



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Kowalczyk

**Respondents:** 1. Cleland McIver Limited  
2. Marc Salford  
3. Liz Roberts

**Heard at:** Manchester      **On:** 9 and 10 January 2020

**Before:** Employment Judge McDonald  
Ms M T Dowling  
Dr B Tirohl

## **Representation**

**Claimant:** Mr M Glazier (friend)  
**Respondent:** Mr D Hulse (Counsel)

# JUDGMENT

The Tribunal's judgment is that:

1. The claimant's complaint that he was subjected to detriments for making protected disclosures fails and is dismissed.
2. The claimant's complaint that he was unfairly dismissed fails and is dismissed.
3. The claimant's complaint that he was directly discriminated against because of disability in breach of ss.13 and s.39 of the Equality Act 2010 fails and is dismissed.
4. The claimant's complaint that he was subjected to disability related harassment in breach of s.26 of the Equality Act 2010 fails and is dismissed.

# REASONS

1. The claimant in this case raised complaints that he had been subjected to detriments and dismissed for making protected disclosures and that he had been discriminated against because of disability.

### **Introduction**

2. The final hearing of this case took place on the 9 and 10 January 2020. We heard evidence from the claimant in support of his case. For the respondent we heard evidence from Marc Salford (the claimant's Line Manager at the relevant time) and from Elizabeth Roberts (the respondent's Human Resources and Payroll Manager).
3. The final hearing of this case was originally due to take place on 28-29 November 2019. However, that hearing was converted to a preliminary hearing. There were written witness statements for all three witnesses dating from that postponed final hearing. There were also supplementary witness statements for the claimant and Mr Salford (dated 3 January 2020 and 23 December 2019 respectively). We read all those statements. Each witness was cross examined and answered questions from the Tribunal. References to paragraph numbers beginning "WS" below are to paragraphs in the relevant witness's written original statement. In the case of the claimant and Mr Salford, we have used SWS when referring to paragraphs in their supplementary witness statements.
4. There was an agreed bundle of documents consisting of pages 1-142. References in this judgment to page numbers are to pages in that bundle.
5. Both parties had produced written skeleton arguments. We also heard comprehensive oral submissions from Mr Hulse and brief oral submissions from Mr Glazier. We took those submissions into account in reaching our decision and have referred to them where relevant but have not set them out in full in this judgment. We were also referred to various legal authorities. Where relevant to the issues we needed to decide, they are referred to in the section of his judgment headed "The relevant law".
6. Having heard the evidence and submissions the Tribunal deliberated in chambers on the afternoon of 10 January 2020. The Employment Judge apologises to the parties for the delay in writing up those conclusions and providing this judgment to the parties caused by his other judicial commitments and absences from the Tribunal.

### **Complaints and Issues**

7. The complaints and issues to be dealt with were clarified and agreed at the preliminary hearing on 28 November 2019. The claimant brought four complaints:
  - a. That in breach of s.47B of the Employment Rights Act 1996 ("ERA") he had been subjected to detriments by the respondents on the ground that he had made protected disclosures ("the detriments complaint")

- b. That his dismissal by letter dated 4 December 2018 was automatically unfair in breach of s.103A ERA because the reason or, if more than one the principal reason for that dismissal was that he made protected disclosure (“the automatically unfair dismissal complaint”).
  - c. That in breach of s.13 and s.39 of the Equality Act 2010 (“the 2010 Act) he was directly discriminated against because of his wife’s disability (“the direct discrimination complaint”).
  - d. That in breach of s.26 of the 2010 Act he was subjected to disability related harassment (“the harassment complaint”).
8. Although the claimant’s supplementary witness statement referred to “Victimisation” Mr Glazier confirmed at the start of the hearing that the claimant was not pursuing a complaint of victimisation in breach of s.27 of the 2010 Act.
9. This meant that the issues we needed to decide were as follows:

The detriment complaint

- a. Was the claimant subject to the alleged detriments set out in Employment Judge Sherratt’s Order dated 10 July 2019 (annexed to this Judgment) by the first, second and third respondent on the ground that he had made a protected disclosure? The respondent accepts that the claimant made two protected disclosures.

The automatically unfair dismissal complaint

- b. Was the reason, or if more than one, the principal reason, that the first respondent dismissed the claimant that he had made a protected disclosure?

The direct discrimination complaint

- c. Did the respondents treat the claimant less favourably by giving him short notice of shift changes? The comparator relied on by the claimant is Wictor Slaski.
- d. Was any such less favourable treatment because of disability? The disability relied on is the claimant’s wife’s mental health issues. The respondent accepts the claimant’s wife is a disabled person.

The harassment complaint

- e. Did the respondent repeatedly give the claimant short notice of changes to his shifts?
- f. If so, was that unwanted conduct related to the claimant's wife's disability?
- g. If so, did it have the purpose or effect of violating the claimant's

dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

Remedy

- h. If any of the claimant's claims succeed, what remedy is it appropriate to award him?

**The Relevant Law**

The detriments complaint

10. S.47B ERA says that:
- (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
11. By s.48 ERA a complaint may be made to an employment tribunal that a worker has been subjected to a detriment. On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act was done (s.48(2) ERA).
12. The ERA does not define "detriment" but in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL**, the House of Lords (as it then was) adopted the definition established in previous cases that 'detriment' meant simply 'putting under a disadvantage'. All the circumstances must be taken into account. The test is whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": **Barclays Bank plc v Kapur and others (No 2) [1995] IRLR 87**. However, it is not necessary to demonstrate some physical or economic consequence.

The automatically unfair dismissal complaint

13. An employee who does not have two years' continuous employment cannot usually bring a claim of unfair dismissal. However, S.103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one the principal reason) for the dismissal is that the employee made a protected disclosure. S.108 ERA says that no qualifying period of employment is needed to bring a claim that a dismissal is automatically unfair under s.103A.
14. The Court of Appeal set out the position when there is a dispute about the real reason for a dismissal in **Kuzel v Roche [2008] EWCA Civ 380 [2008] IRLR 530**:
- a. It is necessary for the tribunal to identify only one reason or one principal reason for the dismissal. That reason or principal reason for a dismissal is a question of fact for the tribunal. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

- b. The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. The employer knows better than anyone else in the world why it dismissed the complainant. It is for the employer to show that it had a reason for the dismissal; that the reason was, as it asserted, a potentially fair one; and to show that it was not some other reason.
  - c. When the employee contests the reason for dismissal put forward by the employer there is no burden on him to disprove it, let alone to positively prove a different reason. However, where an employee positively asserts that there was a different and inadmissible reason for the dismissal, she must produce some evidence supporting the positive case, such as making protected disclosures.
  - d. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
  - e. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence. The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was.
  - f. If the employer does not show to the satisfaction of the tribunal that the reason was what it asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
  - g. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.
15. If a Tribunal finds that a claimant has been unfairly dismissed S.118(1) ERA says that:

"Where a tribunal makes an award of compensation for unfair

dismissal under section 112(4) or 117(3)(a) the award shall consist of-  
(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and  
(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."

