EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Boyle	**- V -**	John Lewis Plc

Heard at: London Central **On**: 14 – 18 September 2020

Before: Employment Judge Baty
Ms CI Ihnatowicz
Mr R Baber

Representation:

For the Claimant: In person
For the Respondent: Ms G Hicks (counsel)

RESERVED JUDGMENT

1. The claimant's complaints of unfair dismissal, automatically unfair dismissal because of making protected disclosures, being subjected to a detriment because of making protected disclosures, and direct sex and sexual orientation discrimination were all presented out of time.

a. In the case of the unfair dismissal and protected disclosure complaints, it was reasonably practicable to have presented the complaints in time. The tribunal does not therefore have jurisdiction to hear those complaints and they are accordingly struck out.

b. In the case of the sex and sexual orientation discrimination complaints, it was not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear those complaints and they are accordingly struck out.

2. If the tribunal had had jurisdiction to hear the claimant's complaints of unfair dismissal, automatically unfair dismissal because of making protected disclosures, being subjected to a detriment because of making protected disclosures, and direct sex and sexual orientation discrimination, they would all have failed.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 18 November 2019, the claimant brought complaints of unfair dismissal, automatically unfair dismissal because of making protected disclosures, being subjected to a detriment because of making protected disclosures, and direct sex and sexual orientation discrimination. The respondent defended the complaints.

The Issues

2. The issues were agreed between the parties and the tribunal at a preliminary hearing on 10 July 2020 before EJ Lewis and a copy of that agreed list of issues was attached to EJ Lewis's note of that hearing. At the start of this hearing, the parties confirmed to the tribunal that that list of issues remained as agreed at the preliminary hearing.

3. It had been agreed at the preliminary hearing that this hearing would consider issues of liability only and that, if appropriate, issues of remedy would be determined at a separate remedies hearing. The issues to be determined by the tribunal at this hearing were therefore (with the exception of the remedy issues set out below) as follows:

Jurisdiction (s.123 EqA 2010)

1. Has the Claimant presented his complaints before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates? Specifically:

Direct Discrimination

a. Has the Claimant's discrimination claim been brought within the period of three months starting with date of the act to which the complaint relates (s.123(1)(a) Equality Act ("EqA") 2010)?

b. If not, has the Claimant presented his claim in such other period as the employment tribunal thinks just and equitable (within the meaning of s.123(1)(b) EqA 2010)?

Unfair Dismissal

c. Has the Claimant's unfair dismissal claim been brought before the end of the period of three months starting with the effective date of termination (s.111(2)(a) Employment Rights Act ("ERA") 1996)?

d. If not: (a) has the claim been brought within such other period as the tribunal considers reasonable; and (b) has the Claimant shown that it was not reasonably practicable for him to present his complaint before the end of that period of three months (s.111(2)(b) ERA 1996)?

Protected Disclosures

e. Has the Claimant presented his complaints before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them (s.48(3)(a) Employment Rights Act ("ERA") 1996)?

f. If not, has the Claimant shown that it was not reasonably practicable for the complaint to be presented before the end of that period of three months (s.48(3)(b) ERA 1996)?

g. If so, has the Claimant presented his complaints within such further period as the tribunal considers reasonable (s.48(3)(b) ERA 1996)?

Unfair Dismissal

2. Was the Claimant dismissed for a fair reason under s.98(2) ERA 1996? The Respondent avers that the reason for dismissal was conduct. The Claimant claims that he was dismissed as a result of having made protected disclosures contrary to s.47B(1) ERA 1996 (as set out below). In light of this conflict:

a. Has the claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason?

b. If so, has the Respondent proved its reason for dismissal?

c. If not, has the Respondent disproved the allegedly real reason advanced by the claimant?

3. If so, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss him? In particular:

a. Did the Respondent have reasonable grounds for its belief that the Claimant was guilty of this misconduct?

b. Had the Respondent carried out as much investigation as was reasonable in the circumstances?

c. Was the procedure followed by the Respondent within the range of reasonable options open to a reasonable employer? The Claimant claims that he did not understand the case against him, which was never made clear and the dismissal letter merely stated that he was dismissed for misconduct.

d. Was the decision to dismiss a fair sanction; that is, was it within the range of reasonable responses?

Direct Discrimination (s.13 EqA 2010)

4. Did the Respondent treat the Claimant less favourably because of his sex and/or sexual orientation by not inviting him to interview in respect of the Home Design Stylist role on 19 October 2018?

5. Was this less favourable treatment? The Claimant relies on:

a. “B” as an actual comparator for his sexual orientation discrimination claim;

b. The women who were invited to interview as evidential comparators for his sex discrimination claim; and/or

c. Hypothetical comparators.

6. Why was the Claimant not invited to interview in October 2018?

a. Has the Claimant proved facts from which the tribunal could conclude that the Respondent treated him in this way because of his sex / sexual orientation (s.136(2) EqA 2010)?

b. Has the Respondent shown that the treatment was not because of because of his sex / sexual orientation any way, consistent with s.136(3) EqA 2010?

7. Did the Respondent treat the Claimant less favourably because of his sex and/or sexual orientation by not upholding his grievance lodged on 8 March 2019?

8. Was this less favourable treatment? The Claimant relies on a hypothetical comparator.

9. Why was the grievance not upheld?

a. Has the Claimant proved facts from which the tribunal could conclude that the Respondent treated him in this way because of his sex / sexual orientation (s.136(2) EqA 2010)?

b. Has the Respondent shown that the treatment was not because of because of his sex / sexual orientation in any way, consistent with s.136(3) EqA 2010?

Protected Disclosures

10. Did the Claimant disclose information, which in his reasonable belief tended to show that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it is subject, within the meaning of s.43B Employment Rights Act ("ERA") 1996?

11. The Claimant relies on the following alleged disclosures:

(1) [Disclosure 5A] A disclosure made into the Good Suggestion weblink on the John Lewis intranet and copied into an email to Adrian Wenn (amongst others) on 7 October 2018, paragraphs 2 and 3 (pp.157-158 of PH bundle).

(2) [Disclosure 5B] A disclosure made in an email to Morton Edwards and Adrian Wenn (amongst others) on 21 April 2018. (p.56 of the PH bundle).

(3) [Disclosure 5C] A disclosure made on the John Lewis Google + platform4 (open to partners at the Oxford Street store) and other emails in December 2018 about equal pay. And a disclosure made in the company magazine on 30 November 2018 regarding the minimum wage.

(4) [Disclosure 5D] A disclosure made in an official grievance on 1 February 2019 and repeated in a meeting with Kim Lowe on 7 March 2019.

12. With respect to each of these: (a) was there a disclosure of information; and (b) what failure (within the meaning of section 43B(1)(a) to (f) of the ERA 1996) did the information disclosed tend to show? The Claimant claims that he informed the Respondent that:

(1) [Disclosure 5A] It was conducting credit checks openly on the shop floor, displaying customer's personal data in potential breach of Article 5(1)(f) of the General Data Protection Regulation (EU) 2016/679.

(2) [Disclosure 5B] It was pressurising / incentivising staff to promote a John Lewis credit card in breach of section 4.9 to 4.11 of the Financial Conduct Authority Guidance FG18/2 (March 2018) which insists companies are not allowed punish employees for not achieving targets for credit card introduction.

(3) [Disclosure 5C] It was failing to pay staff equally for equal work contrary to the Equality Act 2010 and failing to pay staff National Minimum Wage contrary to the National Minimum Wage Act 1998.

(4) [Disclosure 5D] It was interfering with its internal Partnership elections by taking various steps which had the effect of "disenfranchise[ing] & divid[ing] low paid Level 10 Partners, more of whom are non-white &/or non-British" in breach of s.158 of the Equality Act 2010 (the steps referred to are set out in the Claimant's email dated 1 February 2019).

13. Did the Claimant reasonably believe there to have been such a failure?

14. Was the disclosure made in the public interest?

15. Was the disclosure made in good faith (s.49(6A)(b) ERA 1996)?

16. If the Claimant is found to have made a qualifying protected disclosure, did he suffer any detriment(s) as a result? The Claimant relies on the following detriments: dismissal and (with respect to the first disclosure only) a threat not to give him a pay rise.

Remedies

17. To what remedy, if any, is the Claimant entitled? The Claimant seeks:

a. financial compensation of £150,000; and

b. recommendations.

18. If the Tribunal finds that the Claimant's dismissal was unfair because the Respondent failed to follow a fair procedure, should any reduction in award be made to reflect any chance that the Claimant would have been dismissed had a fair procedure been followed?

19. If the Claimant is found to have been unfairly dismissed, should the (i) basic award (pursuant to s.122(2) ERA 1996) or (ii) compensatory award (pursuant to s.123(6) ERA 1996) be reduced to any extent because of any contributory conduct of the Claimant?

20. Has the Claimant acted unreasonably in seeking to mitigate his loss (s.123(4) ERA 1996)?

21. If the disclosure was not made in good faith, would it be just and equitable to reduce any award (by up to 25%) accordingly (s.43B(1)(d) ERA 1996)?

The Evidence

4. Witness evidence was heard from the following:

For the Claimant:

Mr Martin Welch, a partner at the respondent who accompanied the claimant to his two disciplinary meetings in June 2019 (employees of the respondent are referred to at the respondent as "partners"); and

the claimant himself.

For the Respondent:

Mr Stephen Giles, a partner at the respondent who was at the times relevant to this claim a team manager at the respondent's Oxford Street branch and the line manager of the claimant;

Ms Karen Wise, a manager at the respondent's Oxford Street branch, part of whose role at the times relevant to this claim was managing the team of home design stylists at that branch;

Mr David Evans, a department manager at the respondent's Oxford Street branch, who heard one of the grievances raised by the claimant (specifically the grievance relating to the home design stylist role);

Mr Scott Houghton, an operations manager at the respondent who was, for 11 months from March 2019 onwards, on secondment to the respondent's Oxford Street branch and who held the disciplinary meetings in respect of and took the decision to dismiss the claimant; and

Ms Sophie Osgerby, the team manager in the appeals office at the respondent, who heard the claimant's appeal against dismissal.

