



EMPLOYMENT TRIBUNALS

Claimant:

Mrs L Vivian-Jones

v

Respondent:

Parity for Disability

Heard at:

Reading (by CVP)

On: 2, 3, 4, 5 August 2022

Before:

Employment Judge Hawksworth
Mrs F Tankard
Ms R Watts-Davies

Appearances

For the Claimant: In person

For the Respondent: Mr D Mold (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant was not subjected to detriment on the ground of having made a protected disclosure. Her complaint under section 47B of the Employment Rights Act 1996 fails and is dismissed.
2. The claimant was not dismissed by reason of having made a protected disclosure. Her complaint under section 103A of the Employment Rights Act 1996 fails and is dismissed.
3. The respondent did not fail to make reasonable adjustments for the claimant. The complaint under sections 20 and 21 of the Equality Act 2010 fails and is dismissed.
4. As the respondent did not subject the claimant to unlawful discrimination, the complaint of discriminatory constructive dismissal also fails and is dismissed.
5. The respondent did not make unauthorised deductions from the claimant's wages, as the claimant was not entitled to be paid for overtime. The complaint under section 13 of the Employment Rights Act 1996 fails and is dismissed.

REASONS

Claim and response

1. The claimant was employed by the respondent from 17 June 2019 to 20 March 2020 as the manager of one of its charity shops.
2. In a claim form presented on 14 April 2020 after a period of Acas early conciliation from 2 March 2020 to 2 April 2020, the claimant brought complaints of whistleblowing detriment and dismissal, disability discrimination and unauthorised deduction from wages.
3. The response was presented on 21 May 2020. The respondent defended the claim.
4. At a public preliminary hearing on 10 January 2022 Employment Judge Dobbie decided that the claimant was disabled at the material times within the meaning of section 6 of the Equality Act 2010.

Hearing and evidence

5. The final hearing took place by video.
6. At the start of the hearing the claimant made an application to strike out the respondent's response for non-compliance with case management orders in respect of the bundle and witness statements. The claimant had only received the bundle on 26 July 2022 (a week before the first day of the hearing). After that, she had been sent around 8 additional pages to be added to the bundle. There were six pages still missing from the bundle. As to witness statements, the claimant had received an email with the respondent's statements on 1 August 2022 (the day before the first day of the hearing) but she had not yet had time to read them.
7. The respondent said that there had been delays with clarifying the issues in the claim and that this was the reason for the late compliance with the tribunal orders. In March 2022, the respondent had made an application for an order that the claimant should provide further information, and had taken the view that in the meantime it was not possible to comply with the orders for preparation of the bundle and the witness statements. A preliminary hearing took place on 12 July 2022 at which the respondent's applications for the case management orders to be varied and for the final hearing postponed were refused.
8. The position at the start of the hearing before us was that the bundle was complete other than the missing pages identified by the claimant. The respondent's witness statements had been served on the claimant. The claimant had sent statements in letter form for her witnesses, but had not served a witness statement for herself.
9. We considered the claimant's application carefully. We decided that the response should not be struck out for non-compliance. Strike out is a very

severe sanction, and we noted that there had been some failures to comply fully with the orders on both sides. We took into account that the respondent had been seeking further information about the claim, and that the claimant had not exchanged a witness statement for herself.

10. Having decided that the response should not be struck out, we were faced with a choice between going ahead with the hearing in the four days available, or postponing the hearing, which would lead to a significant delay. If postponed, the dates for the rescheduled hearing would be likely to be around May 2024. We decided that it was in both parties' interests and in accordance with the overriding objective to go ahead, using some of the hearing time for the parties to complete their preparations. We decided to take the first day to allow the parties to complete the preparations for the hearing, and to start hearing evidence at 11.00 on day two. We gave directions to the parties for steps they were to take before then. These were:
 - 10.1. The respondent was to liaise with the claimant and add the missing pages to the bundle, and then send the claimant the final version of the bundle in hard and soft copy;
 - 10.2. The claimant was to read the respondent's three witness statements (24 pages in all) and prepare her questions for the witnesses by highlighting the points in each of their statements that she disagreed with;
 - 10.3. The claimant's further information document which started on page 90 of the bundle would be treated as the claimant's witness statement, and the respondent's counsel should prepare questions for the claimant on that basis, as her evidence would be heard first.
11. By the start of the second day of the hearing, there was an agreed bundle which had 415 pages. We refer to that bundle by page number.
12. The claimant produced some additional documents at the start of the second day. There were 18 pages called ET - 1 to ET - 18. There was an additional small bundle called B3, which had 49 pages. These documents were not all in the main bundle, but had previously been seen by the respondent (some were disclosed to the claimant as part of a data subject access request). These documents were all admitted by consent. We refer to the pages in bundle B3 as B3-1, B3-2 etc.
13. A medical report was also added to the bundle during the course of the hearing, by consent.
14. There was also a chronology. The respondent prepared the first version, and the claimant added some entries in red.
15. We heard evidence from the claimant on day two of the hearing. The evidence of the claimant's son Mr Gennaro was interposed during the afternoon to accommodate his availability. Towards the end of the day we had a 30 minute break for the claimant to take pain killers and rest. We continued after the break at the claimant's request, so that her evidence

could be completed by the end of the day, to allow her to discuss the case overnight with her husband who was assisting her.