16. The basic award is calculated based on a week's pay, length of service and the age of the claimant.
17. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).
18. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called Polkey reduction named after the House of Lords decision in **Polkey v AE Dayton Services**).
19. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).
20. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

#### The direct discrimination complaint

21. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:  
  
"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".
22. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:  
  
"On a comparison of cases for the purposes of section 13 ... there must be no material differences between the circumstances relating to each case".
23. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic (in this case disability), the key question is the "reason why" the decision or action of the respondent was taken.
24. Under s.13 treatment "because of a protected characteristic" includes discrimination by association, i.e. where the less favorable treatment of the

claimant is because of their association with someone with a protected characteristic. In this case, as in the case of **EBR Attridge Law LLP (formerly Attridge Law) and anor v Coleman 2010 ICR 242, EAT**, cited to us by Mr Glazier, the claim is that the claimant was treated less favourably because a family member is a disabled person.

The harassment complaint

25. The definition of harassment appears in section 26 of the 2010 Act which so far as material reads as follows:

"(1) A person (A) harasses another (B) if -

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

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect."

26. The Equality and Human Rights Commission gives more detail on the factors relevant in deciding whether conduct has the effect referred to in s.26(1)(b) at paragraph 7.18 of its Statutory Code of Practice on Employment ("the EHRC Code"):

"7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an

objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

The burden of proof in cases under the 2010 Act

The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

27. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

28. The Employment Appeal Tribunal ("EAT") summarised the proper approach to the facts in cases under the 2010 Act in **Talbot v Costain Oil, Gas & Process Ltd and others [2017] I.C.R. D11:**

"(1) It is very unusual to find direct evidence of discrimination;

(2) Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;

(3) It is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;

(4) The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;

(5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;

(6) The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;



(7) If it is necessary to resort to the burden of proof in this context, section 136 of the Equality Act 2010 provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination."

29. In **Brown v London Borough of Croydon and anor 2007 ICR 909, CA.** the Court of Appeal considered that although it would normally be good practice to apply the two-stage test, it was not an error of law for a tribunal to proceed straight to the second stage in cases such as the instant one, where this does not prejudice the claimant. As the House of Lords indicated in **Shamoon** it may sometimes be appropriate for a Tribunal to move straight to the "reason why" question in deciding whether less favourable treatment was because of a protected characteristic.

#### Remedy in cases under the 2010 Act

30. Where a claimant succeeds in a claim of direct discrimination or harassment, s.124 of the 2010 Act gives the Tribunal three options (though not mutually exclusive) when deciding on an appropriate remedy for a claimant:
- to make a declaration as to the rights of the complainant and the respondent (s.124(2)(a))
  - to order the respondent to pay compensation to the complainant (s.124(2)(b)), and/or
  - to make an appropriate recommendation (s.124(2)(c)).
31. Most commonly the Tribunal will award compensation, the amount of which corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (s.124(2)(b) and (6) combined with S.119(2) and (3) of the 2010 Act). This means that there is no upper limit on the amount of compensation that can be awarded for discrimination, unlike, for example, compensation for unfair dismissal. Compensation can include compensation for injury to feelings and personal injury in addition to compensation for financial loss.

#### **Findings of Fact**

32. We first set out the agreed facts. We then set out our findings on those incidents where the facts were in dispute.

#### Agreed facts

33. The respondent company sources, manufactures, supplies and distributes household textiles such as curtains, blinds, cushions, kitchen and bathroom textiles and bedding. Within the respondent's warehouse there are two teams. The first is the "Pick" team which picks products from the "pick faces" within the warehouse which are then dispatched to its customers such as Dunelm stores. The second team is the "Replenishment" team. That team's role is to ensure the "pick faces" are replenished with fresh stock for the

“Pick” team to pick from.

34. The two teams work independently and on different shift patterns. The Replenishment Team starts work later in the day and works into the evening, the idea being that it replenishes the pick faces once the Pick Team has picked what it needs for dispatch from the pick faces.
35. The claimant worked as a warehouse operative on the Replenishment Team. He had started working for the respondent as an agency worker and became a full-time employee on 31 July 2018. Mr Salford was his line manager. In his witness statement, the claimant described Mr Salford as “the best boss I’ve ever worked for” (para 4 of his witness statement).
36. It is agreed that the claimant has an extremely difficult family situation. His wife (we have used this terms as this is how the claimant referred to his partner) has mental health issues which means she cannot safely be left alone at home. The claimant’s unchallenged evidence was that this meant that he could only leave home for work if her carer or his mother in law was in the house with her. That meant that changes in his shift patterns or working hours caused the claimant significant difficulties unless he had enough advance notice to arrange for someone to be with his wife while he was at work.
37. The respondent accepted in its skeleton argument that two of the five matters which the claimant says are detriments took place. It accepts that it changed the staff shift pattern (including the claimant’s) for the week of 19 November 2018. It also accepts that it suspended the claimant on 23 November 2018 (confirmed by letter dated 28 November 2018 at p.104). It denies that either of those actions were taken because the claimant had made protected disclosures or amounted to direct disability discrimination or harassment.
38. It was also not in dispute that the respondent dismissed the claimant following a probationary review meeting on 30 November 2018 (confirmed by letter dated 4 December 2018 at p.109). The respondent however denies that the dismissal was in any way connected to the claimant’s protected disclosures.

Disputed facts

39. Turning to the disputed facts, we set out below our findings of fact in relation to the following:
  - a. The respondent’s response to the first protected disclosure
  - b. The respondent’s response to the second protected disclosure
  - c. The decision to change the shift pattern
  - d. The comparator named by the claimant in the direct discrimination complaint
  - e. The decision to suspend the claimant
  - f. The decision to dismiss the claimant
  - g. What happened after the dismissal
40. Where there was a direct conflict of evidence between witnesses on specific

incidents we have set out our reasons for preferring one witness's evidence over another's. Overall, we found the evidence of Mr Salford to be more reliable than that of the claimant. His evidence was clear and internally consistent. He gave evidence in a straightforward manner and was willing to accept where he might have made mistakes, e.g. in not communicating changes to shift times to Bob McDonald in November 2018. The claimant's evidence was more confused, less internally consistent and he accepted that at times he had difficulty remembering when incidents had happened.

*The respondent's response to the first protected disclosure*

41. Much of the communication between the claimant and Mr Salford was by way of text message. The first protected disclosure was made in a text message exchange on 31 July 2018 (p.77). At 16:41 the claimant informed Mr Salford that a new worker, who had started work in the warehouse was a known drug dealer. In this judgment we will refer to that person as "AB". The claimant said he could let Mr Salford know his name if needs be. Mr Salford texted back a minute later saying "Please. Can look into it then". The claimant sent AB's name and some other identifying details and at 17:03 Mr Salford sent him a text message saying "Ok cheers will look into it."
42. The following morning the claimant sent a text at 8:34 (p.77) asking "Morning boss did you find anything about him (AB)". Mr Salford texted five minutes later to say "No. Just asked Andy/Nick to look at it for me". Mr Salford's evidence, which we accept, was that this referred to him having passed the matter on to Andy Wood, Production Manager and Nick Livesey, Supervisor. He had done so because they, rather than Mr Salford, managed the production team in which AB was working.
43. The claimant said (WS para 20(iv) and 21(ii)) that the text message evidence suggested nothing had been done about this first protected disclosure for a month. His evidence for that was the text message from Mr Salford dated 29 August (p.82) which says "I'll try and look at it this week". However, we find that that text message related to the second protected disclosure referred to by the claimant in a series of texts to Mr Salford a few minutes earlier.
44. As we record below, the claimant confirmed during his oral evidence at the final hearing that the allegation that Mr Salford laughed in his face related only to the second protected disclosure.
45. Mr Salford's evidence (WS para 11) was that AB had been working on a temporary basis through an agency and the matter was resolved within a week with AB's engagement with the respondent being terminated on 8 August 2018. Mr Salford also gave evidence (WS para 12) that when offered AB as an agency worker in January 2019 (so after the claimant's dismissal), he made it clear that the respondent did not want AB working for it. His evidence on this point was supported by an email exchange with the agency (pp.116-118).
46. The claimant accepted that AB was working in the production team when he raised the issue with Mr Salford. In his cross examination evidence he

