



EMPLOYMENT TRIBUNALS

Claimant: Marlena Anna Paszkowska

Respondent: Stiltz Limited

Heard by CVP (remote video link): **On:** 5 and 6 January 2023.
11 January (in chambers).

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: Mr V D'Cruz, advocate

Respondent: Mr P Starcevic, counsel

JUDGMENT

1. The claimant was unfairly dismissed by the respondent. She resigned as a consequence of a breach of the implied term of trust and confidence by the respondent. The principal reason for the constructive dismissal was that the claimant had made protected disclosures.
2. The respondent shall pay to the claimant compensation in respect of the unfair dismissal in the sum of £11,112.89, comprising a basic award of £1,360 and a compensatory award of £9,752.89.
3. The recoupment provisions do not apply.
4. The claims for unauthorised deductions from wages and breach of contract are dismissed upon withdrawal.

REASONS

Introduction and issues

1. This is a complaint for unfair dismissal on the ground that the claimant made protected disclosures. The claimant resigned.
2. At the commencement of the hearing Mr D'Cruz said that there were claims for detrimental treatment as well as unfair dismissal, but as that had not been clear from the claim form and would require amendment and the Tribunal was not constituted to consider a detriment claim, the claimant chose not to pursue an application to amend.
3. Mr Starcevic queried whether a claim under section 103A of the ERA had been presented in the claim form. The Tribunal was satisfied that had been anticipated by the respondent and no disadvantage arose to the respondent in allowing an amendment to embrace such a complaint.
4. Mr D'Cruz said the claimant was only pursuing a claim for unfair dismissal under section 103A of the Employment Rights Act 1996 (ERA) and not under general principles. He informed the Tribunal the claimant was not pursuing her claim for unpaid commission.
5. The issues were:
 - 4.1 Did the claimant disclose information to the respondent which tended to show a breach of a legal obligation or that the health and safety of a person might be endangered?
 - 4.2 If so was that a reasonable belief?
 - 4.3 If so, was it in the reasonable belief of the claimant in the public interest?
 - 4.4 Did the respondent act in a way which was calculated or likely to destroy or seriously undermine trust and confidence?
 - 4.5 If so, did it act without reasonable and proper cause?
 - 4.6 Did the claimant resign as a consequence?
 - 4.7 If so, did the claimant otherwise affirm the contract by delaying her resignation between the last act which constituted a breach and evincing an intention to keep the contract in existence?
 - 4.8 Was the reason, or if more than one the principal reason, for the dismissal that the claimant made the protected disclosures?

- 4.9 What losses has the claimant sustained as a consequence of the dismissal?
- 4.10 Would or might the claimant have left the respondent in any event and if so when or by what chance?
- 4.11 Has the claimant taken reasonable steps to mitigate her losses?
- 4.12 Did the claimant unreasonably fail to comply with the ACAS Code of Practice on Discipline and Grievance Procedures such that it is just and equitable to reduce any award by up to 25%?

Evidence

- 5 The Tribunal heard evidence from the claimant, Miss Magdalena Starzak, Export Sales Manager, Mr Lachlan Faulkner, co-founder and Chief Commercial Officer and Mr Greg Welch, Head of Engineering.
- 6 The parties submitted a file of documents running to 196 pages.
- 7 I have set out my findings on the evidence below. I found the claimant to be an impressive witness whose evidence was clear, precise and consistent. The witnesses for the respondent assisted the Tribunal and I regarded them as genuine but where there was a conflict in recollection, I found the claimant's account more reliable. It was supported by the contemporaneous documentation. Mr Faulkner and Miss Starzak viewed the problem the claimant had raised through the lens of the need to make sales and promote the interests of the business. That reflected in the way they recalled matters, without fully recognising the significance of the problem the claimant had identified.

Background/Findings of Facts

- 8 The respondent is a company which manufactures, supplies and installs domestic and home lifts directly to customers in the UK market and, through a network of third-party distributors/dealers, worldwide. Within the UK it employs 210 employees.
- 9 The claimant worked for the respondent as an Export Key Account Manager from 10 March 2020 to 31 March 2022. Her role was to develop business relationships with dealerships worldwide, but principally in Italy. The clients from overseas were dealers who sold the product to end users. In Italy the respondent created a website which generated interest from end users who would often contact the claimant directly. She would answer any queries they had about the product and refer them to one of the Italian dealers for further advice and its purchase and installation.
- 10 The standards which had to be met, approved and certified were not universal but varied and depended on the territory in which the lifts were sold. In countries which were members of the European Union, the standards had to be compliant with the European Machinery Directive, EU Directive 2006/42/EC. In respect of lift elevations of up to 3 metres, the respondent was permitted to self-certify that

the product met the standard required by the Directive. For lift elevations above that level independent certification was required. The Lift Instituut, based in the Netherlands, was responsible for the certification of compliance in respect of the products which were sold in Europe.

