11 May meeting:-

*'I was unaware that the purpose of this meeting was to raise allegations against me. I thought the meeting was to discuss the issues I had raised, the problems in the shop regarding Covid 19 guidelines and how things would be working moving forward. I had contacted the Respondent to arrange the meeting before I returned to work. If I had been made aware of the purpose of the meeting, I would have brought a witness to the meeting, ensured I was notified of the allegations prior to the meeting, requested evidence of the allegations, properly prepared for the meeting and not just requested to bring my husband for support'.*

27. There is a transcript of the 11 May 2020 meeting at pages at pages 124- 146. Much of that document refers to miscellaneous matters which were not explained to us but which seem to be irrelevant to this case and it is not possible for the Tribunal to fully understand that content. However by page 129 the Respondent states '*so I think moving forward I just don't think it's going to work'.* There is a discussion about several incidents of '*banter'* and *'horseplay*' between employees past and present, there is similarly an analysis of various minor disagreements in the past between the Claimant and her colleagues and who was at fault. However the Claimant again refers to the turning point of '*corona*' at page 138. When the Respondent says '*it's just pettiness isn't it?'* the Claimant is adamant, in the following 13 lines, that after corona there should have been social distancing and says *'in the workplace you should feel safe'.* She draws a sharp distinction between the type of behaviour she

believed was silly messing around and in which she sometimes participated '*before corona'* and between her expectation of safe social distancing once the virus took hold.

28. At page 141 the Claimant is dismissed. She asks for a copy of the Respondent's 'list' '*because I know you've got one...can you just send me a copy because I take it you are not having me back, is that right?'* The Respondent fails to supply the 'misconduct' list and a copy has never been disclosed to this Tribunal but Mrs Fletcher responds to Mrs Best, '*I really don't think it is going to work'.* Mr Fletcher summarises the position-'*I feel Leah* [ a mis-print for Leigh] *the phone calls I was getting, I said*, '*this carries on I'm going to have no staff left'.* Mr Fletcher verbalises the direct connection between his pre-determined decision to dismiss the Claimant and the complaints he received from Ms Footer and others about the Claimant's 'attitude' and persistent complaints over covid safety. We find that the principal reason for the Claimant's dismissal on 11 May 2020 was that she made protected disclosures. One of the consequences of those disclosures was the complaint or complaints by her colleagues. The Respondent accepted those complaints without intervention, with no proper investigation and sought to preserve its residual workforce by taking the step of dismissing the Claimant. The nexus between the making of the disclosures and the dismissal is clearly established.

29. It is axiomatic that if the Claimant had the two year qualifying period of employment and the Tribunal had jurisdiction to hear an 'ordinary' unfair dismissal claim then such a claim would inevitably succeed on the basis of a fundamentally flawed, procedurally unsafe and unfair decision to impose the ultimate sanction of dismissal in all the circumstances. In this case we are satisfied that the Respondent unreasonably failed to follow the ACAS Code on Disciplinary and Grievance Procedures and a 20% uplift is appropriate at the remedy stage.

30. The Respondent says at paragraph 27 of the Grounds of Resistance that the Claimant was dismissed for '*causing such an unpleasant environment in the shop that they had no choice but to dismiss'.* The letter of dismissal giving one week's notice is at page 147 dated the same day, 11 May 2020.It gives no such reason for the Claimant's dismissal. The letter makes no reference to the covid pandemic or its effects upon the Claimant or the Respondent's business. Instead it refers to '*various concerns that we have regarding your conduct and professionalism dating back to 2019'* and lists five '*recent examples of your comments and conduct'* from 15 February 2020 onwards. Those matters were not pre-notified to the Claimant before either the 24 April or 11 May 2020 conversations/meetings and she thus did not know the case she was required to answer. Similarly the alleged incidents of inappropriate behaviour set out at length in paragraphs 6-23 and at paragraph 33 of Mrs Fletcher's statement were not fully put to the Claimant at either meeting as being part of the reason for her warning and/or dismissal. The Claimant was not previously disciplined for these matters. We have seen no evidence that, as contended by Mrs Fletcher at paragraph 70 of her statement, there were *'valid conduct reasons which had been addressed periodically during the Claimant's employment'* and the Respondent's representative did not put it to the Claimant in cross examination that this was indeed the case.

31. We have therefore determined that these matters were not the reason or principal reason for the Claimant's dismissal. First, she was not formally or informally warned or disciplined for any of this conduct before 24 April 2020. She apologised for the

shouting at Mr Fletcher on 20 March 2020 and the incident was resolved; Mr Fletcher confirmed he had at the time been '*happy to move on'*. The vague allegation that the Claimant '*accused employees of stealing money from the shop'* apparently relates to something the Claimant said only at the disciplinary meeting itself. The incident on 15 February 2020 and the comments about cold sores were not discussed at the said meeting as the transcript demonstrates.