also accepted that he had not followed up the issue of AB with Mr Salford after his text messages on 31 July and 1 August 2018. However, he claimed that the respondent had allowed AB to return to work for them. He said he was 100% sure that AB had come to work on the replenishment team after he had raised the issue of his drug dealing with Mr Salford.

47. When it comes to the claimant's allegation that AB was re-engaged by the respondent, we prefer Mr Salford's evidence. The email exchange in January 2019 (pp.116-118) supports his evidence that the respondent would not have re-engaged AB. In addition to that, we are satisfied that had the respondent re-engaged AB to work on the same team as the claimant, the claimant would have immediately raised that with Mr Salford. There is no evidence that he did so. As the claimant accepted, the only text messages relating to AB are those on the 31 July 2018 and 1 August 2018.
48. The claimant also said (SWS para 20.vi) that Mr Salford had asked him to look into it rather than dealing with the matter himself and that "he did nothing about it" (SWS para 5.vii). It was not clear whether he was making that allegation in relation to both disclosures but in relation to the first disclosure the claimant accepted in cross examination that there was no evidence from the text messages between him and Mr Salford to support his allegation that Mr Salford had asked him to look into the issue of AB himself. We find that is correct.
49. We find that Mr Salford did take action in response to the claimant's text about AB and that as a result the respondent terminated AB's engagement. We also find that he had made it clear to the claimant that he was dealing with the issue raised by the claimant and do not accept the claimant's allegation that Mr Salford asked him to look into it.
50. As we record below, the claimant confirmed at the hearing that the allegation that Mr Salford laughed in his face applied only in relation to the second protected disclosure.

*The respondent's response to the second protected disclosure*

51. The second protected disclosure was the claimant reporting to Mr Salford that one of the Respondent's employees, XY, was smoking cannabis in his lunch break. The claimant said this disclosure happened face to face in the workplace but was not certain of the date. He thought it might have been mid-August. It was agreed that the disclosure happened at the latest by 29 August 2018 when the claimant texted Mr Salford to allege that XY went to the train station every dinner to have a joint (text message at 8:50 on 29 August 2018 at p.82).
52. Mr Salford in his evidence in chief confirmed that he had had a conversation with the claimant where the claimant raised his concerns about XY. Mr Salford said he told the claimant he would sort it out and denied laughing in his face. His response to the text message from the claimant on 29 August 2018 was "Bare (sic) with me pal. I'll try and look at it this week" (text message at 8:53 on 29 August 2018 at p.82). There were no further text messages from the claimant about XY.

53. The claimant's evidence was that nothing was done in relation to XY until January 2019 (WS para 19). Mr Salford's evidence was that he did investigate the second protected disclosure. His evidence (WS para 16) was that over the next few days he and Bob McDonald (the claimant's shift supervisor) conducted observations of XY. Their conclusion was that there was no evidence of his smoking cannabis nor of his being less productive in the afternoon (which the claimant had also alleged). On that basis, Mr Salford and Mr McDonald decided that no further action was necessary. Mr Salford's evidence was that no further concerns were raised by the claimant. Mr Glazier did not challenge Mr Salford's evidence on this point. There is no evidence in the text messages after the 29 August 2018 of the claimant raising this issue again or chasing MR Salford for information about the outcome. Given the number and frequency of the text messages exchanges between the claimant and Mr Salford we would have expected some reference to it in the text if, as the claimant alleged, he was actively chasing Mr Salford about the XY issue.
54. There is nothing in the text messages to suggest any deterioration in the relationship between the claimant and Mr Salford which we would have expected to see if Mr Salford had indeed "laughed in [the claimant's] face". We find that the relationship between them continued to be good until the suspension on the 23 November 2018. On 8 October 2018, for example, the claimant texts Mr Salford to say "you are such a great boss" (p.86) and refers to him in a text on 16 November 2018 as "boss of the year" (p.96).
55. Taking into account the contents of the text messages and our findings about the relative credibility of the claimant and Mr Salford, we prefer Mr Salford's evidence. We find he did not laugh in the claimant's face as alleged. We also find he did take steps to investigate the claims about XY but concluded that there were no grounds for further action at that point.
56. The claimant also claimed that Mr Salford's failure to report the protected disclosures to Ms Roberts in HR meant that the respondent could not say that it had fully investigated those disclosures (claimant's WS para 21.iii). It was not disputed that Ms Roberts did not know about the protected disclosures until the end of the probationary review meeting on 30 November 2018. There is, however nothing in the respondent's Whistleblowing Policy (pp.50-53) which suggests that a disclosure should be reported to or dealt with by HR. the policy says that a Director or Senior Manager will make enquiries. We find that that is what happened in this case. Ms Roberts's evidence, which we accept, was that it was Mr Salford who would deal with operational matters. We do not accept, therefore, that the failure to report the matter to Ms Roberts amounted to a failure to investigate the disclosures raised.

*The decision to change the shift pattern*

57. Mr Salford's unchallenged evidence (WS para 6) was that the Pick team normally worked 6 a.m. to 3 p.m. Monday to Thursday and 6 a.m. to 12 p.m. on Friday. The Replenishment Team (in which the claimant worked) normally worked 12 p.m. to 9 p.m. Monday-Thursday and 11 a.m. to 5 p.m. Friday.