- 11 The lifts which were promoted by the claimant with which this case is concerned were manufactured for the respondent by a company in China. Initially there was one type of lift known as the Duo +. The Lift Instituut (Instituut) provided a certificate of conformity with the Directive for the Duo+ dated 7 February 2017. The Instituut attached a report to the certificate. The certificate contained 'Additional Remarks' which included the following, "*Furthermore see Chapter 5 of the report belonging to this EC type examination certificate*". In its conclusion, the certificate stated, "*This machine meets the requirements of the Machinery Directive 2006/42/EC taking into account any additional remarks mentioned above*". One of the conditions in Chapter 5 was that the machine was not suitable for wheelchair use.
- 12 The respondent introduced a second make of lift in 2018 known as the Trio +. It was of a larger size than the Duo +. It was large enough to accommodate three people or a wheelchair. It was clearly the intention of the respondent to promote and market the Trio + for that purpose, because it submitted a detailed report known as a Technical Construction File (TCF) to the Instituut stating that it was based on the same control systems, operating systems and safety systems as the Duo + but was enlarged to accommodate greater loads including wheelchairs.
- 13 The Instituut issued a revised certificate on 14 June 2018 which added the Trio+ to the same certificate as the Duo +. It was valid up to 7 February 2022. The Instituut issued a revised certificate on 25 March 2021 which stated that the travel height of the Trio + was 6m (in the earlier certificate it had been 4m) and stating it had 3 stops. Another revised certificate was issued on 8 February 2022, because the previous versions had then expired. It was valid until 7 June 2022. A revised certificate was issued on 8 June 2022. All of these certificates contained the same additional remarks and conclusions as the first certificate for the Duo +, set out in paragraph 10 above. In other words, they all referred to condition 5 of the report which stated the machine was not suitable for wheelchair use. It made no distinction between the two machines.
- 14 On 10 August 2022 the Instituut issued a fifth revised certificate which is valid until 10 August 2027. The conclusion is the same, but there is no reference to condition 5 of the report in the additional remarks. The report attached to this new certificate has a revised condition 5 which states that the Duo is not suitable for wheelchair use.
- 15 At the beginning of 2021, one of the dealers in Rome informed the claimant of an anomaly between the Instituut's certificate and the respondent's own certificate of conformity, insofar as the former referred to a travel height of 4m and the latter 4.5m. The claimant queried this with her manager, Miss Starzak, who said the respondent was able to self-certify the maximum travel height and that it only amounted to an extra 50cm. She said that the claimant should not disclose the certificates of the respondent or the Instituut in future. Ms Starzak also informed

the claimant she had a Czeck client who had queried whether there was compliance with safety regulations. This concerned an elevation up to 6m and 3 stops. Ms Starzak told the claimant she could not yet provide him with a certificate from the Instituut because one had not yet been issued but she had provided the respondent's certificate of conformity. The claimant had received requests from Italian clients about a lift which would stop at 3 floors. The revised certificate of 25 March 2021 which was subsequently issued addressed this.

16 In December 2021 the respondent introduced new commission targets for the claimant which were much more challenging than previously. This was confirmed in a letter of 20 January 2022 with a table setting out the commission structure.

17 At the beginning of 2022 the Italian Government introduced a grant for the installation of domestic lifts which would carry wheelchairs. Dealers in Italy had informed the claimant that to qualify for the grant the lifts would have to be compliant with an Italian ministerial decree, DM 236. The claimant's research led her to the view that the size of the lift would mean there was not compliance with the ministerial decree, but that an application could be made to the relevant department for approval regardless of that if there were other features such as power doors.

18 On 25 January 2022 Mr Chris Westwood, Electronics Engineering Manager at the respondent, emailed Ms Starzak and Mr Faulkner in respect of the topic of the Italian grant. He stated there was an exclusion on the certificate in respect of all wheelchairs. He stated that he and others were working on having the restriction removed for manual wheelchairs but in his opinion removal of the exemption for power wheelchairs was less likely.