5. An agreed bundle in three volumes numbered pages 1–1316 was produced to the tribunal. The claimant also produced a separate bundle of claimant's disclosure which, by agreement, was before the tribunal, but it was never in fact referred to.

6. The tribunal read in advance the witness statements and any documents in the bundle to which they referred.

7. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the beginning of the hearing. This was largely adhered to.

8. Various adjustments had been made to the tribunal room layout and procedure in the light of the coronavirus pandemic. The judge discussed these adjustments with the parties at the start of the hearing and at other times during the hearing and any changes were agreed with the parties, for example in terms of the procedure for the parties handing up paper documents/submissions.

9. A small number of documents were added to the bundle by agreement during the course of the hearing. The only occasion when there was a dispute as to whether to add documents to the bundle came on the morning of the fourth day of the hearing, when the evidence had nearly been completed. The previous evening, the claimant had asked Ms Hicks whether the respondent's constitution could be added to the bundle. As this was a lengthy document, she had suggested that certain areas which were of concern to the claimant should be added and they agreed to do this. The copies were duly provided by the respondent and were ready to add to the bundle the following morning. However, the claimant then said that he wanted the whole constitution put in. We heard submissions from both parties. We decided not to allow the whole constitution to be added for the following reasons. Firstly, we could not see the relevance of it to the issues of the claim; secondly, the claimant in his submissions had already acknowledged that the parts of the constitution which were of concern to him had been dealt with, so there seemed even less point in adding the rest of the document; finally, and importantly, this was now the final day of evidence and, if we allowed the claimant's request, it would have resulted in a delay in the hearing of at least an hour to enable Ms Hicks to go back to Chambers and prepare the documents and bring them to the tribunal, which would have set the tribunal's timetable back and been disproportionate,

particularly in the light of the lack of relevance; this was also compounded by the fact that, in the light of the coronavirus pandemic, we had attempted during the course of the hearing to try to limit lots of individuals having to touch documents. The claimant commented later that day that he thought that the tribunal's decision declining to add these documents had been a sensible one.

10. Ms Hicks produced written submissions, which the tribunal read before the parties gave their oral submissions. The tribunal had allowed plenty of time not only for itself but for the claimant to read Ms Hicks' submissions. The judge asked the claimant, prior to the oral submissions, whether the claimant had had enough time to read the respondent's written submissions. The claimant said that he had had enough time but had chosen not to read them and to focus on his own submissions. In the light of this, the judge asked if Ms Hicks would go through her submissions in more detail for the benefit of the claimant, which she duly did.

11. The hearing was not a straightforward hearing to manage. During the claimant's cross-examination, the judge had to interject on many occasions to try and get the claimant to focus on answering the questions which he was being asked and not to go off on lengthy tangents. Similarly, when the claimant was cross-examining the respondent's witnesses, the judge had to interject on many occasions to move the claimant on from asking questions about matters which were not relevant to the issues which the tribunal had to determine. Similarly, during his submissions, the claimant persistently started giving fresh evidence and the judge had to explain to him on numerous occasions that he was not allowed to do this and we could not take this evidence into account.

12. Due to time constraints, the tribunal's decision was reserved.

Findings of Fact

13. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

14. The claimant commenced employment with the respondent on 16 November 2015. He remained employed by the respondent until he was summarily dismissed with effect from 18 June 2019. At all material times he was employed as a "selling assistant" in the respondent's Oxford Street store.

15. The respondent promotes a culture of respectful treatment of fellow partners, as its handbook makes clear:

"We treat each other and anyone with whom we come into contact at work with dignity, respect and fairness. We expect high standards of behaviour at all times and any failure to meet them will be taken very seriously…

Make sure your own conduct does not cause offence to other Partners… We treat… any offensive conduct of a written, spoken, physical or visual nature as a disciplinary matter."

16. The respondent's disciplinary policy makes clear that employees may be summarily dismissed in cases of "serious misconduct" (the respondent uses the term "serious misconduct" rather than "gross misconduct", but the handbook is clear that it is these types of behaviours which are regarded as conduct of a sufficiently serious nature to warrant summary dismissal). Examples of "serious misconduct" include "serious or persistent disruptive behaviour" and "inappropriate behaviour at work".

Partner Voice agenda setting meeting

17. On 2 January 2018, the claimant was involved in an incident at a Partner Voice agenda setting meeting. Partner Voice meetings form part of the respondent's internal democracy and provide the opportunity for partners to raise their opinions and consult with management on local issues. The claimant was an elected Partner Voice representative for the Oxford Street branch.

18. In this meeting, the claimant used inappropriate language to describe the food served in the partner dining room ("PDR"). He described the food as "dried up slop" and then left the meeting early. Present at the meeting was one of the people who prepared the food (Ms Claudine Scarlett).

19. In emails of 5 January 2018 to Mr Morton Edwards, a manager, the claimant further commented on the food as follows:

"The shocking food being served in the PDR has a huge negative impact on the spirit-de-corps" amongst Partners. High prices for utterly disgusting dried-up slop."

20. Suggestions of his for improvement included:

"JL/Waitrose food tech lab to do a DNA analysis of what animals & body parts the PDR "Shepherds Pasty" ghastly grey filling is pureed from".

21. In another email of the same date to Mr Edwards, the claimant stated that:

"The Shepherd's Pasties contain a ghastly grey puree that taste like something that should not go into your mouth";

and

"I find the battered fish on Fridays to be completely unpalatable. I took one bite discreetly spat the mouthful out & threw the fish in the bin".

22. Mr Edwards, and another manager, Ms Amanda Montague-Sweetland, tried to resolve the PDR food incident informally and sought an apology from the claimant to those partners who had felt insulted by what he had said. No apology was, however, forthcoming.

Sam Mancey investigation

23. Further allegations of inappropriate conduct by the claimant came to the respondent's attention. These related to comments made about the food served in the PDR at a Partner Voice meeting in March 2018. Although these particular allegations never ultimately went forward to the eventual disciplinary hearing, they did trigger an investigation into the claimant's conduct, including his conduct at the earlier 2 January 2018 Partner Voice agenda setting meeting.

24. On 7 March 2018, Ms Sam Mancey was appointed to carry out an investigation. She is an experienced manager who at the time had almost 30 years' experience and had carried out many investigatory meetings.

25. Ms Mancey interviewed and took statements from Ms Montague-Sweetland and Mr Edwards.

26. In relation to the 2 January 2018 meeting, Ms Montague-Sweetland confirmed that the claimant had used the phrase "slop" amongst other phrases and explained that she had spoken to him after the incident, as he had left the room agitated; she stated that the claimant had told her that he had not meant to offend the catering partners and that she explained that he should not disrespect other partners; she stated that the claimant had agreed to provide an apology (which was never forthcoming) and that she and Mr Edwards had agreed to support the claimant in drafting an appropriate apology.

27. Mr Edwards' statement described the claimant's conduct, the use of the word "slop", and the conversation between himself, Ms Montague-Sweetland and the claimant thereafter. Mr Edwards' statement made it clear that the claimant had been told that his behaviour was not acceptable and that an apology was required.

28. The claimant has sought to suggest both during the internal process and at this tribunal that the statements of Mr Edwards and Ms Montague-Sweetland are inconsistent. They are not inconsistent in any material respects. Whilst they are not identical, they corroborate each other in all material respects.

29. On 16 March 2018, Ms Mancey sought to interview the claimant as part of her investigation. During that meeting the claimant behaved in a disruptive and intimidating way towards Ms Mancey, causing her to feel shaken. As a result of this incident, Ms Mancey felt that she had to excuse herself from the investigation process.

30. Ms Mancey produced a witness statement shortly after this experience setting out what had happened.

31. Mr Jack Howe was therefore appointed as investigating officer shortly after that and tried to interview the claimant twice on 7 April 2018 and 11 May 2018, but the claimant refused to meet with him.

Grievances

32. In May and June 2018, the claimant raised a number of grievances, including against Ms Mancey, Mr Howe and Ms Montague-Sweetland. He asked, having received trade union advice to this effect around this time, that the disciplinary process be suspended while these grievances were investigated. The respondent accordingly suspended the disciplinary process. As a result of the many grievances raised by the claimant and the respondent's thorough investigation of them, the last of those grievances was not concluded until March 2019. The disciplinary investigation process was then resumed, with Mr Howe interviewing the claimant on 20 April 2019. The claimant has no complaint about the delay to the disciplinary investigation caused by investigating and hearing his grievances; indeed, he told us at this hearing that he considered that it was the right thing for the respondent to do.

33. The claimant's grievances were investigated independently of the disciplinary process. Most of the many grievance investigation interviews/hearings/appeals were of no relevance to the disciplinary proceedings which resulted in the claimant's dismissal; indeed, the vast majority of this documentation was (entirely reasonably) not before the disciplinary hearing and did not form part of the material which was considered in the decision to dismiss the claimant.

34. However, some of the things that arose during the grievance investigations are of relevance to this claim. In particular, in a grievance investigation interview on 18 July 2018, Ms Scarlett, the member of the catering staff, giving her account in relation to what the claimant did at the 2 January 2018 Partner Voice agenda setting meeting and her reaction to it, stated: "Shocked!… I was really hurt by him… I took offence in the meeting".

35. In addition, the conclusions reached in these grievance processes included that the claimant's conduct at the January 2018 Partner Voice agenda setting meeting and the 16 March 2018 investigation meeting with Ms Mancey fell below the standard expected. As noted, however, these conclusions were not before the subsequent disciplinary meeting in relation to the claimant.