58. Mr Salford gave undisputed evidence that the respondent would sometimes change the timing of the Replenishment Team shifts by moving them to earlier in the day but that it usually gave staff a number of weeks' notice before doing so. The claimant's evidence was that Mr Salford had in the past given him six weeks notice of the changes in shift patterns (claimant's WS para 2) and Mr Salford did not disagree with that.
59. Mr Salford did not dispute that for the week beginning 19 November 2018 he changed the Replenishment Team's shift to 10 a.m. to 7 p.m. Monday to Thursday and 10 a.m. to 4 p.m. on Friday without giving such advance notice. In his witness statement (WS para 22) Mr Salford's evidence was that he changed the shift because it was becoming increasingly difficult to manage shift patterns because of staff absences at what was the respondent's busiest time of the year. He therefore brought the shifts forward, in part so that members of the Pick team could help with replenishing the pick faces. That evidence was not challenged by Mr Glazier in cross-examination.
60. Mr Salford's evidence was that one reason for changing the shift pattern was to cater for uncertainty in staff numbers, including uncertainty about the claimant's own attendance. We find that the text messages corroborate that uncertainty. They show the claimant had not been in work on Friday 16<sup>th</sup> November or on Monday 19<sup>th</sup> November 2018 because of serious personal issues affecting his family. We find that at 10.22 on 19 November 2018 Mr Salford texted the claimant to ask him whether he would be in work the next day. His text explained he was "just trying to sort the staff situation out here" (p.96). In cross examination evidence he explained that there were only 4 members of a team of 7 in for the week of 19<sup>th</sup> November. He also gave unchallenged evidence that Bob McDonald, the shift supervisor, had cancelled his leave to provide cover that week. We accept that evidence, which is also corroborated by the notes of the meeting at which the claimant was dismissed (pp.107-108) in which Mr Salford is reported as saying that Mr McDonald was meant to be on leave all that week but had cut that leave short after Wednesday of that week due to the volume of work and other members of the team being off sick.
61. It was also not disputed that Mr Salford first told the claimant of the change in shift by text at 7:20 a.m. on Tuesday the 20 November 2018 (p.97 and Mr Salford's WS para 24). That text says "We are on 10-7 today if you are back in today pal". We find that text corroborates Mr Salford's evidence that he changed the shifts not knowing whether the claimant would be working that week of the 19 November 2018. There was no evidence that the change in shift applied only to the claimant. We find that the change applied to the Replenishment Team as a whole.
62. In answer to the claimant's texted question, Mr Salford confirmed that the change to 10-7 was "just for this week" (text at 9:02 on 20 November 2018 at p.97). The claimant then texted to ask whether Friday would be 10-4 or 11-5 and Mr Salford confirmed again that "10-7 is only this week. We'll be on 12-9 until end of Feb when it will be reviewed. Friday will be 10-4" (text message at 13:34 on 20 November on p.98). In response the claimant asked "Ok so this will definitely not change just so I can the care worker" to which Mr Salford replied "No wont change" at 13:50 he same day (p.98).

63. We find that Mr Salford did change the Replenishment Team's shift pattern for the week of 19 November 2019 and that he intended that change to be for one week only (at least until the matter was reviewed in February). We accept his evidence (which Mr Glazier did not challenge in cross examination) that he made that change because the Replenishment Team was down to almost 50% of its capacity at the respondent's busiest time of year.
64. We do accept that the change of shift without notice did cause the claimant particular difficulties. It is clear from the text messages between the claimant and Mr Salford on the 20-21 November 2018 (pp.96-97) that the claimant was struggling to rearrange his wife's carer rota so that he could leave to go to work by 10 a.m. rather than 12 p.m. Mr Salford recognised this difficulty by agreeing that the claimant could come in for 12 p.m. on the 20 November 2018 (text message at 8:44 on 20 November 2018 at p.97). In the event the claimant did not attend work on the 20 November nor on the 21 November.
65. Mr Salford's explanation of why he did not tell the claimant about the change of shift earlier was that he was very busy and simply forgot. We accept that evidence. It seems to us consistent with the evidence we have accepted about this happening during the respondent's busiest period and at a time when the team was depleted by absences. Mr Salford's evidence is also corroborated by his text message to the claimant at 8:44 on 20 November apologising for only letting him know about the shift change but "I've been rather busy" to which the claimant responded "I no" (text message at 8:48 on 20 November at p.97).
66. We find that by the afternoon of the 20 November 2018 Mr Salford had given the claimant a categorical assurance that his hours for Friday of that week would be 10-4 rather than 11-5.
67. The claimant worked his shift on Thursday 22 November 2018 but did not attend at work on Friday 23 November. The reason he gave for this was that Bob McDonald, his shift supervisor, had "changed [his] shift at 7 p.m. [on 22 November]" (text message to Mr Salford at 11:08 on 23 November 2018 at page 100).
68. The claimant's evidence was that Mr McDonald had told him at the end of his shift on Thursday 22 November 2018 that his shift on Friday started at 11 a.m. rather than 10 a.m. He set out what was said in his text message to Mr Salford at 11:24 on Friday 23 November 2018 "I said cya at 10 bob said no11" (p.101). We find that Mr McDonald did make that comment. Mr Salford did not challenge that the comment was made. However, he said (WS para 29) that if Mr McDonald did make the comment it would have been "a comment made in error because the usual start time for Friday shifts is 11 a.m.". In cross examination he accepted that there might well have been a failure on his part to confirm with Mr McDonald (who had come back off leave) that the shift time on Friday was 10-4 rather than the usual 11-5. Mr Salford's evidence (WS para 29), which we accept, was that he confirmed that it was he who had changed the shift to 10-4 and that Mr McDonald did not change his shift (text to the claimant at 11:20 on 23 November 2018 at

p.101).

69. The claimant in his statement (WS para 34) and in a text to Mr Salford (at 11:16 on 23 November 2018 at p.100) suggested that Mr McDonald had changed his shift 4 times that week. In an earlier text that same day (at 11:08 on p.100) he said that “4 times this week my shift has changed”. We do not accept that is accurate. Instead we find that Mr Salford changed the claimant’s shifts at the start of the week so they started at 10 a.m. We accept Mr Salford then agreed that the claimant could come in to work at 12 p.m. on the 20<sup>th</sup>. We do not think that can count as a “change of shift” because it was a change at the claimant’s request back to his previous shift pattern to help him ensure there were carers in place for his wife. We also do not accept Mr McDonald changed the Friday shift back to 11-5. Given Mr Salford’s categorical confirmation in the text messages that the shift was 10-4 we find it much more plausible that Mr McDonald had misunderstood the shift pattern for that Friday.
70. What we find, then, is that the claimant’s shift for the week of 19 November 2018 was changed by Mr Salford but he was given no advance notice of that change. We also find that Mr McDonald did make a remark to the claimant at the end of his Thursday shift which cast doubt on the start time of the Friday shift which Mr Salford had repeatedly said would be 10 a.m. We find that Mr McDonald had either misunderstood or not remembered that the Friday shift that week was due to start at 10 not 11. We don’t accept Mr McDonald actually changed the Friday shift start time from 10 to 11.
71. What we do accept is that given his home life and family circumstances at the time, even a passing remark by Mr McDonald casting doubt on the shift pattern would have caused the claimant agitation and upset. It is clear from the number of times he asked Mr Salford to confirm the shift pattern (pp.97-98) that it was very important for him to know for certain what the shift pattern was so he could ensure care for his wife while he was at work.

*The comparator named by the claimant in the direct discrimination complaint*

72. The comparator named by the claimant was Wictor Slaski (“Wictor”) who also worked in the Replenishment Team. Mr Salford dealt with the facts of his case in his supplementary witness statement dated 23 December 2019. That evidence was not challenged. We find that Wictor was asked to move to an earlier shift so that his mother Anna, who also worked for the respondent, could supervise a later production shift from 2 p.m.-11 p.m. That later production shift runs during the respondent’s busy period leading up to and over Christmas. The claimant had alleged that Wictor was allowed to change his shift to enable him to walk his mother’s dog. Mr Salford’s evidence (SWS para 6) confirms that there is some truth in that. We accept that Wictor’s mother agreed to the request to supervise the later production shift on condition that Wictor could be changed to an earlier shift pattern to cover her home commitments which included walking her dog.
73. We accept Mr Salford’s unchallenged evidence that to accommodate this in October 2018 he moved Wictor out of the Replenishment Team into the Goods-in Team which he also managed (SWS para 7). That meant that



Wictor's shift pattern changed to 8 a.m.-5 p.m. allowing his mother to supervise the evening production shift. That arrangement lasted during the busy period until January 2019 when Wictor returned to the Replenishment Team working on his normal shift pattern (SWS para 7).