19 Ms Starzak forwarded the email to the claimant and her colleague Francesca McDermott who had joined the respondent in September 2021 and worked with the claimant in the Italian market. At a team meeting later in the week of 25 January 2022, the claimant raised the content of the email and that it stated the lifts were not compatible with wheelchair use under the Insituut certificate. Miss Starzak acknowledged that but said the lifts could physically accommodate the wheelchair.

20 On 2 February 2022, whilst on the phone to a customer, the claimant overheard a discussion between Miss Starzak and Miss McDermott, who shared the same office as the claimant, about the compatibility of the lifts with wheelchair use and the restriction on the certificate. At about the time the call concluded Miss Starzak was reading out the prohibition which was in condition 5 of the certificate. It was from her mobile phone on which she had access to the document. The claimant had not seen the report before, nor known first-hand of its content. Hearing this confirmed to her mind what Mr Westwood had reported in his email. She asked why they were selling lifts which were not suitable for wheelchair use. Miss Starzak said that although it did not comply with the certificate, the Trio lift was able to accommodate wheelchairs and that the restriction applied to the Duo. The claimant said that did not make sense because why would the certificate and test report say both models were unsuitable. The claimant said they had been lying to customers to. Ms Starzak said she knew and should not have told them.

The discussion became heated. Ms Starzak said she had regretted allowing the claimant and Ms McDermott to discover that the certificate of the Instituut had excluded wheelchair use. She held her arms out and said to the claimant and Ms McDermott, "*why are you being so negative*". She said if they did not change they would have to talk differently.

- 21 I am satisfied these last remarks were said in a raised voice. Miss Starzak accepted that she had held out her hands in frustration. In her evidence she said she was trying to motivate the two and move forward. She said the remark was made in the context of the claimant and Ms McDermott not wishing to confront the dealers about working around the Italian decree restriction, such as making a case about the power doors on the lift. By that stage, however, the claimant had linked the two matters. She had asked how she could reassure the Italian dealers who asked about legal compliance given that they now knew about the restriction on the certificate. The comment about having a different conversation was at the end of this fraught discussion. It left the claimant with the impression that some form of action may be taken and she felt threatened.
- 22 Ms Starzak arranged for a Teams meeting to include herself, the claimant, Ms McDermott and Mr Faulkner for 3 February 2022. The purpose in the heading to the invitation email was: *New targets vs 75% Italian Gov grant / Stilz product compliance*. The discussion at the meeting focussed on compliance with the Italian decree and reassuring the dealers about achieving that with the special case which could be advanced. The exclusion for wheelchair use in the certificate was not raised.
- 23 After the meeting, on 3 February 2022, Miss Starzak entered the shared office and apologised to Ms McDermott for losing her control the previous day. She added she could not reassure her she would not behave similarly in the future. A further lengthy discussion ensued, which was similar to the previous day. The claimant said she would not be willing to lie on the behalf of the respondent to customers about the certified use of the product. The discussion became heated. Miss Starzak said she would summarise the discussion of the previous day and circulate it to include Mr Faulkner. She said he was to attend a Teams meeting on 9 February 2022 and the matter could be resolved then. Miss Starzak left the office and said, in parting, that she could not manage them.
- 24 Miss Starzak prepared an email later that day but did not circulate it. It was sent to Mr Faulkner. She stated she was having problems managing the claimant and Ms McDermott and she needed help so was escalating the matter to him. She referred to the problems in respect of the Italian grant and objections raised by dealers. She stated that the previous day it reached the point at which she had said she did not wish to deal with all this negativity. She stated she was frustrated about that and the fact they were not confident about the product they were selling and they needed to speak differently. She stated that the response to her was to be told she should stop threatening them. She addressed the events of that morning after the Teams meeting at which the claimant said she had acted out of order, they would not have it and they were not girls or children. She said they had accused her of threatening her and the claimant had said she, Miss Starzak, could call her lawyer. She said it was too much for her to take, that

it was a serious matter and needed to be resolved for her to be able to continue to work for the respondent.