"Disclosure 5B"

36. On 21 April 2018, the claimant sent an email to Mr Edwards and another manager, Mr Adrian Wenn, amongst others. This email is relied on as "Disclosure 5B" for the purposes of the claimant's alleged protected disclosures. This email is a series of suggestions about how the commission-based system for promoting John Lewis credit cards might work. It does not disclose information. It does not suggest that the respondent's current procedures are in any way illegal, albeit in relation to one of the suggestions he makes, the claimant states "Even if it was legal I realise that… would be undesirable…". There is however no suggestion of illegality in terms of the current arrangements or in relation to anything that the respondent was proposing.

"Disclosure 5A"

37. On 7 October 2018, the claimant sent an email to the respondent's distribution service desk (as part of the respondent's "Good Suggestions" procedure), copying in Mr Wenn, Mr Giles and others, including a manager called Mr Mohammed Aftab. In that email, he suggests that the procedures around the respondent's "interest-free credit" applications are outdated and not compliant with legislation, in particular in relation to personal data. The respondent accepted at this hearing that this was a protected disclosure.

Home Design Stylist role

38. In October 2018, the claimant applied for the role of "home design stylist" within the respondent. At the time Ms Wise was the team manager part of whose role included managing the team of home design stylists at Oxford Street. She was responsible for the recruitment exercise for a home design stylist which she ran in October 2018. There was one vacancy.

39. Ms Wise follow the respondent's normal procedures for recruitment. The candidates were both external and internal. Applicants had to send a CV in. The first stage of the selection process was a CV review. Ms Wise assessed the CVs by reference to the "essential" and "desirable" qualifications and experience as per the job description in relation to the role. Specifically, the job description made it clear that a design-related qualification was "essential".

40. As she does with these processes in general, Ms Wise made a point of not looking at the names of the individuals on CVs and of folding down the tops of the pages so that she does not know their names and personal details. She was unaware of the sex or sexual orientation of any of the candidates when she carried out this exercise.

41. At the CV review stage she was chiefly looking at whether the individual had a design background and whether they had any relevant design qualifications or experience working in interior design.

42. 12 individuals applied for the role, three of whom later withdrew their applications. Of the nine applicants who did not at some point later withdraw their applications, Ms Wise invited eight to interview. She did not invite the claimant to interview. His CV did not contain the relevant design qualifications.

43. Ms Wise did not have the CVs of the candidates during these tribunal proceedings as these had long since been disposed of in order to comply with GDPR. At a very late stage during this tribunal hearing itself, the claimant chose to disclose his CV. It was therefore agreed that Ms Wise should be recalled to give further evidence in the light of this. However, even with the claimant's CV before us, it was clear that the claimant did not have the relevant interior design qualifications/experience which Ms Wise was looking for.

44. Of the candidates who were invited to interview, the majority were women and this reflected the fact that the majority of applicants were women.

However, two of the candidates invited to interview were male. One of these was the individual whom the claimant maintains is gay and whom he cites as a comparator (although we have no evidence of the sexual orientation of this individual beyond the claimant's bare assertion of the same and we make no findings in this respect); we have had no evidence as to the sexual orientation of the other male individual who was invited to interview (for the sake of clarity, this second male individual was one of the three applicants who subsequently withdrew his application).

45. Following his rejection for this role, the claimant submitted a grievance, which was heard by Mr David Evans. Although the claimant never withdrew his complaint about the handling of the grievance being an act of sex/sexual orientation discrimination, his main case at this hearing appeared to be that Mr Evans was not qualified to hear the grievance because he didn't have a background in home design. That is, however, an invalid criticism as Mr Evans' role did not require this expertise as his role was, as he made clear in evidence, to assess the fairness of the process.

46. We have seen the documentation in relation to this grievance and heard Mr Evans' evidence; he appears to have carried out a thorough and appropriate investigation. Based on this he, entirely reasonably, did not uphold the claimant's grievance. He set out the reasons for his decision in a letter of 8 March 2019 to the claimant.

<u>"Disclosure 5C"</u>

47. An article written by the claimant was published in the respondent's internal magazine, the "Gazette", on 30 November 2018. This article is a pitch to push for the payment of the London living wage. It does not disclose information. In the article, the claimant refers to what he calls HMRC's "national minimum wage investigation debacle", which was an investigation carried out by HMRC into whether the respondent had been in technical breach of the national minimum wage rules owing to the way it averaged out partners' basic pay over a period to ensure a consistent amount was paid.

48. It is alleged in the list of issues that a disclosure was made by the claimant on Google + and in other emails in December 2018 about equal pay. However, nobody has been able to recover this and it was barely (if at all) referred to during these proceedings. In the absence of evidence, we find on the balance of probabilities that no such disclosure was made.

<u>"Disclosure 5D"</u>

49. The claimant sent an email to himself on 1 February 2019 relating to "democracy" at the Oxford Street branch. In it, he criticises the respondent's democratic processes and states that the respondent is "running a democracy in the same way as a Banana Republic with the same predictable outcomes: unequal voting rights; loss of assets & ultimately financial failure". The respondent chooses to operate and run an internal democracy. However, it is under no legal obligation to do so.

50. This email makes reference to an official grievance. However, that grievance is not relied on as being the first part of "disclosure 5D"; rather it is this email of 1 February 2019, sent by the claimant to himself.

51. At a grievance meeting on 7 March 2019 with Kim Lowe, the claimant made more criticisms regarding "democracy" at the respondent, suggesting for example that the respondent had been using "democratic dirty tricks" in the running of the partnership elections. This is relied on by the claimant as the second part of "disclosure 5D".

52. In March 2019, the claimant was given a pay rise with effect from 1 April 2019. This was done in accordance with the respondent's normal and detailed procedures for setting pay.

Google + post

53. On 7 April 2019, the claimant made a post on Google +, a social network used internally to communicate with and between partners. Partners each have a Google + account and there are various groups that partners can join. The claimant submitted a post regarding an incorrect display of a window blind in which he stated:

"From what I understand we no longer sell Luxaflex Roman blinds. What I should really do is take this misleading display down. The reason I haven't is that I just do not care… Please feel free to post photos of any displays around Oxford Street that need sorting out. Then if you care enough to be bothered post another photo showing what you did to fix the display".

The post was visible to partners on Google + and a number saw it and reacted to it by leaving comments, including objecting to the fact that the claimant stated that he just did not care and making the point that delivering this message in such a negative tone was not aiding anything.

54. This Google + post subsequently became one of the three allegations for which the claimant was disciplined, along with his behaviour at the 2 January 2018 Partner Voice agenda setting meeting and his behaviour to Ms Mancey at the 16 May 2018 investigation meeting.

Disciplinary investigation

55. As noted, Mr Howe then resumed the disciplinary investigation and, despite the claimant having refused to meet him on a number of occasions, had a lengthy investigation meeting with the claimant on 20 April 2019. Mr Howe also interviewed Mr Geoff Meenan, who was a witness to the investigation meeting involving Ms Mancey.

56. The claimant was also suspended from work on full pay during the disciplinary investigation with effect from 20 April 2019.

57. Mr Scott Houghton was appointed to chair a disciplinary hearing in relation to the claimant. Mr Houghton has worked at the respondent for over 18

years and is a senior manager (managing 130 people). Over the course of his employment with the respondent, he has conducted more than 30 disciplinary processes. He had, however, only joined the Oxford Street branch in March 2019 on secondment and had never met the claimant prior to being asked to hear his disciplinary.

58. The claimant was subsequently invited to a disciplinary hearing. In advance of the meeting, the claimant had been sent all the relevant documents, including the witness interviews of Ms Montague-Sweetland, Mr Edwards, Ms Mancey and Mr Meenan, plus the extensive notes of Mr Howe's investigation meeting with the claimant which contained the details of the charges. He was advised that the meeting could result in his dismissal.

59. The disciplinary hearing was eventually held on 7 June 2019 (after two previous dates were found to be inconvenient for the claimant). The disciplinary hearing was reconvened on 18 June 2019. The first meeting lasted two hours and the second meeting 6½ hours. The claimant had every opportunity to answer the charges against him. He was accompanied at both meetings by a companion, Mr Welch.

60. Mr Houghton considered all of the three charges.

Partner voice agenda setting meeting

61. Mr Houghton noted that Mr Howe's investigation had concluded that at the 2 January 2018 meeting, the claimant had described the food served at the PDR as "dried up slop" (amongst other terms), and then left the meeting early. It had also concluded that the statement was made in the presence of the catering partner who prepared the food, who had been upset by the comments.

62. When Mr Houghton discussed this with the claimant, the claimant accepted that he had used that phrase and he reiterated that he felt that it was an accurate description of the food served at the PDR. He told Mr Houghton that other partners who had been present in the room reacted to say that he "should not have said that". He told Mr Houghton that he had then left the meeting and had afterwards spoken to Ms Montague-Sweetland and Mr Edwards. He said that he did not mean to be rude about the catering partner but had been commenting on the food only. He told Mr Houghton that the catering partner had not actually been upset, which seemed at odds with the findings of the investigation; Mr Houghton therefore offered to interview this partner but the claimant said that he did not want him to do so.

63. Mr Houghton considered the statements of Ms Montague-Sweetland and Mr Edwards, which he considered corroborated this, and was satisfied that the claimant had used the expression "dried up slop", that this was not appropriate language and that he had caused offence in making that statement. He was concerned that the claimant stood by the comments that he had made about the food and the manner in which he had made them. He felt that this showed a lack of judgment and sensitivity on the claimant's part; it was not the fact that he was raising concerns about the food which was an issue, but rather the manner in

which he chose to communicate those concerns. Mr Houghton was concerned that the claimant did not seem to realise this or appreciate the consequences of his actions and therefore was concerned that the respondent would not see any improvement in his behaviour in the future.