74. We find that when Wictor was working on the Replenishment Team, he was working the same shifts as everyone else on that team including the claimant. That is confirmed by the clocking in sheets for Wictor (pp.128-129) when he returned to the Replenishment Team. We also find that the change to his shift pattern was made to accommodate a genuine business need, i.e. to allow his mother to supervise the respondent's evening production shift.

*The decision to suspend the claimant*

75. The respondent accepts that Mr Salford suspended the claimant on 23 November 2018. The suspension was on full pay. Mr Salford's evidence (WS para 30) was that he made that decision because of an inappropriate text message sent to him by the claimant on that date about Bob McDonald, the claimant's supervisor. The text referred to was sent by the claimant at 11:08 (p.100) and says "bob has not got a clue" and reported a conversation in which the claimant had said to another worker on the shift "we do it my way fuk bob...he is blind I run that shift yesterday not that fucker". He did finish the text with a "sorry for my language" but we accept Mr Salford's evidence (his WS para 30) that based on that text he believed that the relationship between Mr McDonald and the claimant had broken down. We also accept his evidence that he was concerned that that tension would come to a head while he was due to be on annual leave from Monday to Wednesday of the following week. That is consistent with the text he sent the claimant suspending him (at 11:11 on 23 November 2018 at p.100) which says "if you aren't coming in today then I don't want you on site until next Thursday [i.e. 28 November] as I am on annual leave until then and we'll deal with this then".
76. His evidence was also corroborated by the unchallenged evidence of Elizabeth Roberts. In her witness statement (para 5) she says that Mr Salford came to see her to show her the text message about Mr McDonald and to explain he had decided to suspend the claimant "so that another manager did not have to deal with the matter whilst [Mr Salford] was on annual leave".
77. Ms Roberts's statement also confirmed Mr Salford's evidence (WS para 30) that at that point he showed Ms Roberts the volume of text messages he was receiving from the claimant. We find that by the 23 November 2018 the claimant was usually sending Mr Salford a number of text messages a day and that from the end of October 2018 in particular those messages included references to the claimant's own mental health state (describing himself as "emotionally fucked") and the impact of his family circumstances (including the death of close relatives) on that mental state. We find that one trigger for the escalation in the texts of that nature from the end of October on was that the claimant had on 29 October 2018 found out that his wife had been subjected to a very serious sexual attack as a teenager. The texts from then on included some texts making threats of violence against the

perpetrators of that attack. Given that context, we find that by 23 November 2018 Mr Salford did not want any other manager to deal with the claimant in his absence.

78. The decision to suspend the claimant was confirmed by a letter from Ms Roberts dated 28 November 2018 (p.104). It said that the suspension was “following texts which were received from yourself on Friday 23 November 2018”. That letter said that Mr Salford and Ms Roberts would “discuss the matter in more detail” with the claimant on the 30 November 2018. It also explained that because the claimant was in his probationary period, the respondent’s full disciplinary procedure did not apply. We find that is consistent with the clause headed “Probationary Period” in the claimant’s statement of particulars of employment (p.45).
79. The letter enclosed a further letter (wrongly dated 28 November 2017) inviting the claimant to a probationary review meeting on Friday 30 November 2018. That letter (p.105) explained the probationary review meeting would cover all aspects of the claimant’s role, in particular his performance to date, attendance, time keeping, conduct and suitability for the role. It warned that one possible outcome of the review was termination of employment.

*The decision to dismiss the claimant*

80. The claimant was dismissed at the probationary review meeting held on 30 November 2018. That meeting was conducted by Mr Salford and Ms Roberts. Ms Roberts took notes during the meeting and the typed up version of the notes were included in the Tribunal bundle (pp.107-108). It was not suggested during the Tribunal hearing that the notes were inaccurate and we accept them as an accurate record of what took place at the meeting.
81. Based on those notes and the witness evidence, we find that the meeting was led by Mr Salford. He explained the purpose of the probationary review meeting to the claimant. He confirmed that he had suspended the claimant because of the text he had received from him on the 23 November 2018 and that he thought it only fair to deal with the matter himself when back from annual leave rather than leaving it to another manager to deal with. That is consistent with the finding we made above about the reason for the suspension.
82. The claimant responded to say that he felt it was unfair that he had been suspended because of his personal issues and family circumstances and Mr Salford responded by saying that they were aware of those issues and had tried to help by allowing the claimant to take annual leave at short notice (on the day of the request in some cases) and by changing his sickness absence to holiday leave so he did not lose pay.
83. The claimant then raised his unhappiness about Bob McDonald changing his shift and was (to quote the notes at p.107) “quite derogatory about Bob as his supervisor saying he couldn’t run a shift, was useless and kept disappearing”. Mr Salford reiterated that it was his decision to change the shifts that week and explained again his reasons for doing so.

84. We find (based on the meeting notes, para 31 of Mr Salford's WS and Ms Roberts's evidence at para 11 of her witness statement) that Mr Salford then said that the respondent would always try to help out individuals with difficult circumstances but that he did not appreciate his decisions being questioned when he was trying to accommodate everyone and make things easier for those people picking up the work load. We find he also told the claimant that sometimes he had to make decisions to suit the needs of the business and the employees and "that doesn't suit everyone".
85. We find that the claimant again expressed his respect for Mr Salford as a manager but also his frustration about what he said was the laziness of his colleagues on the Replenishment Team which meant that, in the claimant's opinion, he was running that shift. Mr Salford's response was to confirm that there were no concerns about the claimant's performance or time keeping but there were concerns about his absences and the volume and content of the text messages he was sending.
86. In terms of absences, Mr Salford told the claimant he had reached the trigger point under the respondent's absence policy (which we find was 3 absences in 12 months – confirmed in the letter of dismissal at p.109) and also raised concerns about short notice absences via last minute requests to take annual leave.
87. When it came to the text messages, we find Mr Salford told the claimant that as well as the content and volume of text messages being inappropriate, it was inappropriate to send messages in the evenings or over weekends.
88. We find that at that point (near the end of the meeting) Ms Roberts intervened to add that that the volume of texts the claimant was sending Mr Salford was inappropriate and that some of the texts (in the wording of her note) "portrayed him as a loose cannon". We find that comment angered the claimant and that in response Ms Roberts reminded him of the conversation she and he had had in the previous week when she had advised the claimant to stop messaging Mr Salford as it was "too much".
89. We find that Mr Salford then confirmed that he was terminating the claimant's employment because he had failed his probationary period. In the notes, the reason Mr Salford is reported as giving is "his absence and conduct in relation to the level of texts and the inappropriate nature".
90. At that point the claimant referred for the first time at the meeting to employees "smoking weed" on site, a number of individuals dealing drugs and a supervisor drinking on shift. The note (p.108) which the claimant did not dispute reports him as saying "now you have sacked me I'll tell you". It does not report the claimant referring back specifically to the protected disclosures made about AB and XY in July/August nor does it suggest that at that meeting he raised concerns about Mr Salford having failed to investigate those earlier disclosures. Mr Salford's evidence (WS para 32), which we accept, is that these were further allegations and that he said that the respondent would investigate those through their internal procedures.
91. The decision to dismiss the claimant was confirmed in a letter from Mr

Salford dated 4 December 2018 (p.109). It records the reasons for dismissal as being concerns about “absence and conduct”. As to absence, it notes that the claimant had 5 occasions of absence in 8 months. As to conduct, it says that “the volume and content of your text messages in relation to [the claimant’s personal circumstances over the weeks preceding his dismissal] have been wholly inappropriate. Ultimately this has resulted in the breakdown of trust between yourself and the company”.