- 25 One passage specifically dealt with certification: *“I would also like to add – that both Francesca and Marlena feeling very concerned about the product itself, especially Trio + not being suitable for wheelchair -as per Liftinsituut. Despite my explanations, that we have got a compliance certificate and your explanations earlier on a teams call with them, the nature of the certification. Despite my reasoning that we have so many accolades and customers stories out there in public of people using our lift with a wheelchair, they stated that with the knowledge they have now, that lift is not for wheelchair- it’s against their morale to lie to the customers and dealers and its unethical from the company to require this from them. They also pointed out that they cannot work that way I want them to work be positive all time and pretend that there are no negatives”.*
- 26 On 8 February 2022, the claimant sent an email to Miss Starzak to record her views and expectations for the forthcoming meeting. She noted she had not received the promised summary from her. She stated conformity with safety regulation was crucial in her work with dealers in Italy given the potential risk and consequent liability associated with use of that type of appliance. She stated she had supplied dealers with the Insituut certificate on request and later the respondent’s own declaration of conformity, as she had been instructed. She identified discrepancies between the respondent’s self-certification record and that of the Instituut in respect of height and that it had now become apparent, following Mr Westwood’s intervention, that the product was not certified for wheelchair use. She said the respondent’s certificate of compatibility was misleading and of questionable legal validity. She added that in any event the Instituut certificate had expired. She referred to the Italian grant and the decree. She stated that she had found Miss Starzak’s manner in dealing with this wholly unprofessional and unacceptable and, although she had apologised, she was unable to give a reassurance about her conduct in the future. She stated the incident had a profound effect on her and she asked for reassurance that Miss Starzak would maintain control and civility in the future.
- 27 In her concluding remarks she proposed an agenda for the meeting:
- (1) Ensuring that I do not expose myself to liability by misleading dealers about product compliance in the future;*
 - (2) Ensuring that there is evidence in a legally valid form of product compliance;*
 - (3) A clear sales strategy for achieving the increased targets;*
 - (4) A system for dealing with work related concerns in a mutually acceptable manner.*
- 28 Ms McDermott, who had been copied in, sent a similar email endorsing what the claimant had said and asking for reassurance that the products they were selling had a valid certificate of legal compliance as she did not wish to face legal liability.
- 29 Mr Faulkner attended the following day. He decided not to have a meeting with the team as a whole as on 3 February 2022, remotely, but to speak to Ms

McDermott and the claimant individually and separately, in that order. That came to a surprise for the claimant who was anxious as she awaited her meeting in the afternoon.

- 30 In the meeting with the claimant Mr Faulkner said that the lifts were certified and fit for purpose. He said a German shareholder had identified the problem previously and he had reassured them. The claimant believes he said this was in 2018, but I am satisfied from Mr Faulkner's evidence it was in 2021. He told the claimant that they would correct the mistake and have a new certificate issued. He said it would take about 6 months. The claimant asked what would happen in the meantime if there was an accident and he replied that he would be the first to go to prison. Mr Faulkner does not recall whether he made such a remark, but I was satisfied the claimant's recollection was accurate. She said he was polite throughout the meeting, but she was not reassured.
- 31 Following the meeting, on 9 February 2022, Mr Faulkner sent the claimant and Ms McDermott an email in which he stated a new certificate would be obtained within 6 months. He forwarded an email from Mr Welch of the same date, which provided an explanation of how the certificates came to be issued and that they and the Insituut had failed to notice that the condition restricting wheelchair use had not been modified to relate only to the Duo+. Mr Welch stated that they were working to renew the certificate to have the condition removed and that there had been no argument against it. In his email Mr Faulkner stated that the lifts were absolutely fit for purpose and approved for travel over 3m by the Instituut. The email included some comments about the Italian grant and sales strategy. He concluded by saying he was confident with the team and they should push on with sales.
- 32 The claimant made enquires with her previous employer, Platinum Stairlifts, about vacancies. She accepted the offer of a job and resigned from the respondent on 3 March 2022. On 14 March 2022 the claimant was placed on garden leave until 31 March 2022.
- 33 The claimant commenced work with Platinum Stairlifts on 1 April 2022. She resigned from that post on 10 May 2022. She remained unemployed until 8 August 2022, when she obtained employment with Handicare. In her evidence she stated she has recently obtained employment in a different sector, with Chain Cargo. She shall move to that job at the end of this month.

The Law

- 34 By section 94 of the ERA an employee has the right not to be unfairly dismissed.
- 35 A dismissal is defined by section 95 of the ERA and includes the employee terminating the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct, section 95(1)(c). This is known as a constructive dismissal.