Sam Mancey investigation meeting

64. Ms Mancey's statement described the claimant displaying "aggressive and disrespectful behaviour" towards her during the investigation meeting. She had described the claimant interrupting her, demanding a companion at the meeting, and using an aggressive tone and intimidating body language. She described that she had had to end the meeting early due to the claimant's behaviour, that she had felt "shaken up" after the meeting and that she no longer felt that she could continue the investigation.

65. The claimant refuted this version of events in the disciplinary meeting. He denied acting inappropriately at the meeting and denied acting aggressively or in an intimidating manner. His primary focus was that he felt that Ms Mancey had not held the meeting properly. In particular, he took issue with the fact that he had not been given notice of the investigatory meeting and did not have a companion.

66. In considering the differing accounts, Mr Houghton reviewed the statement of Mr Meenan, who had witnessed the meeting. Mr Meenan had attended the meeting having been asked by the claimant to act as a witness part way through. Mr Meenan's statement recorded that the claimant had become "visibly angry" and that the meeting had become "heated very quickly". Whilst he did state that the claimant had not become "physically aggressive, shout or become threatening", he noted that the claimant had acted in a negative and defensive way and that his behaviour was not proper or appropriate to the situation. Mr Meenan had noted that Ms Mancey had become "visibly and emotionally shaken" and he felt the need to check on her afterwards to ensure that she was okay after what had happened. Whilst Mr Houghton did not know Ms Mancey particularly well, he gave evidence that she came across as quite a strong lady who would not be intimidated easily and he knew that she had a lot of experience in the partnership, so for her to have felt upset to the point where Mr Meenan had to check that she was okay indicated to him the seriousness of the situation.

67. The claimant refuted the version of events given by Mr Meenan but, having considered the evidence, Mr Houghton preferred the version of events given by Mr Meenan and Ms Mancey. He concluded that their statements were sufficiently consistent with one another. He noted that Mr Meenan was an independent person who had attended the meeting at the claimant's request and he did not think that he had any reason to be untruthful in his statement.

68. He also thought that it was plausible that the claimant had behaved in a manner which upset Ms Mancey, noting from his own experience at the lengthy disciplinary hearings that the claimant talked quite loudly and could have an imposing presence and that, on a number of occasions during the meetings with

him, his companion Mr Welch had to tell him to calm down and to think before he spoke and that he also had to ask the claimant not to be rude. Mr Houghton therefore thought that it was credible that the claimant had acted in the way described by Ms Mancey and Mr Meenan. He was therefore satisfied that the claimant had behaved inappropriately in the meeting and that his inappropriate behaviour had caused Ms Mancey to become shaken and upset.

69. Again, at no point did the claimant acknowledge the problems with his behaviour or the fact that he had upset Ms Mancey. He showed no recognition of the fact that Ms Mancey had been upset and focused only on what he perceived to be flaws in how she had run the meeting. In the light of the 2 January 2018 example as well, Mr Houghton was concerned that the claimant was demonstrating a pattern of inappropriate behaviour in meetings and a lack of concern for the feelings of other partners.

Google + post

70. The claimant accepted that he had written the post and he told Mr Houghton that he had done so to attract attention to the issue and to provoke a reaction. Mr Houghton stated that his concern was the manner in which he had chosen to raise the issue, in particular him saying that he "did not care". He felt that in choosing to post as he did, the claimant was being deliberately provocative and again not showing sufficient regard to the feelings of other partners who might see the post, including those responsible for the display. He thought that the claimant's post was disrespectful to the individuals he worked alongside who are responsible for displays in the store. He thought that the claimant had shown poor judgment in posting as he did and that his tone was negative and disrespectful. Rather than admitting this, the claimant told Mr Houghton that he thought that there should be a moderator to check his posts before they went up. Mr Houghton felt that this demonstrated that the claimant was not taking on personal responsibility for improving his conduct and he was concerned that there would not be a change in his behaviour going forwards.

71. At the end of the reconvened disciplinary hearing, Mr Houghton adjourned and spent over an hour considering his decision. He concluded that, for the reasons set out above, the claimant had committed serious misconduct, namely inappropriate behaviour at work. He concluded that all three of the allegations were upheld and that all three amounted to serious misconduct. He considered that, of these, the allegation regarding Ms Mancey was the most serious; but that did not mean that he did not consider that the other two were also serious. Furthermore, the nature of the three allegations was such that it indicated a pattern of behaviour of a particular type by the claimant, which made matters more serious.

72. In turning to deciding what sanction was appropriate in relation to this misconduct, the fact that there was a pattern was important to Mr Houghton. He considered whether a lesser sanction than dismissal would be appropriate, but he considered it important that the claimant had not shown any contrition for his behaviour or any real recognition of the impact that his behaviour had had; therefore, Mr Houghton was not satisfied with the claimant's behaviour would

improve as a result of a warning. He found that the claimant had been informed on a number of occasions what kind of behaviour was acceptable in the partnership but nevertheless displayed a pattern of inappropriate behaviour at work. He got the impression that the claimant felt that the respondent should change the parameters around him rather than him taking on responsibility to change his behaviour (for example, in the claimant's suggestions that, rather than adjust his own posts on Google +, the respondent should monitor him). Ultimately, he felt that he could not trust the claimant to act appropriately at work and that this inappropriate behaviour was causing upset to other partners which could not be tolerated.

73. He took into account the claimant's length of service but did not believe that it mitigated the seriousness of the misconduct. He felt that the conduct was so serious that a sanction of summary dismissal was appropriate.

74. Mr Houghton reconvened the meeting and confirmed to the claimant that he was terminating his contract on the grounds of serious misconduct. Following the hearing, he wrote to the claimant on 18 June 2019 to confirm his decision. The claimant was separately provided with a copy of the notes of the disciplinary meeting. The letter confirmed the claimant's right of appeal against the decision. The claimant's employment therefore terminated with effect from 18 June 2019.

Mr Houghton's knowledge of the claimant's "disclosures"

75. The first time Mr Houghton saw the documents relied on by the claimant as "disclosures 5A and 5B" was when he was preparing for this employment tribunal claim. He had not seen them at the time he took the decision to dismiss the claimant. They could not, therefore, and did not form any part of his decision to dismiss the claimant.

76. As regards "disclosure 5C", Mr Houghton does not recall ever seeing any posts by the claimant on Google + regarding equal pay or the minimum wage or any emails from the claimant in December 2018 regarding equal pay or the minimum wage. He may have seen the Gazette article before, because he receives the Gazette and reads it, but he does not recall ever having read this specific letter from the claimant and certainly never made any connection when he was hearing the disciplinary hearing. At the time that this edition of the Gazette was published, he did not know the claimant as he was working in a different branch and so did not make any connection between them. We therefore find that Mr Houghton was not aware (in the sense that they were not present in his mind, consciously or subconsciously) of either of these alleged disclosures at the time that he took the decision to dismiss the claimant and they did not form any part of his decision to dismiss the claimant.

77. At the time of his decision to dismiss the claimant, Mr Houghton was not aware of the email or the subsequent conversations which the claimant had with Kim Lowe which formed the basis of "disclosure 5D". They could not, therefore, and did not form any part of his decision to dismiss the claimant.

Appeal

78. The claimant appealed against his dismissal. The appeal was heard by Ms Osgerby, who is a team manager in the appeals office, part of the independent side of the respondent, and which hears appeals from partners against dismissals and grievances. Ms Osgerby did not have any prior knowledge of the claimant's situation.

79. The claimant chose not to bring a companion to the appeal hearing (although he had been informed of his right to do so), which took place on 17 July 2019. The appeal hearing lasted around four hours. The claimant was given every opportunity to state his case. The grounds of the appeal were essentially the claimant disputing the accuracy of the witness statements which were before the disciplinary hearing and maintaining that the incidents were not serious enough to warrant dismissal.

80. Ms Osgerby conducted further interviews with Mr Houghton, Mr Howe and Ms Mancey amongst others. As is evident from the documents we have seen and from Ms Osgerby's evidence, and without reiterating all that evidence, her approach to the appeal was extremely thorough.

81. Ms Osgerby was satisfied that the investigation and disciplinary process had been carried out fairly and that the conclusions reached were reasonable. She did not find that the witness statements for the disciplinary hearing were in any material respects inconsistent. She agreed with Mr Houghton's assessment that the claimant's conduct was indicative of a pattern of behaviour, namely inappropriate conduct particularly with regards to his interactions with other partners. She was very concerned by the claimant's apparent unwillingness to accept that he could have, and should have, behaved differently and his lack of recognition as to how his behaviour had impacted on others and was not satisfied that the claimant would be able to demonstrate sufficient improvement in the future. She therefore agreed that dismissal was an appropriate sanction in the circumstances and did not uphold the claimant's appeal.

The Law

Unfair dismissal

82. The tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(1) and (2) of the Employment Rights Act 1996 ("ERA") and whether it had a genuine belief in that reason. The burden of proof here rests on the employer who must persuade the tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal (although see below also in relation to the burden of proof in public interest disclosure unfair dismissal cases).

83. In conduct cases, the principles in British Home Stores v Burchell [1978] IRLR 379 apply, namely that, in dismissing the employee, the employer must

have a genuine and reasonably held belief that the relevant misconduct took place, following such investigation as was reasonable.

84. The tribunal must then decide whether it is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. The tribunal refers itself here to a 98(4) of the ERA and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. It is useful to regard this matter as consisting of two separate issues, namely:

1. Whether the employer adopted a fair procedure? This will include a reasonable investigation with, almost invariably, a hearing at which the employee, knowing in advance (so as to be able to come suitably prepared) the charges or problems which are to be dealt with, has the opportunity to put their case and to answer the evidence obtained by the employer; and

2. Whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. The tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. However, it sits as an industrial jury to provide, partly from its own knowledge, an objective consideration of what is or is not reasonable in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee's point of view: on the facts of the case, has the employee objectively suffered an injustice? It is trite law that a reasonable employer will bear in mind, when making a decision, factors such as the employee's length of service, declared intentions in respect of reform and so on.