92. Prior to the meeting, Mr Salford had prepared a note of the claimant’s various absences (p.106). Those absences are corroborated by the text messages in the bundle. We accept that some of those absences were taken as sick leave and some either taken as holiday or converted to holiday leave to ensure the claimant was paid for what would otherwise be unauthorised absences. As we report in the next section of this judgment, the claimant appealed against his dismissal (his letter of 10 December 2018 at p.110-111). He does not in that appeal letter dispute the number of absences recorded for him by the respondent. We note that the note at p.106 covers not only the claimant’s period of employment from 1 August 2018 but also his period as an agency worker with the respondent before he was confirmed as an employee. The reference in the dismissal letter to 5 periods of absence in 8 months therefore covers both the agency and employed periods. We find, however, that the claimant was absent for the periods set out at p.108. Not all of those were periods of sickness absence but many were short notice absences (taken as holiday leave) to deal with family crises. We find (based on the text messages) that a number of those absences taken as holiday leave were short notice arranged on the day by text message exchange with Mr Salford. We accept that the reason for those absences were the claimant’s family circumstances, including mental health crises experienced by the claimant’s wife. We find that Mr Salford was aware that was the case. Mr Salford also accepted in cross examination that he was not fully aware of the impact that the medication which the claimant was taking for his own mental health issues might be having on the claimant’s behavior. He conceded that had he been so aware that might have influenced his approach.
93. When it comes to the volume and content of the texts, we have already noted that the volume and content of the texts changed from the end of October 2018. It was at that point that the claimant found out what had happened to his wife and started to make threats of violence against the perpetrators. Some of those threats were in explicit terms. On 29 October at 10:52 the claimant sent Mr Salford a text message (at p.89) saying that he was going to “go in there work place and chop all their dicks off”.
94. The Tribunal asked Mr Salford why he had suspended the claimant in response to the text on 23 November 2018 but not taken action against the claimant in relation to that text on 29 October. His response, which we accept, was that he viewed the text about Bob McDonald on 23 November as being significant because the claimant and Mr McDonald had to work together. We find that by 30 November 2018 Mr Salford had formed the view that the claimant and Mr McDonald would not be able to work together in Mr Salford’s absence. We find that was based on the comments about Mr McDonald made by the claimant in his text on 23 November 2018 and on the fact that the claimant repeated similar comments at the review

meeting itself (p.107). We also find that by the 23 November 2018 Mr Salford had decided that the volume and content of texts he was getting from the claimant was “too much” (to use Ms Roberts’s wording). His and Ms Roberts’s evidence was that he had not previously raised the issue of the text messages with Ms Roberts but had been coping with them himself. We find that by 23 November 2018 he felt he could no longer do so.

95. The claimant’s case is that his dismissal was due to his having made protected disclosures. It is accepted that Mr Salford knew about the two protected disclosures because they were made to him. His evidence, however, was that those disclosures played no part in the decision to dismiss the claimant. In his witness statement he said he regarded those matters to have been dealt with in July and August and that they played no part in his decision to dismiss the claimant (WS para 33). We accept that evidence. It is consistent with the notes of the meeting (where the claimant does not refer to anything relating to protected disclosures until after he was told he was dismissed). It also seems to us to be consistent with our findings that the claimant did not follow up either of the protected disclosures after the end of August 2018.
96. We find it was Mr Salford who took the decision to dismiss. For the sake of completeness, we find that Ms Roberts did not know about the two protected disclosures until after the decision to dismiss was taken. Even if the decision to dismiss was partly hers, those disclosures could not therefore have played any part in that decision on her part.

*What happened after the dismissal*

97. It is part of the claimant’s case that the detriments as a result of his making protected disclosures included post-termination victimisation. That aspect of his claim was not fully clear from his statement nor from the skeleton argument submitted by Mr Glazier. However, from his letter of appeal dated 10 December 2018 (p.110-111) we understand the main complaints to be that he was denied an appeal against dismissal; denied the notes of the review meeting; and that (as set out in his letter 15 December 2018 to Ms Roberts (p.113)) he believed that the respondent had made deductions from the final payment to him.
98. The claimant’s letter of appeal against his dismissal dated 10 December 2018 states that the reason for his dismissal was not attendance or other issues but that he “sent many texts” to Mr Salford about illegal drugs being smoked in the workplace and that this “was an irritation to him”. Pausing there, we find that is not consistent with the facts. We have recorded above the texts making protected disclosures and find that it is an exaggeration to say the claimant sent “many texts” about drugs being smoked in the workplace. The allegation that this was an “irritation” to Mr Salford is not consistent with our findings that the relationship between the claimant and Mr Salford continued to be good until towards the end of November 2018.
99. The detriment alleged by the claimant is that he was denied an appeal against dismissal. It is not disputed that the claimant was not given an appeal against dismissal. Ms Roberts in her letter dated 21 December 2018 (p.114-115) responding to the claimant’s appeal confirms there is no right

of appeal because that is only given during the disciplinary procedure. As we noted above, the claimant's particulars of employment confirm that the disciplinary procedure does not apply during the probationary period. The same applies to the provision of notes. Ms Roberts's evidence was that (as with denial of an appeal) the request for notes was rejected because the decision to dismiss did not take place under the disciplinary procedure but by way of a probation review. We find it slightly surprising that the claimant was denied the notes of the meeting. However, Ms Roberts's evidence on this point was not challenged and we find that the reason the claimant was denied an appeal and the notes of the meeting was because Ms Roberts was following what she understood to be the respondent's processes. We accept that at the time she made those decisions she was aware of the protected disclosures, but accept her evidence that they did not play a part in her decision.

100. When it comes to the alleged deductions from the final payment to the claimant, we accept the explanation given by Ms Roberts at points 4 and 5 of her letter dated 21 December 2018 (pp.114-115). She confirmed that the respondent would not be clawing back any training costs (para 4) and that the respondent had decided to exercise its discretion in the claimant's failure not to make any deductions for absences in December. We find that the claimant did not subject the claimant to any detriment in terms of his final payment – if anything it treated him favourably.

### **Analysis and conclusions**

101. We now set out our analysis and conclusions in applying the relevant law to the facts we have found in relation to each of the issues we have to decide.