16. We heard from the claimant's witnesses Ms Sinclair and the claimant's husband Mr Jones at the start of day three. We had a 30 minute break before the respondent's witnesses started, to allow the claimant some additional time before asking her questions. The respondent's witness evidence began at 11.30 on day three. We heard from the respondent's witnesses Ms Cooper (day 3), Mrs Stevens (day 3 and day 4) and Mr Turnidge (day 4).
17. Mr Mold and the claimant made closing comments on the afternoon of day four.
18. There was insufficient time within the four days for us to make our decision and deliver judgment, and so we reserved judgment. The judge apologises to the parties for the delay in the promulgation of this reserved judgment, this reflects the general pressure of work in the employment tribunals at present.

Issues

19. A discussion to identify the issues took place at a preliminary hearing on 8 July 2021. Clarification of the issues occurred after further information was provided by the claimant, and following the preliminary hearing on 10 January 2022.
20. A final agreed list of issues for determination was produced (pages 110 to 113 of the bundle). This is set out below with the original numbering retained for ease of reference. Although some of the points are slightly abbreviated in the list below, we considered the issues as agreed by the parties.
 1. Time limits/limitation issues
 - 1.1. Were all of the Claimant's complaints presented within the relevant time limits?
 - 1.2. In respect of any acts of discrimination, was there an act and/or conduct extending over a period?
 - 1.3. In respect of any claim for whistleblowing detriments or unlawful deduction from wages, was there a series of similar acts/deductions?
 - 1.4. In respect of any claims that are out of time, should time be extended under the applicable test?
 2. Constructive automatic unfair dismissal and constructive discriminatory dismissal

- 2.1. Was the Claimant dismissed within the meaning of s.95 ERA 1996 or s.39(7)(b) EqA 2010? i.e. Did the Respondent act in a way which entitled the Claimant to terminate the employment without notice?
- 2.2. The conduct the Claimant relies on are the below acts of alleged whistleblowing detriment / discrimination.
- 2.3. In respect of the constructive discriminatory dismissal claim only:
 - 2.3.1. Was / were the act(s) / omission(s) in contravention of the EqA 2010 as alleged below?
 - 2.3.2. Did the Claimant resign in response to those acts?
- 2.4. In respect of the claim under s.103A ERA 1996 only:
 - 2.4.1. Was / were the detriment(s) done or omitted to be done on the grounds of any proven protected disclosure(s)?
 - 2.4.2. Did the Claimant resign in response to such acts / omissions?
 - 2.4.3. If so, did the Claimant affirm the contract of employment before resigning?
3. Public interest disclosure and detriments (PID)
 - 3.1. Did the Claimant make one or more protected disclosures as set out below?
 - 3.2. Did the Respondent subject the Claimant to any detriments, as set out below?
 - 3.3. If so was this done on the ground that she made one or more protected disclosures?
 - 3.4. The alleged disclosures the Claimant relies on are as follows:
 - 3.4.1. On 20 January 2020, the Claimant informed the police about an incident in the shop; and
 - 3.4.2. On 20 January 2020, the Claimant informed Alison Cooper by telephone that she had made the above report to the police.
 - 3.5. The Claimant alleges that the disclosures are protected by law on the basis that she believes her disclosures tended to show:
 - 3.5.1. a criminal offence;
 - 3.5.2. a breach of a legal obligation;
 - 3.5.3. that a person's health and safety is at risk / endangered.
 - 3.6. The alleged detriments the Claimant relies on are as follows:
 - 3.6.1. On 20 January 2020, Alison Cooper was very angry with the Claimant for reporting the matter to the police stating, "What did Natasha do to encourage him to behave like this?" and asking the Claimant what the staff member had done to cause the incident;
 - 3.6.2. By telephone, on 20 January 2020 Christine Stevens "told the Claimant off" and accused her of being unprofessional for reporting the matter to the police;
 - 3.6.3. Neither Christine Stevens nor Alison Cooper visited the store or provided any adequate support to the Claimant or colleagues following the incident, including: (i) on 20 January 2020 the Claimant telephoning Alison Cooper for advice / support but was told she was unavailable; and (ii) Christine Stevens failing to provide support during working hours but calling the Claimant late in the evenings (around 9pm) to discuss the matter;

- 3.6.4. Alison Cooper spoke negatively about the Claimant to Natasha Dos Santos stating “what has that woman caused now!!”;
- 3.6.5. Members of the management team spoke negatively about the Claimant in electronic communications, as follows: (i) a former support manager stating she wished the Claimant had cancer and that she could return to the store as manager;
- 3.6.6. On 12 February 2020 Alison Cooper threatened the Claimant that she would extend her probation period in a face to face visit to the Church Crookham store.