Protected disclosures

85. The principal relevant law is set out in Parts IVA and X of the ERA.

86. For the detriment and dismissal complaints relating to protected disclosures, colloquially referred to as "whistle blowing", an employee must first prove on the balance of probabilities that he or she made a protected disclosure. To do this the employee must first prove that he or she made a qualifying disclosure under s.43B of the ERA. 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 six categories set out at s.43B (a-f). The categories relevant to this case are:

(a) That a criminal offence has been committed, is being committed or is likely to be committed; and

(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

87. The case of Cavendish Munro Professional Risks Services Ltd v Geduld [2010] IRLR 38 EAT indicates that there is a distinction between "information" and an "allegation". The ordinary meaning of "information" is "conveying facts" and that is what is required to fall within s.43B. A mere allegation will not suffice. However, the two are not mutually exclusive; a protected disclosure may contain both information and allegation (see Kilraine v London Borough of Wandsworth [2016] IRLR 422, EAT).

88. Crucially, it is not the happening of a matter within one of the above categories which is relevant to the establishment of the qualifying disclosure but merely whether the employee has a reasonable belief in its having happened, happening or the likelihood of its happening. A belief may still be objectively reasonable even where the belief is wrong or does not on its facts fall within one of the categories outlined about.

89. The same reasonable belief test applies to the public interest test incorporated into s.43B ERA and referred to above (see Chesterton Global Ltd and another v Nurmohamed [2015] UK EAT/0335/14). Nurmohamed established that the test is whether an individual has a reasonable belief that the disclosure is in the public interest. Further, on the facts in Nurmohamed, the EAT upheld a finding that the protected disclosures, which concerned the manipulation of the employer's accounts such as to affect adversely 100 senior managers, were in the public interest. The sole purpose of the amendment to section 43B(1) introducing the "public interest" test was to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109. The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. In Nurmohamed, the breach affected other people as well as the claimant.

90. If the employee establishes that he or she made a qualifying disclosure, he or she must then prove that it was a protected disclosure. This can be done in a number of ways in accordance with s.43C-43H of the ERA. A disclosure made to an employer, as set out in s.43C, is one such way in which a qualifying disclosure can be a protected disclosure as well. The requirement that such a disclosure must be made in good faith to become a protected disclosure no longer applies since the law changed in 2013.

91. If the above is established, the employee has made a protected disclosure.

92. S.47B(1) provides that: "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure". Following the case of NHS Manchester v Fecitt and others [2011] EWCA Civ 1190, it is established that in terms of causation the disclosure must be a material influence (in the sense of being more than a trivial influence) in the employer's subjecting the claimant to a detriment. Under s.48(2) ERA, it is for the employer to prove on the balance of probabilities the ground on which the act, or deliberate failure, complained of was done.

93. For the automatically unfair dismissal claim under s.103A to succeed, the protected disclosure must be the sole or principal reason for dismissal. It is for the employer to show the reason or principal reason for the dismissal. However, where a Tribunal has rejected the reason put forward by the employer, it is not bound to accept the reason put forward by the claimant and it is open to the Tribunal, on the evidence, to conclude that the true reason is one not advanced by either party (Kuzel v Roche Products Ltd [2008] ICR 799, CA). In Kuzel, the Court of Appeal summarised the approach to establishing the reason for dismissal as follows:

1. Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason?

2. If so, has the respondent proved his reason for dismissal?

3. If not, has the respondent disproved the [allegedly real reason] advance by the claimant?

4. If not, dismissal is for the [allegedly real] reason.

94. In some cases, it may be appropriate to look beyond the mental processes of the dismissing officer. In cases where there is evidence that someone else in the hierarchy of responsibility knew of a protected disclosure and presented a tainted investigation report (for example) this may, on the facts, be capable of converting a dismissal delivered in good faith into a detriment on grounds of a protected disclosure. See Royal Mail Group v Jhuti [2019] UKSC 55, [2020] IRLR 129 per Lord Wilson at [60] as follows:

"If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination."

95. The task for the tribunal in every instance will be to determine the reason for the dismissal.

Direct sex/sexual orientation discrimination

96. Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination.

97. Sex and sexual orientation are both protected characteristics in relation to direct discrimination.

98. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

99. The burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did discriminate against the employee. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied; there must be something more (Madarassy v Nomura International plc [2007] IRLR 246. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision and the employer must prove that the treatment was "in no sense whatsoever" because of the relevant characteristic. If the employer is unable to do so, we must hold that the provision was contravened and discrimination did occur. However, in cases where the tribunal is able to make clear positive findings either way, it is not necessary to apply the burden of proof provisions described above.

100. In London Borough of Islington v Ladele [2009] IRLR 154, paragraph 40, the EAT stated that "The explanation of the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee".

Jurisdiction/time limits

Unfair dismissal/whistleblowing complaints

101. The ERA provides at section 111(2) in relation to complaint of unfair dismissal, "… an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal: (a) within the period of three months beginning with the effective date of termination, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months".

102. The jurisdictional test in relation to complaints of being subjected to a detriment as a result of having made a protected disclosure is set out at section 48(3) ERA. It provides that: "an employment tribunal shall not consider a complaint under this section unless it is presented – (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

103. In terms of the way they apply in this claim, the tests in relation to unfair dismissal and protected disclosure detriment are effectively the same.

104. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. 'That imposes a duty upon him to show

precisely why it was that he did not present his complaint' (Porter v Bandridge Ltd 1978 ICR 943, CA).

105. In Palmer v Southend on Sea BC [1984] 1 WLR 1129, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. It also held that, although the pursuit of a domestic appeals procedure was a relevant circumstance for consideration by the tribunal, it was not by itself enough to make it "not reasonably practicable" for an employee's complaint to be presented within the prescribed period.

106. In Dedman v British Building & Engineering Appliances [1974] 1 WLR 171, the Court of Appeal held that the fact that a dismissed employee does not know of the time limit for presenting a complaint is irrelevant to the question as to whether it was practicable for him to do so within the time limit; nor was the fact that his solicitors failed to advise him of the time limit mean that it was not reasonably practicable to have presented the claim on time.

107. Where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is aware of his or her rights will generally be taken to have been put on inquiry as to the time limit. Indeed, in Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488, EAT, Mr Justice Wood said that, when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the tribunal to reject the claim.

Sex/sexual orientation discrimination complaints

108. The Act provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

109. It further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

110. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by

inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

111. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA. This is the exercise of a wide, general discretion. There is no requirement to go through all of the matters listed in s 33(3) of the Limitation Act 1980, provided no significant factor has been left out of account, see London Borough of Southwark v Afolabi [2003] IRLR 220 CA.

112. Ms Hicks also referred us to the case of Miller v Ministry of Justice UKEAT/0003/15 (15 March 2016, unreported), in which Laing J observed (at [12] and [13]) that there are two types of prejudice which a respondent may suffer if the limitation period is extended: firstly, the obvious prejudice of having to defend the claim which would otherwise have been defeated by a limitation period; and secondly the "forensic prejudice" caused by fading memories, loss of documents, and losing touch with witnesses. Such forensic prejudice is "crucially relevant" in the exercise of discretion and may well be decisive. However, the converse does not follow: if there is no forensic prejudice to the respondent that is not decisive in favour of an extension.

113. The three-month primary time limit in relation to all three jurisdictional tests set out above is extended, under specific provisions, by time spent in ACAS early conciliation.

Conclusions on the issues

114. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Unfair dismissal

Reason for dismissal

115. We turn first to the issue of the reason for the claimant's dismissal in the context of both the automatic unfair dismissal (protected disclosure) complaint and the ordinary unfair dismissal complaint.

116. In summary, we have no hesitation in accepting Ms Hicks' submission that the reason for the claimant's dismissal was his conduct, specifically his conduct in relation to the three allegations concerning the Partner Voice agenda setting meeting in January 2018; the investigation meeting with Ms Mancey in March 2018; and the Google + post of April 2019.

117. As to the claimant's case in his claim that his dismissal was because of the alleged protected disclosures, the first thing to note is that at this hearing he did not really put to Mr Houghton, the dismissing officer, that his decision to

dismiss him was because he allegedly made protected disclosures; rather he focused on what he perceived as unfairnesses in Mr Houghton's decision to dismiss him by reason of conduct. That in itself is a weak starting point given that the claimant needs to show, in accordance with the guidance in Kuzel, that there is a real issue as to whether the reason put forward by the respondent (conduct) was not the true reason for dismissal.

118. In terms of the reason put forward by the respondent (conduct), the evidence is absolutely clear that the respondent started investigating alleged misconduct by the claimant back in early 2018; only stopped this, in accordance with the claimant's own wishes, to investigate his grievances; continued investigating alleged misconduct from April 2019 onwards; invited him to a disciplinary meeting where all the evidence provided was about alleged misconduct of the claimant; and purportedly dismissed him for that misconduct All the contemporaneous documentation produced by the respondent backs this up and there is a great deal of it, over a lengthy period. It is against this extensive and comprehensive background that the claimant needs to show that there is a real issue with the conduct reason put forward by the respondent.

119. Of immense evidential significance in this context is the fact that, as we have found, Mr Houghton, at the time he took the decision to dismiss the claimant, was unaware of any of the claimant's alleged protected disclosures. As we have found, he had not seen the vast majority of them until these employment tribunal proceedings; the only one which he may have seen was the article in the Gazette regarding the minimum wage but, as we have accepted, he had no reason to have made a connection between that letter and the claimant, particularly in the context that he was working at a different branch and did not know the claimant at the time the letter was published in the Gazette. In any event, we have accepted that none of these alleged protected disclosures were taken into account by Mr Houghton. Accordingly, we accept Ms Hicks' submission that this amounts to a complete defence to the complaint that the claimant's dismissal was in any way because of any of the alleged protected disclosures.