32. The failure of the Respondent to adduce any written or witness evidence at the 11 May meeting which related to the allegations of misconduct and lack of professionalism for which the Claimant was said to be dismissed leads us to further conclude that the principal reason for the dismissal was the making of protected disclosures and not these historic and/or miscellaneous matters.

33. The disciplinary appeal was held at short notice by video conference with an audio recording on 20 May 2020. The date was finally confirmed only on 18 May 2020 (pages 152 - 153) when the Respondent agreed to incorporate additional grounds of appeal. The Claimant gave cogent and credible evidence that it was only on 18 May that she received the link to the video conference whereby the appeal was conducted and even then she was obliged to contact the external organisation herself in order to obtain the relevant details. The appeal was conducted by an external HR consultant, Ann Heppell, appointed by the Respondent; Ms Heppell did not give evidence. The outcome of the appeal was notified to the Claimant on 5 June 2020 and it upheld the original decision to dismiss. The List of Issues contains no questions relating to the conduct of the appeal which the Tribunal is asked to determine save insofar as the detriments listed at paragraph 9 and 16 d) and e) include procedural defects in the preparation for the appeal process, which we have addressed below. For example the Respondent does not contend that the appeal stage has corrected or ameliorated any of the defects at the dismissal stage. The witness statements of the Respondent's witnesses refer to the existence of the appeal stage but make no further comment

34. It is significant that the majority of the Claimant's grounds of appeal listed at paragraph 57 of her Particulars of Claim, at page 149 in her email dated 12 May 2020 continue to emphasise her priorities before dismissal which were to seek management support to enforce covid safety practices amongst her co-workers and to bring an end to the intimidation of her '*by laughing and entering my space at the height of coronavirus'* and its effect on her health. These were matters she had previously raised during her employment.

35. Finally, we agree with the submission of Ms Miller on behalf of the Claimant that it is more likely than not that the Respondent retrospectively constructed a list of misconduct issues to justify a dismissal which was already pre- determined and for which the principal reason was that the Claimant made protected disclosures.

36. We are satisfied that the words and actions of the Claimant which ultimately created the divide between her and her employer were those which amounted to protected disclosures about endangerment to health and safety at the shop.

37. <u>Unlawful Detriment: Section 47B Employment Rights Act 1996</u>

The relevant statutory provision states that '*A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure'.*

38. We have already found that the Claimant made protected disclosures.

39. The list of detriments to which the Claimant contends she was subjected because she made protected disclosures is set out in paragraph 9 a-f of the List of Issues and we have used the same numbering below. We have reminded ourselves that the legal test is to consider whether the disclosures have materially influenced any act or deliberate failure to act by the Respondent which has resulted in detriment to the Claimant. It need not be proven that the making of disclosures is the sole or principal reason for the detriments.

40. Overall the detriments alleged by the Claimant fall into a broad category i.e. that the manner and process of her dismissal was detrimental because of the failure to give her adequate warning of and information about her alleged misconduct and the failure to carry through a procedurally fair procedure leading to an automatically unfair dismissal. This caused the Claimant confusion, distress, frustration and upset. Ms Miller submits on the Claimant's behalf that the failure to follow the disciplinary process fairly all go back to the 'cherry on the cake' What'sapp message at page 77 warning the Respondent that the Claimant may tell others, if she contracts the covid19 virus, that she got it from work. She submits and we agree that there is no other reason disclosed in evidence which would trigger dismissal or even any significant disciplinary step.

41. We find that the Claimant:-

a) has been unable to supply clear detailed evidence of false allegations being made against her as a result of her whistleblowing. Rather we have reached the conclusion that the multiplicity of misconduct allegations made against the Claimant on 24 April and 11 May 2020, in an attempt to find alternative reasons for her to be 'let go' after she made protected disclosures, were insufficiently logged, investigated or discussed with her and her colleagues. We are unable to reach the conclusion that they were or are entirely false. This is not an instance of unlawful detriment.

b) we have already found that the Respondent failed to give disciplinary warnings about any previous allegations of misconduct by the Claimant i.e. prior to 24 April 2020.

c) we have already concluded that the Claimant was not notified that the 11 May 2020 meeting was a disciplinary meeting and/or that she was at risk of dismissal. We do not agree that there was any way she could guess or foresee these matters or outcomes as Mrs Fletcher suggests.