4. Reasonable adjustments: EQA, sections 20 & 21

- 4.1. Did the Respondent know or could it reasonably have been expected to have known that the Claimant was a disabled person?
- 4.2. Did the respondent have the following provisions, criteria or practices “PCPs”:
 - 4.2.1. Not providing training to new staff joiners / store managers;
 - 4.2.2. Not providing IT support to store managers;
 - 4.2.3. Understaffing the store;
 - 4.2.4. Requiring the store remain open even the it was understaffed;
 - 4.2.5. Requiring the Claimant to work 6 days a week;
 - 4.2.6. Not holding a return to work interview after an employee has an emergency admission to hospital and takes time off work or after returning to work following a period of time off recovering from surgery;
 - 4.2.7. Not offering a phased return to work following a staff member returning to work after a period of time off for surgery.
- 4.3. Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that she:
 - 4.3.1. suffered increased stress which caused her pain due to her condition and exacerbation of other symptoms;
 - 4.3.2. had to work excess hours (to make up for the short-staffing) which in turn caused stress and exacerbation of her symptoms;
 - 4.3.3. had to resign to protect her health.
- 4.4. If so, did the Respondent know or could it reasonably have been expected to have known the Claimant was likely to be placed at any such disadvantage?
- 4.5. If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:
 - 4.5.1. Providing adequate training to new staff joiners / store managers;
 - 4.5.2. Providing IT support to store managers;
 - 4.5.3. Allocating more staff to the store;
 - 4.5.4. Allowing flexible working arrangements or reduced hours;
 - 4.5.5. Holding return to work meetings after a period of absence;
 - 4.5.6. Allocating some of the Claimant’s duties to someone else;

- 4.5.7. Offering a phased return to work following a significant period of absence.
- 4.6. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?
- 5. Unauthorised deductions
 - 5.1. Was the Claimant entitled to be paid for overtime? The Claimant asserts that she had a contractual right to be paid for overtime.
 - 5.2. If so, did the Respondent make unauthorised deductions from the Claimant's wages by failing to pay her for the following overtime:
 - 5.2.1. The Claimant relies on an "additional hours sheet"

Findings of fact

- 21. We make the following findings of fact about what happened. We have not included here everything that we heard about during the hearing. Our findings focus on aspects of the evidence which we found most helpful in determining the issues set out above. Where there is a dispute about what happened, we consider the evidence we have heard and the documents we have read, and we decide what we think is most likely to have happened.
- 22. The claimant joined the respondent in June 2019 in the role of shop manager for one of the respondent's charity shops. She had had an interview with the respondent in 2017, for the post of assistant manager. Although the claimant was not successful in that application, the respondent kept her details on file. When a shop manager role became vacant, they approached her directly in February 2019 to offer her that role.
- 23. On 8 March 2019 the claimant had a meeting with Christine Stevens, the respondent's senior shops manager (page B3-2). They met in a coffee shop. The claimant said that at this meeting she told Mrs Stevens about her disability. Mrs Stevens said that the claimant did not tell her about her disability during this meeting. When she completed an employee information form on 3 June 2019, the claimant wrote 'N/A' in the space for information about current medical conditions and medications. She disclosed an allergy to bee stings (page 129). She said that she did not provide information about her disability because Mrs Stevens told her at this meeting that she should not mention it in writing, as the condition was managed and was not a problem for a disability charity.
- 24. We have to decide what we think is more likely. We think it is more likely that the claimant did not tell Mrs Stevens about her disability in this meeting. We reach this finding because we think it is unlikely that a senior manager in a disability charity would have suggested that the claimant should hide her disability. Mrs Stevens' account is also consistent with the documents we have seen. In particular, the claimant's emails to the respondent while she was on sick leave do not suggest that the claimant

had previously informed the respondent of her medical history. It is understandable that the claimant might not want to go into details, but there is no suggestion in the correspondence between her and the respondent that she had given them any background about her health condition. Her correspondence sounds as if she was telling them about a newly emerged health issue which was being investigated (for example, in an email on page 195 the claimant says she has 'no idea... what's wrong').