120. In addition, this is not a case in which the claimant was dismissed for an invented reason. He never sought to deny that he committed the first allegation (he admitted to referring to the food in the PDR as "dried up slop"); the misconduct in the second allegation was verified by both Ms Mancey and Mr Meenan, an independent witness; and the claimant's conduct in the third allegation is apparent from the Google + post itself.

121. Furthermore, the acts of misconduct could not have been used as a pretext to dismiss the claimant for making the alleged protected disclosures as the first two acts of misconduct (in January and March 2018 respectively) predated any of the alleged disclosures (the first of which was on 21 April 2018) and an investigation into the claimant's misconduct was already well underway prior to the first of the alleged disclosures.

122. In terms of any ordinary challenge to the conduct reason given by the respondent, the above reasons are more than enough for us to find that the

claimant has not established any issue whatsoever as to the conduct reason put forward by the respondent being the true reason for dismissal.

123. However, in his witness statement, the claimant suggested for the first time that Mr Howe unfairly suspended him in April 2019 due to his alleged protected disclosures and then passed on a "bent" investigation to Mr Houghton. The claimant only put this suggestion in very generalised terms. However, and although the claimant certainly did not put it in these terms himself, his allegation could be read as a suggestion that, even if Mr Houghton himself was unaware of the protected disclosures, the reason for dismissal could nonetheless be because of the protected disclosures under the principles in the case of Jhuti.

124. The claimant never made this allegation whilst he was employed or in his claim form or at any of the preliminary hearings which took place prior to this hearing. The first mention of it was in his witness statement. Witness statements were in the end only exchanged the week before this tribunal hearing owing to delays on the part of the claimant. Consequently, the respondent has not had the opportunity to call evidence from Mr Howe (and in these circumstances we do not blame the respondent for that). Furthermore, as noted, the allegation is made in very generalised terms. For these reasons, we are not minded to accept these bare assertions, unsupported by evidence, in any event. However, in relation to this allegation, we also accept the submissions made by Ms Hicks in this respect as follows:

> 1. As noted above, the acts for which the claimant was suspended were not bogus and the first two of them predated all of the alleged protected disclosures.
>
> 2. The first allegation was investigated by Ms Mancey, who even on the claimant's case is not accused of conducting a "bent" investigation and whose interviews with Ms Montague-Sweetland and Mr Edwards formed part of the evidence on which Mr Houghton relied.
>
> 3. An independent grievance process had also concluded that the claimant's conduct at the Partner Voice agenda setting meeting and the investigation meeting with Ms Mancey was inappropriate and fell below the standard expected. This undermines the claimant's suggestion that Mr Howe's investigation was "bent".
>
> 4. At no point during his grievance against Mr Howe, his disciplinary hearings or his appeal did the claimant claim that Mr Howe was motivated by any of the claimant's alleged protected disclosures.
>
> 5. There is no evidence that Mr Howe was aware of any of the "disclosures" which the claimant made. He was not copied into any of those disclosures which take the form of emails and there is no evidence before us to suggest that he saw any of the other disclosures. In addition, during his cross-examination, the claimant claimed that the real reason for his dismissal was the "election engineering" disclosure (disclosure 5D); this disclosure was, however, raised as a private

grievance and was not made via the Gazette, Google + or any public platform and there is no evidence of this disclosure being known to anyone (let alone Mr Howe) apart from Kim Lowe. In the light of this absence of evidence, we find on the balance of probabilities that Mr Howe did not have knowledge of any of the claimant's alleged protected disclosures.

125. We would also add that we have seen no evidence of Mr Howe somehow trying to concoct a "bent" investigation report at all (as opposed to the subsequent question of whether, if he did so, he did so due to his being motivated by the claimant's alleged protected disclosures). By contrast, the documentation we have seen appears to evidence a thorough and comprehensive investigation by Mr Howe, without any evidence of bias. We therefore also find on the balance of probabilities that Mr Howe's investigation report was unbiased.

126. For all of these reasons, we conclude that: Mr Howe did not carry out a "bent" investigation at all; he was not in any way motivated by the claimant's alleged protected disclosures; there was therefore no "tainted evidence" provided by Mr Howe and on which Mr Houghton relied in reaching his decision to dismiss the claimant (as was the case in the case of Jhuti); and, in this respect too, the claimant has not shown that there was a real issue as to whether the conduct reason put forward by the respondent was the true reason for his dismissal.

127. That being the case, it is not necessary to go on and consider the remaining questions in the approach set out in Kuzel. The claimant's alleged protected disclosures were neither the whole nor the principal reason for the claimant's dismissal (nor indeed did they form any part of the reason for the claimant's dismissal). His complaint of automatically unfair dismissal due to making protected disclosures under section 103A ERA therefore fails.

128. By contrast, the real reason for dismissal was conduct. We reiterate the points made above in this respect without repeating them. In summary, the contemporaneous documentation points to conduct being the reason for dismissal, as does the evidence of the respondent's witnesses and the fact that the three elements of misconduct were established in a thorough investigation and disciplinary process; furthermore, having dismissed the claimant's speculative suggestions that his alleged protected disclosures were the reason for his dismissal, there is no evidence whatsoever of any other reason apart from conduct being the reason for dismissal. In the light of this, and in the light of his own evidence, we have no doubt that Mr Houghton genuinely believed that the claimant had committed misconduct and that that was the reason for which he dismissed him. The respondent has therefore proved that conduct was the reason for dismissal.

129. We now turn to the various issues to do with section 98(4) reasonableness for the purposes of the ordinary unfair dismissal complaint.

Reasonable grounds

130. There is an abundance of evidence as to why Mr Houghton's genuine belief that the claimant had committed misconduct was indeed a reasonable one in the case of each of the three allegations.

131. In terms of the January 2018 Partner Voice agenda setting meeting incident, the claimant repeated the comments which he made in emails around that time to Mr Edwards (which we have quoted in our findings of fact above and which we do not repeat here); the interviews with Ms Montague-Sweetland and Mr Edwards evidence that he made the comments; and, by the claimant's own admission, he use the words "dried up slop" to describe the food.

132. The respondent's belief that the claimant had acted in an aggressive manner towards Ms Mancey in the March 2018 investigation meeting was based on Ms Mancey's own statement, which was corroborated by the statement of Mr Meenan, who was an independent witness who attended the meeting at the claimant's own request and therefore was unlikely to have any axe to grind against the claimant. It was entirely reasonable for Mr Houghton to believe their version of events over and above that of the claimant.

133. As to the Google + post, the respondent relied on the post itself. The claimant did not deny that he wrote the post and admitted that he was trying to be deliberately provocative in the way he wrote it.

134. The respondent therefore had a reasonable belief that misconduct had taken place in the case of each of the three allegations and the second limb of the test in Burchell is therefore satisfied.

Investigation

135. The investigation carried out by the respondent was also reasonable.

136. The respondent conducted investigation interviews with the appropriate people: in relation to the January 2018 incident, Ms Montague-Sweetland, Mr Edwards and the claimant; in relation to the March 2018 investigatory meeting incident, Ms Mancey, Mr Meenan and the claimant; and in relation to the Google + post, the claimant only (which was all that was necessary given that there was documentary evidence and the claimant did not deny that he wrote the post). In addition, during the appeal process, Ms Osgerby carried out appropriate additional interviews with Mr Houghton, Ms Mancey, Mr Howe and others. There has been no real suggestion that there were other people who should have been interviewed as part of the investigation but who were not interviewed.

137. However, it was not just that the respondent interviewed the right people. We have seen the statements and the investigation report and we consider that the way that the investigation was carried out was thorough and detailed. There was nowhere further to which the investigation "ought reasonably to have gone" but to which it did not go.

138. As the investigation was reasonable, the third and final limb of the Burchell test is also satisfied.

Procedure

139. We have not identified any respects in which the procedure used by the respondent in disciplining and dismissing the claimant was defective.

140. The claimant knew the case against him at every stage. Furthermore, the charges against him were clear from the material sent to him in advance of the disciplinary hearing. He was informed that the allegations, if proven, could result in his dismissal. The fact that the claimant, even at this tribunal, maintains that he doesn't understand why he was dismissed is not a reflection of any ignorance of the reasons why he was being disciplined and for which he was dismissed but frankly further evidence that, to this very day, he still does not appreciate the seriousness of the conduct for which he was dismissed.

141. The claimant had a chance to put his case to disciplinary hearings on 7 and 18 June 2019, lasting two hours and 6½ hours respectively. He was accompanied at both hearings, was able to put his case and had a fair hearing.

142. The disciplinary hearing was held by a senior manager who had worked at the respondent for over 18 years, had sufficient seniority (managing 130 people), had considerable experience in holding disciplinary processes, but who did not know the claimant prior to the disciplinary process.

143. The claimant was given and exercised his right of appeal. The appeal hearing lasted four hours and was detailed and thorough. The claimant was given the opportunity to state his case. Ms Osgerby carried out further appropriate investigations.

144. We do not, therefore, consider that there were any procedural defects, certainly none that would render the dismissal unfair.

Sanction

145. We turn therefore to the question of whether Mr Houghton's decision to dismiss the claimant for this misconduct was an appropriate sanction, that is, whether it was within the reasonable range of responses open to a reasonable employer.

146. First, it is worth restating, as we have done in our findings of fact, the context behind the decision. The respondent promoted a culture of respectful treatment of fellow partners, as its Handbook makes clear (we don't repeat here the entirety of the section of the Handbook set out in our findings of fact above). This is an entirely appropriate and laudable aim. In addition, the respondent's disciplinary policy made clear that employees may be summarily dismissed in cases of serious misconduct, such as "serious or persistent disruptive behaviour" or "inappropriate behaviour at work". Employees were therefore on notice that such behaviour could result in dismissal.