d) we find that the Claimant had insufficient notice and information to prepare for the appeal hearing on 20 May 2020. At most she had three working days from 15 May 2020 but in fact the format and appointment for the meeting was not finally confirmed until 18 May 2020.

e) The Claimant was in all likelihood incorrectly told that it was not necessary for her husband assist and support her at the appeal because it would be by telephone when in fact it was a remote video appeal hearing. The Respondent's letter at page 151B does inform the Claimant that she is entitled to be accompanied by a '*fellow employee'* and is thus compliant with the Employment Relations Act 1999 section 10. When it was put to Mrs Fletcher in cross examination that she had told the Claimant that her husband's attendance would be superfluous she did not deny that remark. She admitted that the Claimant had emailed her (a document not in the bundle) to ask for Alan Best as her companion. However he did not attend the video conference appeal and at page 156 the Claimant confirms to Ms Heppell that she is happy to proceed in her husband's absence. We find that this failure or mistake in communication between the Respondent and the Claimant was not done on the ground that the Claimant made protected disclosures; there is insufficient causal nexus.

f) the entire failure to provide the Claimant with any evidence of the conduct allegations for which she was allegedly dismissed is a serious failure and caused the Claimant significant detriment.

In conclusion we are satisfied that the acts and omissions of the Respondent caused detriment under sub headings b) c) d) and f) and were done on the ground that the Respondent wanted to dismiss the Claimant as swiftly as possible following the disclosures to which her colleagues objected and which the Respondent perceived to threaten its business and reputation. The dismissal was rushed through with a flawed procedure because the Respondent wanted the Claimant to be 'let go' as soon as possible.

42. <u>Harassment-section 26 Equality Act 2010</u>

It is the Claimant's contention that she was harassed under section 26 Equality Act 2010 because the Respondent engaged in unwanted conduct relevant to her protected characteristics of sex and age (she was aged 52 at the relevant time). In particular the Claimant complains that Mr David Fletcher made inappropriate and derogatory comments about her age and remarks, relevant to her sex as a woman, relating to his perception or 'guess' that she might be menopausal or be experiencing stereotypical menopausal symptoms including that her husband would start looking at other younger women. The list of unwanted conduct is set out at paragraph 12 a-d of the List of Issues

43. Katie Footer's evidence at paragraphs 5 and 6 of her witness statement corroborates the Respondent's categoric denial that any such comments were made; Mr David Fletcher denies this conduct in paragraph 8 of his statement and in his oral evidence. Ms Footer gave robust written and verbal evidence under cross examination that no such remarks were made in her presence as alleged. In a case such as this where there is a complete factual contradiction between the parties an independent eye witness giving her account on oath is highly persuasive.

44. In addition we have examined the Claimant's response to the 20 March 2020 altercation which she had with Mr Fletcher concerning a mix up with orders. She sent him a fulsome, straightforward apology albeit unwisely expressed in obscene language. That apology is not conditional and it does not refer to the Claimant's age

or to the menopause. It does not say that the reason the Claimant lost her temper is because Mr Fletcher made offensive remarks, in Katie Footer's presence in the '*back room'*, by shouting '*at the top of his voice'* that 'she [the Claimant] MUST be in her menopause. This is the allegation in paragraph 8 of the Particulars of Claim. Instead the Claimant makes it clear in two separate phrases contained within her What's App messages on page 67 of the bundle that the reason she got so upset in relation to a relatively small disagreement was because she felt so stressed about the '*covid situation'*. She not only fails to give the alleged 'menopause' remark as a reason for her outburst but explicitly gives the 'covid' reason twice.

45. It was not until the Claimant had the phone conversation with Mrs Fletcher from her car on 24 April 2020 that she first mentioned that she was distressed by comments made by Mr Fletcher, in the presence of Katie Footer, about her possible menopausal state. By 24 April 2020, according to the Claimant's account at paragraph 22 of her witness statement, Mr Fletcher had said, on 9 April, that her husband would start looking '*at other younger women now'.* However she did not mention any such degrading or offensive remark to Mrs Andrea Fletcher either on 24 April 2020, in correspondence, at the later meeting on 11 May 2020 or subsequently. We conclude that it is not proven, on the balance of probabilities, that this was said.

46. We do conclude however that Mr Fletcher invaded the Claimant's privacy, broached a highly sensitive topic for her and acted tactlessly in directly asking her, as an employee having the protected characteristic of sex as a woman, whether she was menopausal. He asked that question even after, as he describes in paragraph 5 of his witness statement, she had made it quite clear that she did not wish to participate in any such discussion. A customer had been describing a *'hot flush',* the Claimant put her hands over her ears and said *' I am having none of that, I don't even want to hear about it…I don't want to know and it's not coming into mine and Alan's little bubble'*[Alan is her husband]. Mr Fletcher continued to pursue the topic even after the customer had departed and that was unwanted conduct which had the effect of violating the Claimant's dignity and of creating a humiliating environment for her at work.