The claimant's role

25. The claimant signed a contract of employment on 3 June 2019. It said that she was entitled to an annual salary and to time off in lieu for additional hours worked (page 120). There was no entitlement to pay for additional hours.
26. The claimant began her role on 17 June 2019. She worked 4 days a week, Monday to Thursday (page 120). At the start of her employment she had a detailed handover with the shop's previous manager. The claimant was provided with five modules of online training including training on stress awareness, accident reporting, fire and risk awareness. She completed some of the online training (page 302).
27. As the shop manager, it was the claimant's responsibility to arrange staff and volunteer rotas (pages B3-13, 238, 270). There were staffing issues in the claimant's shop when she joined, because two support managers left at about this time. In August 2019 one of the support managers who had decided to retire went to the respondent's head office. While she was there she spoke to someone about the claimant. A volunteer who was there overheard what she was saying. The volunteer reported back to the claimant that the support manager had been 'bad mouthing' her, and told her what she had overheard. This information was therefore passed on to the claimant by someone who had overheard it. This is not a sufficient evidential basis from which we can reach a finding that what was passed on to the claimant was actually said on that occasion.
28. The respondent was flexible about opening hours if there were staffing issues. For example in September 2019 the claimant asked to shut the shop a little earlier than usual, at 4.00pm, because of staffing issues, and Mrs Stevens had no problem with this (page B3-10).
29. The claimant threw herself into her role, and put in extra hours redecorating and refreshing the shop. Her husband and her son helped her with this and with fundraising for the charity.
30. The claimant also suggested selling some of the respondent's stock by eBay, to increase sales. The respondent agreed. The shop had no computer and no wifi connection and this made it difficult for the claimant to deal with the eBay sales and other administration while at work. The claimant often took work home with her when she needed to access the internet.

31. At the suggestion of the respondent's IT support officer, in July 2019 the claimant bought a laptop on the respondent's account (page B3-6). Steps were being taken to get an internet connection in the shop but there was a delay with this.
32. The respondent felt that the claimant was doing a lot of extra work that was not expected of her. In September 2019 Mrs Stevens told the claimant that she shouldn't have to take work home with her, and suggested that she 'slow down the ebay' while issues with the shop were being sorted (page B3-11). The claimant said she would keep it going as it was working well (page B3-12).
33. In September 2019 the claimant had a week off after being rushed to hospital (page 195). The claimant told the respondent that she would require surgery for removal of a cyst (page 197). Cover was arranged while the claimant was on sick leave, and there were some times where the shop had to open later than normal (page 196).
34. On 25 September 2019 the claimant suggested reducing her days to 3 days a week (B3-10). The respondent agreed to this on 27 September 2019. Mrs Stevens suggested that a shorter week might be better for the claimant, and said she had been worrying about the claimant's health (page B3-12).
35. On 1 October 2019 the respondent sent the claimant copies of various risk assessment documents, at the claimant's request (page 198).
36. The claimant's role was subject to a six month probationary period. The claimant had a three month probationary review with Mrs Stevens on 11 October 2019 (page 211-215). Mrs Stevens told the claimant that it was expected that weekly sales and footfall for the shop would increase. The claimant did not feel that the expected increases were realistic, but she did not write this in the record of the review. She wrote that she felt supported by Mrs Stevens and that her aims for the next year were to ensure that footfall and sales continued to grow (page 213 and page 215). In her evidence to us the claimant said that she had initialled the review document at the end (page 215), but had not initialled the objectives on page 211. She said the initials on page 211 must have been forged. We think it is unlikely that Mrs Stevens or someone other than the claimant would have initialled the objectives on page 211 as the claimant. It is more likely that, if the claimant had not initialled these boxes, they would have been left blank. There would have been no reason for Mrs Stevens to initial page 211 to pretend that the claimant had done so, when the claimant had signed the last page of the review form in any event.
37. On 13 November 2019 the claimant was signed off sick for surgery. The fit note said 'abdominal/bowel operation' and that the claimant would need 8 weeks off work to recover (page 216).
38. The claimant returned to work on 14 January 2020. She worked Tuesdays and Thursdays only for the first two weeks so. Mrs Stevens advised her to

be careful not to do too much too soon (page 219). Alison Cooper, the respondent's executive director, attended the shop on 14 January 2020 to welcome the claimant back to work and have an informal catch up with her.

39. On 15 January 2020 a company called Field Training Services carried out a health and safety risk assessment and inspection for the shop where the claimant worked (page 221-236).