- 36 In order for there to be a constructive dismissal, the employee must have resigned because his employer has committed a fundamental breach of contract and he must not have otherwise affirmed the contract, for example by delaying his resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** and ***Buckland v Bournemouth University [2010] IRLR 445***. The term is not to be equated to a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*** and ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***.
- 37 There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see ***Malik v BCCI SA (in liquidation) [1998] AC 20***.
- 38 Such a breach may be because of one act of conduct or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see ***Lewis v Motorworld Garages Ltd [1986] ICR 157***. If a series of acts, the last event must add something to the series in some way although, of itself, it may be reasonable, see ***Omilaju v London Borough of Waltham Forest [2004] ICR 157*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1***.
- 39 By section 103A of the ERA an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
- 40 A qualifying disclosure is defined in section 43B of the Employment Rights Act 1996. It involves the disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show a defined form of wrongdoing. This includes that a person has failed, is failing or is likely to fail to comply with any legal obligation to which it is subject or the health and safety of an individual has been, is being or is likely to be endangered,.
- 41 Information may include an allegation but a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure¹.
42. If a disclosure relates to a matter where the interest in question was personal to the employee, it is still possible that it might satisfy the test that it was, in the reasonable belief of that employee in the public interest as well his own personal interest. That depends on factors such as the numbers of those affected by the interest, the nature of the interest affected, the nature of the wrongdoing, the

¹ Kilraine v London Borough of Wandsworth 2018 ICR 1850,

identity of the wrongdoer and the extent to which interests were affected by the wrongdoing disclosed².

- 43 If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.
- 44 By Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.
- 45 Section 207A(3) of the Trade Union and Labour Relations Consolidation Act 1992 provides, *"If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies, the employee has failed to comply with that code in relation to that matter and that failure is unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%"*.

Analysis and Conclusions

Qualifying/protected disclosures

- 46 I am satisfied the claimant made a number of protected disclosures to her managers.
- 47 The first was in the week of 25 January 2022, when she raised with her team, which included Miss Stazak, the contents of the email of Mr Westwood. That email and the concern the claimant raised was that at that time there was no valid certificate from the independent body which approved compliance with the Directive, insofar as the Certificate of the Instituut restricted the use of the lifts and excluded wheelchair use. I am satisfied that information tended to show that a person, her employer had failed, was failing or was likely to fail to comply with a legal obligation to which it was subject. That was because the team had been promoting and selling the Trio + lift for wheelchair use since its introduction in 2018.
- 48 Mr Starcevic said that the claimant was doing no more than repeating the information which had been forwarded to her by Ms Starzak. There is no legislative provision, principle or authority to suggest that a qualifying disclosure is limited to fresh information brought to an employer for the first time by the worker making the disclosure. Moreover, the context in which the claimant raised this was slightly different. She was not simply parroting the contents of the email for no purpose. It was to seek clarification that what the team were doing was legitimate. She may not have used the term legitimate

² Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979

at that time, but the context made that obvious. She was not simply asking questions, as Mr Starcevic characterised the discussion in his closing submission. These were statements of fact, drawn initially from Mr Westwood's email, which pointed to a failure to comply with a legal obligation, followed by a request for confirmation this was not the case.

- 49 I am satisfied that the claimant had reasonable grounds for that belief. Mr Welch and Mr Faulkner gave evidence to the effect that this was a technical oversight and that from its inception all had understood the Trio+ lift was safe to use with wheelchairs. Mr Welch said that someone at the Instituut had confirmed this to him verbally in the latter part of 2021. They said the problem was an administrative one, of persuading the Instituut to issue a revised certificate speedily. In addition it was pointed out that only 20% of the lifts sold for wheelchair use would have an elevation of more than 3m and their own self-certified Declaration of Compatibility satisfied the legal requirement in all other cases. They suggested the claimant and Ms McDermott could have referred any enquiries about legal compatibility of the lift to the technical department. It was also suggested that the restriction was only to be found in the report which was seldom, if ever, supplied to the clients.
- 50 None of this confronts the essential objection. That is that the respondent was marketing a lift which the Instituut had recorded as not suitable for wheelchair use. The respondent had promoted and sold the Trio+ lift for wheelchair use. Even if that only affected 25% of sales, in those cases there was not compliance with the legal obligation of independent certification of compliance with the Directive. That could not be cured until the certificate was revised, which ultimately happened on 10 August 2022. The belief of the claimant was entirely reasonable and, to my mind, was correct.
- 51 The claimant made further disclosures of information to the same effect to Miss Starzak on 2 and 3 March 2022, in her email dated 8 February 2022 and in the meeting with Mr Faulkner on 9 February 2022. By this stage the claimant had gleaned further information from Miss Starzak reading out condition 5 of the report itself. The information conveyed on each occasion is contained in the above findings of fact. I reject the suggestion that this was not information falling within section 43B of the ERA or a mere assertion of a breach shorn of detail. The facts constituting the breach which they tended to show were repeated, many times.
- 52 The claimant specifically raised the fact that the certificate was required for safety regulations. This confirms beyond doubt that the claimant reasonably believed these disclosures were made in the public interest. Public safety and compliance with legal obligations to that end are self-evidently public interest issues. It is not for others to second guess the reason the Insituut continued to declare that both lifts were unfit for wheelchair use until August 2022. Whatever might have been said verbally about an oversight to Mr Welch, no confirmation of that was ever put in writing by the Instituut to reassure the staff at the respondent, their clients or others. If the matter had been referred to the technical department, they should not have misrepresented the absence of certification for safety compliance. The concerns both the claimant and Ms