147. Against that background, we agree that the claimant's behaviour repeatedly fell below that standard to such a significant degree that dismissal was an appropriate sanction and one which certainly fell within the reasonable range of responses. His behaviour was entirely inappropriate and was offensive to other partners.

148. We agree with Mr Houghton's assessment that the incident with Ms Mancey was the most serious of the three. However, what was so important in his deciding to dismiss the claimant rather than impose a lesser sanction was that all three incidents evidenced inappropriate behaviour by the claimant of a type which indicated a pattern of such behaviour; and this was despite the claimant having being told that his behaviour at the first of these incidents was inappropriate.

149. Furthermore, key to the decision was the fact that the claimant refused to acknowledge that his conduct was inappropriate in any way and refused to alter his attitude (indeed, even by the stage of this employment tribunal hearing, the claimant still seem incapable of realising or acknowledging that he had done something seriously wrong). That the claimant's behaviour was inappropriate and was likely to be upsetting to other partners was obvious. Indeed, the inability of the claimant to recognise this (as reflected in his ongoing suggestions that he doesn't understand why he was dismissed) says a lot more about the claimant than it does about Mr Houghton's decision. The respondent also has a responsibility to its other partners to protect them from unreasonable, offensive or upsetting treatment by colleagues. Mr Houghton was entirely reasonable in concluding that there was every risk that this sort of behaviour by the claimant would be repeated in future and that, therefore, dismissal was the appropriate sanction.

150. The decision to dismiss the claimant was not therefore, unfair and the claimant's complaint of ordinary unfair dismissal therefore also fails.

<u>Protected disclosure detriment complaint</u>

151. The single whistleblowing detriment complaint is characterised at paragraph 16 of the list of issues as "a threat not to give [the claimant] a pay rise". This complaint was set out in very vague terms; in particular, it was never made clear until the beginning of this tribunal hearing which person at the respondent had allegedly "threatened" not to give the claimant to pay rise. In fact, the complaint was only clarified by the claimant at the beginning of this hearing and, on his own case as clarified, it did not involve a threat not to give the claimant a pay rise; it cannot, therefore, succeed.

152. In clarifying this complaint at this hearing, what the claimant indicated was that this complaint was against an individual called Mr Mohammed Aftab. (Mr Aftab was one of the managers to whom the claimant copied his email of 7 October 2018 which he relies on as "disclosure 5A". As already noted, "disclosure 5A" is the only one of the claimant's alleged protected disclosures which the respondent accepts was indeed a protected disclosure.) Specifically,

the claimant maintained that he told Mr Aftab that he refused to use the Hitachi software to process free credit applications on the shop floor as he was concerned about data protection; and that as a result, Mr Aftab told him that if he refused to complete these application forms he would not receive a pay rise as he would be under performing. During the course of cross-examination, the claimant said that in saying this Mr Aftab was "not being a bully or being intimidating, he was just stating the company's official position". As a result of this, the claimant maintained, Mr Aftab asked the claimant to include him on his subsequent Good Suggestions email about the same issue on 7 October 2018 ("disclosure 5A"), which the claimant duly did.

153. First, we are not prepared to accept as a fact that this happened as the claimant clarified at this tribunal. As the claimant chose only to make this clarification after the hearing had begun, the respondent had no opportunity to call Mr Aftab to give his account of what did or didn't happen in the conversation which the claimant describes. That represents extreme unfair prejudice to the respondent, the fault for which lies entirely with the claimant as a result of not bringing this up until such a late stage. We do not, therefore, accept that Mr Aftab told the claimant that, if he did not complete the application forms, he would not receive a pay rise. As the facts of the complaint (as now pleaded) are not made out, the complaint therefore fails.

154. However, even if we had accepted the claimant's version of events as set out above, the complaint would also fail for two further reasons.

155. First, we accept Ms Hicks' submission that, on the claimant's own telling, Mr Aftab was not subjecting the claimant to a detriment but simply stating what he thought was the respondent's position that if people didn't carry out the duties of their job, it would amount to underperformance and that would have an impact upon pay. There was no specific threat to the claimant and on his own case the claimant accepted that what was said was not said in a bullying or intimidating (i.e. threatening) way; in other words, it was not something said as a detriment, nor was it taken by the claimant as such, even on the claimant's own telling. Furthermore, the claimant was in due course awarded a pay rise in March 2019 (the normal time for pay rises) in keeping with the respondent's usual pay review guidance.

156. Secondly, even if what Mr Aftab allegedly said did amount to a detriment, it could not have been as a result of the claimant having made a disclosure because it is clear from the claimant's narrative that it was (allegedly) said prior to the 7 October 2018 email relied on as "disclosure 5A". For the complaint to succeed, the disclosure would of course need to have been made first, with the detrimental treatment then being made after and as a result of that disclosure. (For the avoidance of doubt, the claimant's complaint related only to "disclosure 5A", the email which was sent shortly after the alleged conversation with Mr Aftab and the subject matter of which is the same as the subject matter of that alleged conversation. The only other of the claimant's four alleged protected disclosures which predated the alleged conversation with Mr Aftab is "disclosure 5B"; this dates from 21 April 2018, almost six months earlier, and relates to different subject matter; furthermore, the claimant is not suggesting that

what Mr Aftab said was in any way related to "disclosure 5B", nor is there any evidence that Mr Aftab was aware of "disclosure 5B"; he was not copied into that email and it is very unlikely that he would know anything about it; we therefore find as fact that on the balance of probabilities Mr Aftab was not even aware of "disclosure 5B" at all.)

157. The claimant's protected disclosure detriment complaint therefore fails.

Protected disclosures

158. As noted, the respondent accepts that "disclosure 5A" was indeed a protected disclosure.

159. Given our conclusions above (specifically that none of the alleged disclosures played any part in Mr Houghton's decision to dismiss the claimant), it is not strictly necessary for us to make any findings as to whether or not the remaining alleged disclosures were indeed protected disclosures. However, we do so for completeness' sake. In doing so, we accept the submissions made by Ms Hicks.

"Disclosure 5B"

160. "Disclosure 5B", the email sent on 21 April 2018 to Mr Edwards, Mr Wenn and others was not a protected disclosure for the following reasons.

161. It did not disclosure information; rather, it was a series of suggestions about the commission-based system for promoting the respondent's credit cards.

162. Secondly, the claimant did not have a belief (let alone a reasonable belief) that it tended to show that the respondent had failed, was failing, or was likely to fail to comply with a legal obligation to which it or anyone else was subject; the claimant merely stated that "even if it is legal" (about which he expressed no concern), it was not desirable for partners to be incentivised for making credit card referrals.

"Disclosure 5C"

163. The claimant's letter in the Gazette was not a protected disclosure for the following reasons.

164. First, it was not a disclosure of information but a pitch to push for the payment of the London living wage.

165. As noted, in the Gazette article, the claimant referred to what he called HMRC's "national minimum wage investigation debacle", which was an investigation carried out by HMRC into whether the respondent had been in technical breach of the national minimum wage rules owing to the way it averaged out partners' basic pay over a period to ensure a consistent amount was paid. However, this was a historical matter and the claimant did not make any suggestion that the respondent had indeed been in breach of the national

minimum wage rules; in short, he did not believe that the respondent had been in breach, was in breach, or was likely to be in breach of a legal obligation to which it was subject.

166. There is also a second element to "disclosure 5C". As noted, it was alleged in the list of issues that a disclosure was made by the claimant on Google + and in other emails in December 2018 about equal pay. However, nobody has been able to recover this and it was barely (if at all) referred to during these proceedings. In the absence of evidence, we find on the balance of probabilities that no such disclosure was made.

"Disclosure 5D"

167. Again, there are two parts to this alleged disclosure.

168. The email sent on 1 February 2019 relating to "democracy" at the Oxford Street branch was not a protected disclosure for the following reasons.

169. First, the document relied on was an email from the claimant to himself; it was not sent to anyone else. It was not, therefore, something disclosed at all.

170. Secondly, the claimant did not have a reasonable belief that it tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation. In the email, the claimant criticises the respondent's democratic processes and states that the respondent is "running a democracy in the same way as a Banana Republic with the same predictable outcomes: unequal voting rights; loss of assets & ultimately financial failure". The respondent chooses to operate and run an internal democracy. However, it is under no legal obligation to do so. The claimant, who was heavily involved in that internal democracy, must have been well aware of this of this and cannot, therefore, have held any belief at all (let alone a reasonable belief) that the respondent was in breach of a legal obligation in this respect, however strongly he may have held views about the workings of the respondent's internal democracy.

171. The contents of the claimant's meeting with Kim Lowe on 7 March 2019 do not contain any protected disclosures either. At that meeting, the claimant made more criticisms regarding "democracy" at the respondent, suggesting for example that the respondent had been using "democratic dirty tricks" in the running of the partnership elections. These do not amount to protected disclosures for the same reasons as are set out in the paragraph above in relation to the email of 1 February 2019 regarding democracy.

172. Accordingly, in summary, "disclosure 5A" was a protected disclosure; however, none of the other alleged disclosures were protected disclosures.

Direct sex/sexual orientation discrimination

Home design stylist application

173. The point at which this allegation of direct sex/sexual orientation discrimination is assessed is the point at which Ms Wise decided whom to put forward for interview and whom she would not put forward for interview. At that point, because of her system of assessing the CVs, she did not know the names of the candidates and did not know either their gender or sexual orientation. She could not, therefore, have made a decision based on these factors, either consciously or subconsciously; for that reason alone, we are able to make a clear positive finding that her decision in no sense whatsoever was because of sex or sexual orientation. This complaint therefore fails at this stage.