The incident in the shop

40. On Monday 20 January 2020 there was an incident in the shop involving a customer, a staff member and a volunteer. The claimant was not in the shop on the day of the incident.
41. On 21 January 2020, the parents of the volunteer attended the shop and spoke to the claimant. The claimant telephoned Ms Cooper. She was unable to get through at first, but she spoke to Ms Cooper at around 9.00am that morning. She only gave her a broad outline of what had happened. Ms Cooper suggested steps that the claimant should take, including speaking to the customer to explain that the behaviour was not appropriate. She said that if the behaviour continued the claimant could ask the customer not to come to the shop, although this might be difficult to enforce. She said if things became problematic, the local police support officers (PCSOs) could be alerted. Shortly after the call at 9.17am, Ms Cooper sent an email confirming their discussion (page 237).
42. The claimant said that during this call Ms Cooper was very angry with her for reporting the matter to the police, and that she asked the claimant, 'What did Natasha do to encourage him to behave like this?'. We find that Ms Cooper was not angry during this call and that she did not ask the claimant this question. We make this finding because the claimant's recollection of the chronology and her conversations with Ms Cooper and Mrs Stevens was not clear: this conversation took place on 21 January, not 20 January as alleged, and the claimant did not tell Ms Cooper on this day that she had made a report to the police because she had not yet contacted the police. The claimant also said, and we accept, that at this stage she only gave Ms Cooper an outline of what had happened. We think it is unlikely that Ms Cooper would have asked the claimant what Natasha Dos Santos had done, especially if she was not aware of any details about what had happened. Finally, the email Ms Cooper sent after the call is friendly and helpful, thanking the claimant for the call and asking her to let Ms Cooper know how she gets on. There is no suggestion that Ms Cooper thought the claimant or any staff member had done anything wrong.
43. In their conversation with the claimant on 21 January 2020 the volunteer's parents were very concerned about what had happened, and told the claimant that the incident ought to be reported to the police straight away. The claimant had details for two neighbourhood PCSOs, so she emailed them on the same day (21 January 2020) to ask for advice and guidance.

44. Later the same day, the customer who had been involved in the incident came into the shop. The claimant decided that she should ban him from coming to the shop and immediately did so (page 239).
45. Later on 21 January 2020 the claimant emailed Ms Cooper to let her know that she had contacted the police (page 241). Ms Cooper replied that evening to say that she would have preferred the claimant to take the warning option that they had discussed, but she said 'what is done is done'. Ms Cooper suggested that the claimant should chat to Mrs Stevens as she had experience with similar incidents and would be able to advise on the best approach. She said the claimant should let her know how her conversation with the customer went, and 'if we need to escalate our approach'. She referred the claimant to online training for staff and volunteers around lone working and health and safety. She said she could offer access to a computer at head office for this if needed (page 240).
46. Later that evening the claimant forwarded her email exchange with Ms Cooper to Mrs Stevens and sent her an update (page 239). She explained why she felt it was necessary to contact the police, and apologised that she did not have explicit permission to ban the customer. She explained that she felt it was a safeguarding issue.
47. The claimant spoke to Mrs Stevens on the same evening. At the time, Mrs Stevens was not working normal hours as a close family member was in hospital with serious health issues. She and the claimant often caught up by phone at around 9.00pm in the evening after work. Sometimes this was at the claimant's suggestion (for example, page 408). The claimant would have preferred not to have had work calls in the evening, but she did not tell Mrs Stevens this as she felt she had to accommodate her. During the call on 21 January 2020, the claimant told Mrs Stevens that she had been told by the police to keep the incident confidential.
48. On 22 January 2020 Ms Cooper visited Mrs Stevens at another one of the respondent's shops. They discussed the incident that had taken place at the claimant's shop. Mrs Stevens did not fully update Ms Cooper, because she was unsure whether she could, in light of what the claimant had said about confidentiality. Later that day, the claimant called Mrs Stevens. Mrs Stevens accepted in her statement that during this call she told the claimant that Ms Cooper was very annoyed about the claimant going beyond her advice. Mrs Stevens suggested to the claimant that Ms Cooper needed to be updated on the detail of the incident so that she understood the seriousness of it (page 273 and 334).
49. Ms Cooper spoke to the claimant again on 23 January 2020.
50. A PCSO visited the shop on 24 January 2020 (page 246). He took statements and advised that the customer should be banned from the shop.