McDermott expressed about the unsatisfactory and potentially unlawful situation of misrepresenting the situation to dealers, even by omission, was valid, whether it came from them or anyone else.

- 53 No issue is taken that if the disclosures were qualifying, they were made to the claimant's employer and so would be protected.

Constructive dismissal

- 54 Although the representatives spoke in terms of detriments, which the claimant summarised in her representative's skeleton argument under the heading *Causation*, I shall address these as conduct complained of rather than detriments, to reflect the language of the implied term of trust and confidence.
- 55 The reaction to the issues raised by the claimant took the form of the difficult discussions which followed with Miss Starzak and the meeting with Mr Faulkner on 9 February 2022. The events are described in the above findings. I am satisfied that reaction constituted conduct which was likely to destroy or seriously undermine the relationship of trust and confidence between the parties.
- 56 The claimant sought reassurance that she would not have to mislead customers or subject herself to liability. She never received reassurance. Rather, she was told that the lift was safe for wheelchair use and that the administrative oversight suggesting the contrary would be rectified in a number of months. She was specifically instructed by Mr Faulkner to keep on selling, in his email. That response alone, was sufficient to destroy the trust the claimant had in her employer. She believed that she and the respondent had misrepresented the position to clients for a long time and they had therefore lied about safety certification. Rather than acknowledge that, her managers sought to side line her objection or belittle it. She was expected to continue with business as usual, notwithstanding the product was being sold without satisfactory certification in instances in which it was to be used for wheelchairs with an elevation of over 3m. This left her in a dilemma of having to misrepresent the position to clients who asked about conformity with the standards or refuse.
- 57 In addition to that, the reaction was unsympathetic and at times hostile. The raised voice, body language and comment of Miss Starzak about a different conversation was perceived as hostile and threatening. Objectively, that is understandable. I accept the evidence of Miss Starzak, that on 3 February the claimant and Ms McDermott raised matters forcibly and animatedly with her. Miss Starzak would give no quarter and refused to offer the reassurance that was sought and warranted. It is clear she found herself in a very difficult situation when she drew on Mr Faulkner's assistance.
- 58 The claimant had expected a written summary of events of 2 February from Miss Starzak, but received none. She anticipated a meeting of the 3 in the team with Mr Faulkner on 9 February 2022, but he took Ms McDermott aside first into a private meeting without explaining why or how he would address

the concerns which had been expressed in the emails forwarded to him by Miss Starzak. Whilst his manner was polite, his comment to the claimant that that he would be the first to face prison in the event of an accident may have been intended to reassure, but it had the opposite effect. Rather than confirm that the product was being marketed compatibly with legal requirements, (which of course he could not), he suggested he might be imprisoned if the misrepresentations were found out. Such a remark to an employee who had expressed to him her profound concerns was misjudged. He followed up the meeting with an email which did not confirm that the claimant's concern was well founded but offered an explanation for how they had found themselves in that position and he exhorted further sales.