#### The detriment complaint

*Was the claimant subject to the alleged detriments set out in Employment Judge Sherratt's Order by the first, second and third respondent on the ground that he had made a protected disclosure?*

102. There are two parts to this question. The first is whether each of the alleged detriments took place and the second is whether it took place because the claimant had made either or both of the protected disclosures.
103. We have found that the following detriments did not occur:
- a. Mr Salford laughing in the claimant's face. We find that this did not happen in response to the claimant making either protected disclosure.
  - b. The respondent failing to investigate the matters raised in the two disclosures.
  - c. Post termination detriment consisting of deductions from the final payment made to the claimant.
104. We have set out our reasons for those findings in the "Findings of Fact" section of this judgment so will not repeat them here.
105. We have found that the following detriments did occur:

- a. Mr Salford changing the claimant's shift pattern for the week of 19 November 2018. We find Mr Salford did change the shift pattern for the Replenishment Team for that week. For the avoidance of doubt, we find that is the only detrimental shift change that took place. We do not accept changing the claimant's start time on the 20 November 2018 was a disadvantage. We also do not accept that Mr McDonald by his passing remark about an 11 a.m. start time changed the shift pattern again.
  - b. Mr Salford suspending the claimant on 23 November 2018.
  - c. Post termination detriment consisting of Ms Roberts refusing the claimant an appeal and copies of the meeting notes from the Probationary Review meeting on 30 November 2018.
106. We have set out our reasons for those findings in the "Findings of Fact" section of this judgment so will not repeat them here. We add that in his skeleton argument (para 6.6), Mr Hulse seemed to deny that the claimant had suffered the detriment of being denied an appeal because he was not contractually entitled to one. Given the definition of "detriment" in the case-law it seems to us that the denial of the appeal is a detriment in that it could reasonably be viewed by the claimant as a disadvantage. The fact that he was not contractually entitled to that appeal would not prevent it being so.
107. It is for the respondent to show the ground on which those acts of detriment were done. We deal with each detriment in turn.
108. The change of shift: As explained in the "Findings of Fact" section above, we accepted Mr Salford's evidence that he changed the shift for the week of 19 November 2018 to an earlier time because the Replenishment Team was reduced to almost 50% capacity so he needed help from other teams. We have carefully considered whether there is evidence which suggests that the decision was actually because of the protected disclosures. We have decided there is not.

First, we accept Mr Hulse's submission that there was a gap of some three months between the last contact between the claimant and Mr Salford about the protected disclosures. We found no evidence that the claimant followed up with Mr Salford about the disclosures after 29 August 2018 (at least not until after his dismissal). We accepted Mr Salford's evidence that so far as he was concerned, the issue of the disclosures had been dealt with back in August/start of September nearly three months before the decision to change shifts. In contrast, we rejected the claimant's evidence that he was constantly raising the issue with Mr Salford and this made him (to quote his appeal letter) "an irritation" to Mr Salford.

Second, the decision to change the shift affected not just the claimant but everyone on the Replenishment Team. It seems to us implausible that Mr Salford would have taken that decision (potentially to the detriment of the business) in order to disadvantage the claimant. Based on our findings of fact, we accept that Mr Salford's primary concern was keeping enough shift resource to enable the business to cope with customer demand. We also note that at the time the shift change was made, Mr Salford did not know whether the claimant would be in work the week of the changed shift.

Third, we do accept Mr Hulse's submission that the evidence of the relationship between the claimant and Mr Salford from the time the disclosures were made to the date of the decision to change the shift was made showed no ill-will towards the claimant on the part of Mr Salford. We accept that this might not always be a factor to carry much weight because someone who intended to treat a whistleblower detrimentally might decide to give the appearance of friendliness to disguise their true intent. We do not think that is the case here, however. The text messages between the claimant and Mr Salford show Mr Salford being very supportive of the claimant in circumstances where some of the texts he was receiving might have resulted in a very different reaction from a manager. This included agreeing that the claimant could come in at 12 on the 20 November 2018 even though his shift had been changed to 10-7.

Taking all that contextual evidence into account we decided that the respondent has established that the reason for changing the claimant's shift for the week of 19 November 2018 was on the grounds of business need rather than because he made protected disclosures.

Although the detriment is identified as "changing the shift pattern" we have also considered whether the way the claimant was notified of the shift change was a detriment on grounds of the protected disclosures made. We accept it was a detriment-Mr Salford only notified him by text on the morning of the 20<sup>th</sup> that the start time was 10. However, we have accepted Mr Salford's evidence that his failure to do so sooner was a genuine oversight at a busy time. In reaching that decision we've taken into account his direct evidence on that point and the first and third factors set out above in this paragraph.

109. The decision to suspend the claimant: We accepted Mr Salford's evidence that what triggered his decision to suspend was the text sent by the claimant on the 23 November 2018 which demonstrated that the relationship between the claimant and Mr McDonald had broken down. We find that that, together with Mr Salford's impending leave and his concern that another manager should not be left to deal with the situation were the grounds for the suspension. Mr Salford's focus was, we find, on making sure the business could keep going with the minimum disruption in his absence on leave. We do not accept the claimant's submission that the protected disclosures played any part in his decision. In reaching that decision we have also taken into account the first and third factors set out in the previous paragraph.
110. Refusal of appeal and meeting notes: This refusal was by Ms Roberts. There was no evidence that Mr Salford played any part in the decision. Ms Roberts's evidence was that the reason she did not allow an appeal or provide notes was that the claimant's case was not being dealt with under the respondent's disciplinary procedure which provides for these. We have reminded ourselves that we are not assessing the fairness or reasonableness of that decision but identifying the reasons for it. We accept the respondent's case that the claimant was dealt with under its probationary review process rather than its disciplinary procedure. That is made clear in the letter inviting the claimant to the meeting on the 30



November 2018 (p.104). It specifically says that “as you are in the probationary period the full disciplinary procedure may not apply” and enclosed an invitation to a probationary review meeting rather than a disciplinary meeting. We find that letter significant because we have found that it was sent by Ms Roberts at a time before she was aware of any protected disclosures by the claimant. The decision to deal with the claimant by way of probationary review rather than the disciplinary procedure was not one that could have been influenced by Ms Roberts being aware of protected disclosures by the claimant. Taking that into account alongside Ms Roberts’s evidence, we accept that the respondent has established that the ground for this detriment was that the respondent was not dealing with the claimant’s case under its disciplinary procedure but as a probationary review which meant he was not entitled to an appeal or notes. We reject the claimant’s submission that the ground for the detriment was that he had made the protected disclosures.