47. We are also satisfied that Mr Fletcher did make comments about the Claimant's age which had the purpose and certainly the effect (our emphasis) of violating the Claimant's dignity (section 26 (1) (b) (i)) and of creating a degrading, humiliating and offensive environment for her at work. The relevant incident occurred on 31 March 2021 when, aware of the Claimant's considerable anxiety about the covid 19 situation, he read out a newspaper article and pointed out that it said that doctors and nurses may have to 'play God' so that younger and fitter people might be prioritised for ventilator treatment because '*they are more likely to survive'.* This exacerbated the Claimant's anxiety because Mr Fletcher was clearly implying that she was not one of those '*younger and fitter people'* with priority.

Ms Footer's evidence at paragraph 8 of her witness statement confirms that the conversation around the newspaper article was about prioritisation for younger people for ventilator therapy. Mr Fletcher's witness statement at paragraph 7 describes the conversation and it is evident that he continued the discussion even after the Claimant put her hands over her ears and said she '*did not want to know'*.

48. These two one-off acts of harassment of a relatively minor nature are relevant to the Claimant's protected characteristics of age and sex and her harassment claims succeed.

49. Victimisation

We are satisfied that the relevant protected act occurred on 24 April 2020 when the Claimant informed Mrs Andrea Fletcher during their phone call, as can be seen from pages 93-94 that she was now making the allegation that Mr Fletcher had shouted the remark 'she must be on her menopause' during their argument on 20 March 2020 and that Katie Footer had been present. This is an allegation (which we find not to have been made in bad faith) that Mr Fletcher has contravened the Equality Act 2010 and no doubt Mrs Fletcher was alarmed to hear the accusation which would reflect badly on her own husband and the Respondent as employer. The statutory reference is section 27 (2) (d) of the 2010 Act.

50. We are certain that this complaint constituted a protected act and that as a result the Claimant was immediately thereafter treated less favourably having been chastised at page 94 of the bundle '*It shouldn't happen like this. You've got to stop moaning and you've got to talk to people with respect…you've got to stop trying to blame people…you're very quick to tell people when they're doing something wrong… you've got to get on with everybody or we'll have to call it a day'.* Mrs Fletcher was unable to give clear evidence of any steps taken by the Respondent to investigate the complaint against her husband and co-director or intervene in any way; she instead tried to close down the conversation. The Claimant then received a verbal warning and her subsequent dismissal seventeen days later on 11 May 2020 was progressed swiftly with little or no due respect for a fair process or the rules of natural justice, as we have described above.

We agree with the Claimant's analysis of the protected act at paragraph 94 of her witness statement –'*The respondent clearly had an issue with me following the issues I raised relating to health and safety and I think I added to their frustrations by also raising the issue of Mr Fletcher's comments on my age/sex specifically his comment about the menopause'*

51. The Claimant has failed to discharge her burden of proof in showing any other specific evidence that she raised Mr Fletcher's comments about her age and sex with Mr and Mrs Fletcher on several occasions as is contended at paragraph 15 (a) of the List of issues

52. The alleged less favourable treatment resulting from the protected act is set out in paragraph 16 a-g of the List of Issues and closely mirrors the detriments claimed in paragraph 9 about which we have made findings of fact above. For the reasons stated above we are satisfied that the detriments listed in paragraph 16 b) c) d) f) and g) occurred as a result of the Respondent's actions (or failure to act) but not detriments a) and e). The addition of the dismissal itself is permissible under section 27 and we are satisfied that part of the reason for the Respondent's decision to dismiss the Claimant is that she made a significant allegation of sexism and ageism against Mr David Fletcher which the Respondent took very seriously as is evidenced by the conversation on page 94 where Mrs Fletcher emphasises and reiterates that the persistent (un-investigated) complaints and 'moaning' by the Claimant lead to a conclusion that she is 'paranoid' 'petty' 'obsessed' and must be deprived of her job.

53. In summary we conclude that the detriments we have found proven were imposed on the Claimant on the ground that she did the protected act described above.

54. Remedy Hearing

A one day remedy hearing at which the compensation to which the Claimant is entitled will be determined is listed for 31 January 2022 and will be conducted remotely via the CVP.

**Employment Judge B Elgot**

**5 January 2022**