- 59 All of this would objectively destroy trust of employees in the position the claimant found herself. There was no reasonable cause for Miss Starzak or Mr Faulkner to have conducted themselves in this way. Whatever their views about the need to maintain sales, a reasonable response required recognition of the claimant's valid concern and the problem redressing, without which the claimant should have been assured continuing sales of the wheelchair would have to be restricted to elevations of less than 3m.
- 60 The conduct was attributable to the making of the protected disclosure. It was suggested that the issues which were raised by the claimant and Ms McDermott were about the new sales commission and the difficulties meeting them because of the Italian decree and the obstacles the Italian dealers had said arose with that.
- 61 I do not accept that argument. That was the background to the circumstances in which it emerged that the certificate generated a problem. Thus, Mr Westwood's email which initially drew the claimant's attention to the certification problem was entitled "*Italian market – Government grants*". The initial concern about overcoming the difficulty presented by the Italian Directive was overtaken by a further, more fundamental encumbrance in the form of the Instituut's certificate and incorporation of condition 5 of the report. It is clear that was central to the claimant's objection and her disclosures in that respect generated the reciprocal conduct which breached trust and confidence.
- 62 I am satisfied that conduct was the principal reason for the claimant's resignation. In her evidence she denied that more opportunities to work from home, or even from Holland where her parents lived, or the new commission structure were the reasons she chose to go. Mr Starcavek drew upon an email from Mr McNulty, at Platinum Stairlifts, in which he stated the main reason the claimant came back to work for them was that she wanted a hybrid role working from home. In cross examination the claimant explained that she could not tell her new employer what had happened as she had obligations of confidentiality to the respondent which they had reminded her of. She pointed out she had worked at home with the respondent initially, during lockdown and even had a spell working from Holland, near her parents. The role had become office based in recent times. I accept her evidence in this respect

and that it was a convenient explanation to provide in those circumstances to a new employer who was curious as to why the claimant chose to move.

- 63 I do not accept there was any affirmation. The claimant had a discussion with a former colleague at the end of January 2022 when the problem of certificate compliance first emerged. It was the lack of reassurance on this and the unreceptive and hostile reaction to her concerns which drove the claimant ultimately to tender her resignation. That conduct, which constituted the breach of the implied term, continued until 9 February. The claimant acted within a month to secure the alternative post at Platinum. This would not evince an intention to stay, over that short period.
- 64 The claimant was constructively dismissed. The reasons for the dismissal were principally because she had made the protected disclosures. The dismissal was unfair.

Remedy

- 65 The claimant seeks continuing losses to date and for up to two years from the time she left the respondent.
- 66 The respondent argues that the claimant has failed to mitigate her loss, choosing to leave Platinum after 5 weeks, not obtaining work for 2 further months and now choosing to change career in the type of work undertaken. In addition, Mr Starcevic says that the award should be reduced to reflect the chance that other causes contributed to the resignation of the claimant which were not attributable to protected disclosures.
- 67 I accept the claimant did take steps reasonably to mitigate her loss in finding work with Platinum. There was a seamless transition from the respondent's work to Platinum in the claimant's field of experience.
- 68 I accept the calculation of the claimant's wages at the respondent on the counter schedule as £3,055.30 per month or £705.05 per week. There is a difference in the net sum in the two calculators produced by both parties. The ultimate figure will depend on the claimant's tax code and the tax year to which the loss relates. Inevitably there is imprecision in this exercise. Because the lower gross earnings at Handicare than the gross earnings at the respondent, as summarised below, would reflect a negligible differential in net weekly earnings on the weekly figure proposed by the claimant of £690 per week, I regard the respondent's net calculator as more likely to be reliable at £705.05 per week.
- 69 The respondent has suggested there remains commission to be accounted for at Platinum but it is appropriate to rely upon the net earnings on the wage slips which have now been disclosed. The claimant received £3,122.95 net for her 5 week period at Platinum Stairlifts, which would be £624.59 per week. That is a differential of £80.55. The loss for 5 weeks is £402.75.

- 70 For the next period I must address whether the claimant's decision to resign was a new and intervening act breaking the chain of recoverable loss and a failure to mitigate. Mr Starcevic draws my attention to the email of Mr McNulty, at Platinum Stairlifts. He wrote that the claimant had told him she had resigned because she could not cope with the stress of supply problems they were having and the stress of customers not being as happy as normal. He said at no time had she said there was any fall out of stress from the respondent. She had also told him she was fed up of the industry and wished to try something different.
- 71 In her evidence, the claimant said that returning to Platinum was a step back. It was largely an administrative role. She could not talk about the reasons she truly left, but it was correct that she had suffered with stress from supply problems. She said she had not been able to sleep whilst she worked at Platinum because of stress which stemmed from working for the respondent. She became increasingly anxious and had acute gastric discomfort, as well as back and joint pain. She said she would speak to many ex-dealers, the customers were similar and this would bring back the difficult times at the respondent. They would often ask why she had left. She said she had tried several times to arrange an appointment with her doctor to address her fragile state, but she was unable to because of the prevalent difficulties in seeing GP's at the time.
- 72 I found the claimant's account entirely convincing. I understand why she did not share the reasons she left Platinum with Mr McNulty, not least because they touched upon her weak medical condition and she did not want to share her experiences at the respondent, a company with which Mr McNulty he was on friendly terms. I find the claimant left Platinum because she found she did not have the strength at the time to continue working there. Her weakened condition had arisen from the circumstances which had led her to resign from the respondent. Her decision to leave did not manifest a failure to mitigate. She had found alternative suitable employment quickly but could not sustain it because of her weakened state of health. That did not break the chain of causation of losses which were attributable to the dismissal.
- 73 The claimant then undertook a reasonable job search which is recorded in the Tribunal bundle. She took a job at Handicare which was in the same industry, but she dealt mostly with end users, not dealers.
- 74 The loss for the period from 11 May 2022 to 8 August 2022 was 12 weeks at £705.05 per week, being £8,406.60.
- 75 In her evidence the claimant did not receive the OTE earning of £55,000 as recorded in the offer from Handicare, but an average of £45,000 per annum. I now have been provided with the wage slips which confirms her earnings were lower. I have taken the cumulative total of her earnings from the December wage slip and deducted the cumulative sums for income tax and national insurance to calculate aggregate net earnings for the 20 week period of £13,653.52. That is £682.76 weekly. I have not reduced the sum to reflect the student loan repayment because that is not included in the Tax Home