The automatically unfair dismissal complaint

*Was the reason, or if more than one, the principal reason, that the first respondent dismissed the claimant that he had made a protected disclosure?*

111. We remind ourselves that **Kuzel** says that the “reason for dismissal” is the set of facts which operated on the mind of the employer when dismissing the employee. The reason given for dismissing the claimant was a breakdown of trust between him and the respondent, linked in particular to his absence record and his conduct in terms of the volume and text messages sent to Mr Salford. As we set out in our findings of fact, we found that a key fact influencing Mr Salford’s decision to dismiss was the evidence that the relationship between the claimant and Mr McDonald was not sustainable. We found that Mr Salford based that view on the text message sent about Mr McDonald by the claimant on 23 November and what he said at the review meeting on 30 November 2018. We also accept Mr Salford’s own evidence that he could not have employees questioning his decision making in the way the claimant had questioned his decision to change shifts for the week of 19 November 2018. We also found that the claimant’s pattern of absence and the volume and content of texts was a factor which influenced the decision to dismiss. All of those findings of fact support the respondent’s case that the claimant was dismissed because the relationship of trust and confidence had broken down due to the claimant’s absences and conduct.
112. We remind ourselves that **Kuzel** says that there is no burden on the employee to prove a reason for dismissal. However, if they seek to contest the respondent’s reason they must produce some evidence to cast doubt on the reason put forward by the employer. In this case, the claimant’s evidence consists of having made two protected disclosures. We have explained when discussing the first and third factors in para 108 why we did not accept that the protected disclosures played a part in Mr Salford’s decision to suspend the claimant. Those same reasons apply to the decision to dismiss. We are satisfied that the protected disclosures were not in Mr Salford’s mind when he decided to dismiss the claimant. We therefore reject the complaint that the protected disclosures were the reason or

principal reason for the claimant's dismissal.

113. What we do accept is that the claimant viewed it as unfair that the respondent did not seem to have taken into account the full impact of matters like changes to his shifts on his home circumstances and the impact of that and the medication he was taking on his behavior. We have some sympathy with that view but that is not enough to enable the claimant's unfair dismissal complaint to succeed. The fairness of the decision to dismiss is not something we can consider because the claimant did not have two years' continuous employment.

The direct discrimination complaint

*Did the respondents treat the claimant less favourably by giving him short notice of shift changes?*

114. We have accepted that the claimant was given short notice of the shift change for the week of 20 November 2018. Mr Salford told him about the change by text on the morning of the 20<sup>th</sup> November. We need to decide whether that was also less favourable treatment than any relevant comparators.
115. We have considered whether Wictor was a relevant comparator. To be so, there would have to be no differences in the material circumstances between him and the claimant. We have decided that he is not an appropriate comparator. He was not in the Replenishment Team when the change to the shift pattern happened for the week of 19 November 2018. His shift change applied to him only and for very specific circumstances linked to his mother's working pattern. We heard no evidence of the notice given to him of his change in shift, which is the less favourable treatment complained of. It seems to us the better approach in this case is that sanctioned in **Shamoon** and **Brown**, namely to ask why the claimant was given short notice of the shift change.
116. As we have recorded above, we have accepted Mr Salford's evidence that his failure to give notice of the shift change to the claimant was an oversight on his part. We are satisfied that had the claimant been on work when the decision to change the shift was made, he would have been given earlier notice of the change. It was because he was absent that Mr Salford overlooked him. We do not accept that amounts to less favourable treatment. Given how busy Mr Salford was at that time, it seems to us he was equally likely to have overlooked telling any other employee who was off work of the shift change.
117. If we are wrong about that, however, and this did amount to less favourable treatment we have concluded that it was not "because of" the claimant's wife's disability. There was no evidence to support the contention that that was the reason for Mr Salford's action. In reaching that conclusion we have taken into account the burden of proof provisions. We are not satisfied that the claimant has proved primary facts from which we could conclude that the respondent may have directly discriminated against him in this way. The burden would not therefore pass to the respondent to provide an adequate

explanation or the treatment. Again, we accept that the provision of short notice of a shift change would have a greater impact on the claimant because of his wife's disability than on others. However, that is not the same as that disability being the reason for Mr Salford's action. We conclude that it was not and the claimant complaint of direct discrimination fails.

*Was any such less favourable treatment because of disability? The disability relied on is the claimant's wife's mental health issues. The respondent accepts the claimant's wife is a disabled person.*

118. We have dealt with this issue in discussing the previous issue.

The harassment complaint

*Did the respondent repeatedly give the claimant short notice of changes to his shifts?*

119. As is apparent from our findings of fact our conclusion is that the respondent did not do this "repeatedly". There was one occasion when Mr Salford gave the claimant short notice of a shift change. The only other incident which could possibly "count" under this issue was Mr McDonald's passing comment about being in by 11 made at the end of the shift on 22 November 2018.

*If so, was that unwanted conduct related to the claimant's wife's disability?*

120. Even taking into account the burden of proof provisions, we do not find that this was the case. As we have discussed in relation to the direct discrimination claim, there were no facts from which we could conclude that Mr Salford's failure to give more notice was related to the claimant's wife's disability. There was no evidence which could lead us to conclude that Mr McDonald's passing comment was related to the claimant's wife's disability. On that basis, the claimant's harassment claim fails.

*If so, did it have the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?*

121. It is not necessary for us to decide this point given that we have decided that any unwanted conduct was not related to the claimant's wife's disability. Had we been required to decide it we would have found that the unwanted conduct did not have the purpose of having a harassing effect nor was it reasonable for the claimant to have viewed it as having that effect.

Remedy

*If any of the claimant's claims succeed, what remedy is it appropriate to award him?*

122. This issue does not arise because we have dismissed all the claimant's complaints.

**Summary of conclusions**

123. We have decided that all the claimant's complaints fail.
124. As a Tribunal we felt it important to add some comments about this case. We accept there was in this case no reasonable adjustment complaint or other disability discrimination complaint other than the complaint of direct disability discrimination. There was opportunity for such complaints to have been identified because the issues in the case were established after two preliminary hearing and the claimant was represented by Mr Glazier throughout.
125. We were, however, concerned that although Mr Salford had been very supportive of the claimant, the respondent as an employer did not seem to have taken more proactive steps in response to the claimant's home situation and its impact on his working life. Mr Salford did on occasion make ad hoc changes to the claimant's work pattern (for example on 20 November) but there was no proactive overall approach to establishing whether the company could do more to enable him to balance his work and caring commitments.
126. With that in mind we were pleased to hear from Ms Roberts in her evidence that in 2019 she become a designated mental health first aider at the respondent. We would encourage her and the respondent to ensure managers are equipped to identify and proactively assist employees who are facing similar challenges to those faced by the claimant.

—  
Employment Judge McDonald

Date 9 April 2020

JUDGMENT SENT TO THE PARTIES ON

9 April 2020

FOR THE TRIBUNAL OFFICE

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**Annex: Protected disclosures and alleged detriments set out in Employment Judge Sherrat's Order of 10 July 2019.**

<p><b>Protected Disclosure 1</b> (admitted) <i>(2 August 2018 though raised subsequently)</i></p>	<p>The Claimant reported that an individual named [AB] was dealing cannabis to the warehouse staff.</p>	<ul style="list-style-type: none"> <li>• Marc Salford laughed in the Claimant's face</li> <li>• Failure to investigate</li> <li>• Change shift pattern</li> <li>• Suspension</li> <li>• Post termination detriment</li> </ul>
<p><b>Protected Disclosure 2</b> (admitted) <i>(1 August 2018 though also raised subsequently).</i></p>	<p>The Claimant reported that a warehouse worker name [XY] was smoking cannabis.</p>	<ul style="list-style-type: none"> <li>• Marc Salford laughed in the claimant's face</li> <li>• Change shift pattern</li> <li>• Failure to investigate</li> <li>• Suspension</li> <li>• Post termination detriment</li> </ul>