174. We would add that, as Ms Hicks has set out in her submissions, the claimant has not sought in his own evidence to suggest that the decision was because of sex or sexual orientation. In his witness statement, the claimant was silent about it; it is simply not a case which he pursued. During cross-examination, even when asked about the reason why he was not put forward for interview, the claimant at no point suggested that the decision was due to less favourable treatment on the grounds of sex or sexual orientation. The only point at which he did start mentioning sex or sexual orientation was when the tribunal panel itself specifically put it to him. All this illustrates a lack of strength of feeling on the issue even on the part of the claimant himself.

175. Whilst the above is enough to dispose of the complaint, we would add that, whilst the claimant was the only person not to be invited to interview, other men were invited to interview. The fact that more women were invited to interview is not surprising as there were more women who applied for the role. Furthermore, we cannot make any assessment of the sexual orientation of those invited to interview (male or female) as, to this day, we do not have that data; the respondent did not have that data and it was not relevant to the decision taken by Ms Wise.

176. We also accept, as Ms Hicks submitted, that the respondent has shown a coherent non-discriminatory reason for not selecting the claimant for interview. He was not selected for the role because of his lack of experience and qualifications. Specifically, the job description made it clear that a design-related qualification was “essential”. The claimant’s CV did not have details of any relevant interior design courses or qualifications. That was clear even from the CV which the claimant submitted at a late stage during these tribunal proceedings.

177. This complaint of direct sex/sexual orientation discrimination therefore fails.

Grievance about home design stylist application

178. As noted, although the claimant never withdrew his complaint about Mr Evans’ handling of his grievance relating to the home design stylist application

being an act of sex/sexual orientation discrimination, his main case at this hearing appeared to be that Mr Evans was not qualified to hear the grievance because he didn't have a background in home design. That is an invalid criticism as Mr Evans' role did not require this expertise as his role was, as he made clear in evidence, to assess the fairness of the process. The claimant did not suggest in his witness statement that the decision in relation to the grievance was because of his sex or sexual orientation nor did he suggest this when the matter was put to him in cross-examination. Rather than suggest that Mr Evans discriminated against him on the grounds of sex or sexual orientation, the claimant said that he "did the best he could but was not qualified". His own case, therefore, is in reality not a complaint of sex or sexual orientation discrimination.

179. Furthermore, Mr Evans in his evidence was clear that he did not take the claimant's sex or sexual orientation into account when making his decision and that he did not know or ask about the claimant's sexual orientation, this being entirely irrelevant to his decision-making process.

180. In any case, we have seen the documentation in relation to this grievance and heard Mr Evans' evidence; he appears to have carried out a thorough and appropriate investigation and, based on the findings of his grievance investigation, he quite reasonably did not uphold the claimant's grievance. We accept Ms Hicks' submission that this is indeed a coherent non-discriminatory reason for not upholding the grievance and that it has nothing whatsoever to do with the claimant's sex or sexual orientation.

181. This complaint of direct sex/sexual orientation discrimination therefore fails.

Time Limits

182. ACAS early conciliation commenced on 16 September 2019 and ended on 16 October 2019. The claim was presented on 18 November 2019.

Unfair dismissal and whistleblowing

183. The date of the termination of the claimant's employment was 18 June 2019. Therefore, taking into account the effect of the ACAS early conciliation provisions on tribunal time limits, the claim would need to have been presented by 16 November 2019 (i.e. within a month of the end of ACAS early conciliation) for the unfair dismissal complaint and the whistleblowing automatically unfair dismissal complaint to be in time. As the claim was presented on 18 November 2019, these complaints were presented out of time (by two days).

184. As to the whistleblowing detriment complaint (the alleged threat not to give the claimant a pay rise), the claimant gave no date for when that actually occurred but during cross-examination he accepted that the alleged threat took place before he sent the email of 7 October 2018 (which is the email which is said to be "disclosure 5A"). This complaint is therefore some nine months out of time.

185. We therefore need to turn to the question of whether or not time should be extended and, specifically, whether it was reasonably practicable for the claimant to have presented these complaints in time and, if it was not, whether they were presented within such further period as was reasonable.

186. Ms Hicks correctly reminds us that whilst, in relation to the dismissal complaints, two days may not seem to be a significant amount of time, the wording of section 48(3) and section 111(2) ERA is mandatory: a tribunal "shall not" consider a complaint brought outside this primary period unless (a) it is brought within such further period as the tribunal considers reasonable and (b) it was not reasonably practicable for the claimant to have presented the complaint within that three month period.

187. Turning first to the question of whether it was reasonably practicable to present these complaints on time, we note that the claimant was someone who was aware of his rights generally, raising multiple grievances between May 2018 and February 2019, as well as opining on various other issues which were to do with employment law issues in other contexts, for example to do with equal pay and the minimum wage. There is no evidence that he was ignorant of his ability to raise these complaints. Furthermore, as is evident from the number of grievances that he issued, he was not afraid of making complaints if he wanted to do that; there is no suggestion that he would hold back from bringing employment tribunal complaints out of any fear of doing so or general timidity on his part. He also admitted that he was in receipt of trade union advice since March 2018 (this included the trade union advising him to ask for the disciplinary process to be paused until the grievances were resolved, which the claimant subsequently did). In addition, on his own case, the claimant sought legal advice as early as May 2019. Furthermore, the claimant admitted in cross-examination that he was aware of the tribunal time limits from ACAS as they had told him the dates during early conciliation.

188. The claimant has submitted that he was suffering from depression and anxiety and submitted a letter of 3 May 2019 from iCope at the NHS. First, however, this does not explain why he was unable to submit a claim form in relation to the alleged pay rise detriment between 7 October 2018 and 3 May 2019 (when he referred himself to the clinic). Secondly, it does not demonstrate that throughout the subsequent period period (3 May 2019 until 18 November 2019) it was not reasonably practicable for him to present the dismissal complaints in time. As he admitted himself in cross-examination, he "wasn't housebound for months on end" and was able fully to participate in both the appeal and the ACAS early conciliation process during that time. As such, the letter does not say that the claimant's impairment was such as to reach the high threshold of making it not reasonably practicable to present his claim in time, especially in circumstances where it was in receipt of legal advice since May 2019. In addition, the claimant had a part-time job in addition to his employment with the respondent and he admitted in cross-examination that he had carried on doing that job throughout this period; that is highly indicative that, if he could work during this period, he was capable of submitting a claim form during this period.

189. For all these reasons, we consider that it was reasonably practicable for the claimant to have presented his unfair dismissal, automatically unfair dismissal (whistleblowing) and whistleblowing detriment complaints within the relevant time period. As that is the case, time cannot be extended and the tribunal does not have jurisdiction to hear these complaints; they are therefore struck out.

190. For completeness, had our answer to the question above been different, we would have considered that the two days in relation to the dismissal complaints did amount to submitting the complaints within such further period as was reasonable; however, the pay rise whistleblowing complaint was not submitted within such further period as was reasonable as it was considerably (nine months) out of time and there is no reason why it could not have been submitted earlier.

Sex/sexual orientation discrimination

191. These complaints concerned two allegations, namely the decision not to invite the claimant to interview for the home design stylist role and the decision not to uphold the claimant's subsequent grievance about this.

192. The decision not to invite the claimant to interview for the home design stylist role took place in October 2018. The claim form was submitted on 18 November 2019; this complaint was therefore submitted roughly 10 months out of time.

193. Mr Evans' decision not to uphold the claimant's grievance about the home design stylist role was made on or before 8 March 2019 (the date of the letter he sent to the claimant setting out his reasons for this decision). As the claim form was submitted on 18 November 2019, this complaint was therefore submitted roughly 5 months out of time.

194. As there are no "in time" discrimination complaints (successful or otherwise), it cannot be argued that these complaints form part of conduct extending over a period with successful in time discrimination complaints such that they are deemed to be in time. The only remaining question, therefore, in relation to both of these complaints, is whether or not it would be just and equitable for the tribunal to extend time. The factors below are relevant to this decision.

195. First, the complaints are respectively ten and five months out of time. This is a significant period of time.

196. Secondly, the burden of proof is on the claimant to show that it would be just and equitable to extend time. The only reason raised by the claimant was the suggestion that he was suffering from depression and anxiety. As already noted, the claimant did not present himself to the NHS iCope services until 3 May 2019. This was some two months after the grievance outcome and some seven months after the decision not to call him for interview for the home design stylist role. No reason has been provided as to why these complaints could not have been brought earlier and we do not therefore accept that there was any such

reason. Furthermore, we reiterate the points already made that, even subsequent to 3 May 2019, the claimant was fully able to participate in the disciplinary, appeal and ACAS processes and that he was holding down another job during this period, which is indicative that, to the extent that he did suffer from depression or anxiety, it could certainly not be to such a degree that it would prevent him from putting in a tribunal complaint. We do not, therefore, consider that the claimant has put forward any valid reason as to why he did not or could not have presented these complaints far earlier.

197. Thirdly, we reiterate that the claimant was in receipt of trade union advice since March 2018 and legal advice since at least May 2019.

198. Finally, and very significantly, we fully accept that the cogency of the evidence in relation to these complaints has been significantly affected by the claimant's delay in presenting them, such that the respondent's ability to defend these complaints has been hampered. We have already noted that Ms Wise, because of entirely understandable GDPR concerns, had not kept the recruitment papers from October 2018. We would add that the time gap hindered her ability to recall details of the process. This amounts to significant prejudice to the respondent in its ability to defend these complaints, caused by the claimant's delay in presenting them.

199. For all these reasons, we do not consider that it would be just and equitable to extend time in relation to the sex and sexual orientation discrimination complaints. The tribunal does not therefore have jurisdiction to hear them and they are accordingly struck out.

200. In summary, therefore, all of the complaints in the claim form are struck out for want of jurisdiction.

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Employment Judge Baty

Dated: 16 November 2020

Judgment and Reasons sent to the parties on:

17/11/20202

For the Tribunal Office :