calculators which have been used for evaluating net pay at the respondent. There was a weekly differential of £24.29 net (being £705.05 less £682.76). The claimant will have worked there for 26 weeks by 31 January 2023, reflecting a differential net loss of £631.54 for the period.

- 76 The claimant has now chosen to leave the sector she had worked in and says she shall receive a similar remuneration of £43,200. She is looking forward to a new challenge.
- 77 I do not accept the submission of Mr Starcevic, that there were other reasons contributing to the reasons the claimant left the respondent which justify a proportionate reduction to reflect her chance of leaving in any event as of 3 March 2022. For the reasons I have set out, I am satisfied the reasons were then overwhelming attributable to the reaction of the respondent to the protected disclosure.
- 78 On the other hand, I am not satisfied that the claimant would have stayed at the respondent but for the constructive dismissal for up to 2 years. I find there was every likelihood she may have chosen a lifestyle change at this time anyway, because she sees the possibility of career progression with Chain Cargo. Furthermore she may have improved her commission earnings at Handicare to reach the target offer of £55,000 so as to mitigate completely any continuing earnings loss. I do not therefore award any losses beyond 31 January 2023.
- 79 Mr Starcevic submits the claimant unreasonably failed to comply with the ACAS Code of Practice on Discipline and Grievance Procedures and that the compensatory award should be reduced by 10% to reflect that. He acknowledges that the claimant had raised the same concerns outside the respondent's grievance procedure which would justify recognition by only a 10% reduction.
- 80 Paragraph 32 of the Code provides that if it is not possible to resolve a grievance informally an employee should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance, in writing.
- 81 The claimant did not raise a grievance having found she had lost trust in her employer. She had raised her concerns verbally with Miss Starzak and then in writing in her email of 8 February 2022. That was in the hope and expectation that Mr Faulkner would address them. That expectation was not fulfilled. Rather Mr Faulkner compounded the problem by figuratively brushing the claimant's concerns under the carpet and not tackling the problem she identified with her manager Miss Starzak.
- 82 Given the seniority of Mr Faulkner and the ensuing breakdown in trust I do not find it was unreasonable of the claimant not to have submitted a formal written grievance. She could reasonably take the view she had exhausted her avenues of complaint by seeking to discuss them with her line manager and then attempting to do so with the senior executive at the respondent. Even

had this been an unreasonable failure to comply with the Code I would not consider it just and equitable to reduce the award in circumstances of such a breakdown of trust at such a senior level.

- 83 The compensatory award comprises losses of earnings of £402.75, £8,406.60 and £631.54; to that is added the sum requested for loss of statutory rights of £312. That is a total sum of £9,752.89.
- 84 I do not believe the claimant received any State benefits during her period of unemployment. The recoupment provisions will have no effect. If that is not the case and the claimant did receive State benefits the claimant and her representative must notify the Tribunal within 24 hours of the receipt of this decision to allow for a reconsideration.
- 85 The maximum weekly pay for the basic award is £544, because the effective date of termination was before the increase on 6 April 2022. The claimant was 41 years of age at the time of the dismissal and so the second year attracts a week and a half's pay under section 119(2)(a) of the ERA. The basic award is £1,360.

Employment Judge D N Jones

Date: 12 January 2023

RESERVED JUDGMENT AND REASONS

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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