51. By 28 January 2020 the claimant had taken some additional steps. She bought some security devices including an alarm bell, camera and personal alarms. She also made some changes to the rota. She updated Mrs Stevens by email on 28 January 2020 (page 242) after they tried to speak by phone but were cut off.
52. On 29 January 2020 the PCSO visited the shop again (page B3-27).
53. Also on 29 January 2020 Ms Cooper called the shop and the claimant updated her and forwarded her email update of 28 January 2020 (page 242). During this call, the claimant gave Ms Cooper details of the incident on 20 January 2020 which Ms Cooper had not previously been aware of. Later on 29 January 2020 Ms Cooper emailed the claimant asking her to prepare a timeline with details of the incident, and the steps taken (page 244).
54. The following day, Ms Cooper met with the claimant. She sent the claimant safeguarding training information, copies of the respondent's safeguarding policies and links to some counselling and support organisations. She also asked for receipts for the security devices (pages 249 to 268).
55. On 30 January 2020, the claimant provided Ms Cooper with another update (page 269). She said she was working on the timeline. She identified some urgent health and safety issues, including a health and safety policy and procedure manual, and issues with the first aid kit.
56. On 31 January 2020 Mrs Stevens emailed the claimant (page 274). She said she had heard that Ms Cooper and the claimant had met up, and that Ms Cooper was up to speed and had provided policy and support information. Mrs Stevens said she thought there was a breakdown in communication as Ms Cooper was not aware that the volunteer's parents had visited the shop. Mrs Stevens said she had been aware of this but she had not told Ms Cooper as she understood that she had been told this in strict confidence because of the police investigation.
57. The claimant replied to Mrs Stevens on 31 January 2020 (page 273). She said the health and safety policy and procedure manual and the first aid kit issues were resolved. She was unhappy about Mrs Stevens' response to her when she had called her on 22 January about the incident in the shop. The claimant said she felt she was being patronised.
58. Mrs Stevens emailed the claimant on 1 February 2020 (page 275). She apologised if the claimant felt she had been patronising. Mrs Stevens said that the breakdown in communication was between Ms Cooper and herself, because Mrs Stevens did not fully understand how much was confidential.
59. The claimant replied to Mrs Stevens, accepting her apology (page 276).

Extension of the claimant's probation

60. The claimant's six month probation period was due to have ended on 17 December 2019. On 12 February 2020 Ms Cooper went to the shop to meet with the claimant. After the meeting, Ms Cooper emailed the claimant to say that it was necessary to extend her probation period because of the difficult circumstances and the extended time off which the claimant had had (page 279).
61. The claimant replied by email on the same day (page 278). She was unhappy that her probation was being extended when there had been no previous indications of any issues with her performance. She said she had had no regular support throughout her time with the respondent or during her recovery from her operation. She asked whether the reason for the extension of her probation was because one of the shop's support managers had given her resignation.
62. On 13 February 2020 Ms Cooper replied to the claimant (page 278). She said that the claimant had been away from the workplace for over 8 weeks, which was why her probation period was only now coming to an end. She said that the claimant's plans in relation to shop takings had not yet produced results, and that she stood by her decision to extend her probation period. Ms Cooper's decision was based on the weekly reports of takings which she received from each shop. She reviewed the sales figures for a six month period and found that sales in the claimant's shop were significantly lower than in a comparable shop which usually had similar sales.
63. Later that evening the claimant emailed Ms Cooper to say that her probation period had finished by default on 17 December 2019 and that she did not feel any extension to her probation period was justified. Ms Cooper suggested a meeting to discuss mutual concerns (page B3-36).
64. On 17 February 2020 after a meeting the claimant told Ms Cooper about her disability (page 293). We find that this was the first time the respondent knew about the claimant's disability.

The claimant's resignation

65. On 24 February 2020 Ms Cooper and the claimant had a meeting at the shop to explore ways to monitor shop performance and maximise revenue (page 287).
66. Later that day, the claimant sent an email to Ms Cooper with her resignation (page 291). She gave 4 weeks' notice.
67. The claimant gave her reasons for resigning in the email. She said she believed that there were many factors impacting the shop which would not easily be resolved, and that she was being blamed and accused of things that were beyond her control. She said that she did not feel supported and that she felt she was being monitored or micromanaged. The email was sent after the meeting to discuss shop performance and revenue, and begins by referring to the meeting and saying 'I do not feel this is an

acceptable working way forward'. We find that these parts of the email refer to the falling shop sales and footfall and the respondent's expectations of the claimant in this respect. The claimant did not think the respondent's expectations were realistic.

68. In her email the claimant also said she had been indirectly bullied by previous staff and she did not want to be subjected to stress as a result. She referred to her disability and said that she was resigning as wrongful dismissal under the Equality Act.
69. Ms Cooper replied on 25 February 2020 (page 291). She said she would be happy to have a discussion with the claimant about her continued employment but that if the claimant's decision was final they would accept it. She referred to the claimant's recent disclosure of her disability, and said she was going to propose a referral to an occupational health firm to see what could be done to support the claimant in her role.
70. On 29 February 2020 Ms Cooper went to the shop. When discussing a complaint with Ms Dos Santos, the shop's support manager, Ms Cooper said, referring to the claimant, something like, 'What has that woman caused now?'

The claimant's grievance

71. On 28 February 2020 the claimant raised a grievance (pages 293-296).
72. The respondent asked its treasurer, David Turnidge, to carry out an investigation into the claimant's grievance.
73. The claimant was signed off sick from 2 March 2020 until the end of her notice period (page 298 and page B3-38). Her last day of employment with the respondent was 20 March 2020.
74. Mr Turnidge identified that the claimant's grievance raised 31 separate concerns. He carried out some initial enquiries into each of these concerns. He conducted an analysis of the sales at the claimant's shop. This showed an overall downward trend for sales in the claimant's shop in the 10 months from June 2019, while sales at the comparable shop did not show the same trend (pages 305-306). He spoke to the people named in the claimant's grievance and considered relevant documents. He prepared a detailed draft report (pages 309-356). The draft report included areas on which he required further clarification from the claimant.
75. Mr Turnidge sent his draft report to the claimant on 17 April 2020. This was during the first national lockdown for covid. Mr Turnidge suggested that the claimant could provide written input, following which he would update his report, and then they could arrange a zoom meeting or phone call to discuss her grievance further (page 307).
76. As part of his investigation, Mr Turnidge carried out an exercise to check that the claimant had been correctly paid. He found there had been a small

underpayment of around £80.00. His suggestion was that the claimant should be paid an extra £217.00 to compensate her for the error and this payment was made.

77. The claimant did not reply to Mr Turnidge, and so the grievance report was not finalised.

The law

Protected disclosure

78. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is:

78.1. a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' set out in section 43B has occurred, is occurring or is likely to occur).

78.2. which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

79. The relevant failures include information that there has been a criminal offence committed, a failure to comply with a legal obligation, or that a person's health and safety has been endangered.

80. Section 43C says:

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person."

81. Section 43F allows for disclosures to prescribed persons. Police forces (or chief constables of police) are not prescribed persons under this section.

Protected disclosure detriment

82. Section 47B of the Employment Rights Act says:

“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.”

83. The test for whether a detriment was done ‘on the ground that’ the worker has made a protected disclosure is set out in *Fecitt and others v NHS Manchester* [2012] IRLR 64, CA. What needs to be considered is whether the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer’s treatment of the worker.

Burden of proof in protected disclosure detriment

84. In a complaint of detriment, section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that where all of the other elements of a complaint of detriment are proved by the claimant, then the burden of proof will shift to the respondent to show that the detriment was not done on the ground that the claimant had made a protected disclosure.

Automatic unfair dismissal

85. Section 103A of the Employment Rights Act provides that the dismissal of an employee is unfair where the reason (or, if there is more than one reason, the principal reason) for the dismissal is that the employee made a protected disclosure. The question for the tribunal is therefore whether the sole or principal reason for dismissal is that the employee made a protected disclosure (*Fecitt and others v NHS Manchester*).
86. A dismissal which is contrary to section 103A is ‘automatically’ unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.
87. The definition of dismissal which applies to section 103A includes constructive dismissal. Section 95(1)(c) provides that an employee is dismissed where:

“the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employer’s conduct.”

Failure to make reasonable adjustments

88. The Equality Act 2010 imposes a duty on employers to make reasonable adjustments for disabled employees. The duty comprises three requirements, in this case, the first requirement is relevant. This is set out in sub-section 20(3):

“(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not

disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

89. Under section 21, a failure to comply with the duty to make reasonable adjustments amounts to unlawful discrimination.

90. Paragraph 20 of schedule 8 of the Equality Act says that an employer, A, is not subject to a duty to make reasonable adjustments:

“if A does not know, and could not reasonably be expected to know –

...

(b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.”

91. The EHRC Code of Practice describes the duty to make reasonable adjustments as:

‘a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled’.

Constructive discriminatory dismissal

92. Section 39 of the Equality Act 2010 explains the ways in which discrimination in employment is prohibited. Section 39(2)(c) prohibits discrimination ‘by dismissing’ the employee. Section 39(7)(b) says that the reference at section 39(2)(c) to dismissal includes constructive dismissal, as it includes a reference to the termination of B’s employment:

‘by an act of B’s (including giving notice) in circumstances such that B is entitled, because of A’s conduct, to terminate the employment without notice’

93. In *De Lacey v Wechsels Limited t/a The Andrew Hill Salon* [2021] IRLR 547, the EAT explained the correct approach to considering whether a constructive dismissal is discriminatory:

“In order to deal with this question, the Tribunal had to ask itself two subsidiary questions:

(1) Were any of the [events which gave rise to the constructive dismissal] themselves tainted by ...discrimination; and

(2) In light of the answer to (1), did the discriminatory matters sufficiently influence the overall repudiatory breach so as to render the constructive dismissal discriminatory?"

Conclusions

94. We have applied these legal principles to the facts as we have found them, to reach our decisions on the issues for determination by us. We have approached the issues in the following order: protected disclosure detriment and dismissal, failure to make reasonable adjustments and constructive discriminatory dismissal, and unauthorised deductions from wages.

Protected disclosure

95. In closing submissions, the respondent accepted that the claimant made two protected disclosures as she alleged. These were set out in the list of issues at paragraph 3.4 as follows:

95.1. On 20 January 2020, the Claimant informed the police about an incident in the shop; and

95.2. On 20 January 2020, the Claimant informed Ms Cooper by telephone that she had made the above report to the police.

96. We have found that the two alleged disclosures were made on 21 January 2020, not 20 January 2020 as the list of issues said. We have also found that the second disclosure was made by email rather than by telephone.

97. It was not entirely clear to us how the disclosures met the requirements of sections 43B to 43H. The disclosure to the police for example was neither a disclosure to the claimant's employer under section 43C nor a disclosure to a prescribed person under section 43F. However, in light of the respondent's concession, we did not need to consider how the legal tests for protected disclosures apply to these two disclosures.

Protected disclosure detriment

98. The claimant alleged that six acts of detriment were done because of her protected disclosures (the six acts are set out at paragraph 3.6 of the list of issues). We have to consider, in relation to each of these acts:

98.1. whether the act took place as alleged;

98.2. if it did, whether the act was a detriment; and

98.3. if it was, whether it was done on the ground that the claimant had made a protected disclosure.

99. The test for whether any detriment was 'on the ground of' a protected disclosure is whether a protected disclosure materially influenced the respondent's treatment of the claimant.

100. Issue 3.6.1: The first act the claimant complained of is: “On 20 January 2020, Alison Cooper was very angry with the Claimant for reporting the matter to the police stating, “What did Natasha do to encourage him to behave like this?” and asking the claimant what the staff member had done to cause the incident”.
101. We have not found that this occurred as alleged. We have not found that Ms Cooper was angry with the claimant on 20 or 21 January 2020, or that she asked a question like this about Ms Dos Santos. This allegation fails on the facts.
102. Issue 3.6.2: The claimant complained that by telephone, on 20 January 2020 Christine Stevens “told the Claimant off” and accused her of being unprofessional for reporting the matter to the police.
103. We have found that the call between Mrs Stevens and the claimant that this allegation relates to took place on 22 January 2020. We have not found that in that call Mrs Stevens told the claimant off or accused her of being unprofessional. We have found that she told the claimant that Ms Cooper was very annoyed that the claimant had gone beyond her advice. She did so not as a criticism of the claimant, but to explain why she felt that Ms Cooper needed to be told more detail about the incident. Mrs Stevens wanted to explain to the claimant the difficulties which were arising as a result of Ms Cooper not being aware of the full details, and the confidentiality limitations Mrs Stevens understood she was under preventing her from discussing the matter with Ms Cooper. When Mrs Stevens made this comment, the claimant already knew that Ms Cooper would have preferred the claimant to take the action that they had discussed, because Ms Cooper had told her this in an email and had said ‘what’s done is done’. In the circumstances, Mrs Stevens’ comments about Ms Cooper to the claimant were not a detriment to the claimant.
104. Issue 3.6.3: The claimant said that neither Mrs Stevens nor Ms Cooper visited the store or provided any adequate support to the claimant or her colleagues following the incident.
105. We have found that Ms Cooper visited the claimant at the shop on 30 January 2020. Mrs Stevens did not visit the shop because she was not working normal hours for personal reasons. Mrs Stevens’ decision not to visit the shop was not materially influenced by the fact that the claimant made protected disclosures. She would not have acted any differently in relation to any incident at the claimant’s shop at the time. Mrs Stevens was relying on Ms Cooper to assist with areas that would normally have been within Mrs Stevens’ remit, for personal reasons. This part of the allegation fails.
106. As to the support provided to the claimant, we have found that both Mrs Stevens and Ms Cooper were in telephone and email contact to provide support to the claimant and advice about what steps to take. For example, Ms Cooper emailed the claimant on 21 and 22 January 2020 to set out advice and guidance to her. She told the claimant to speak to Mrs

Stevens, as she had experience with similar incidents. When the claimant told her more details of the incident, Ms Cooper sent the claimant details of safeguarding training and policies, and counselling support links on 30 January 2020. Mrs Stevens spoke to the claimant on 22 and 23 January 2020 and tried to speak to her on 28 January 2020. She followed up with a number of emails. The respondent did provide adequate support to the claimant and her colleagues following the incident. This part of the allegation fails on the facts.

107. As to issue 3.6.3 (i), we have not found that the claimant tried to telephone Ms Cooper for advice on 20 January 2020; she tried to call her on 21 January. When she did so the claimant was unable to get through to Ms Cooper the first time she called, but she did get through fairly quickly after that. She had spoken to her by 9.17am. This also fails on the facts, as the incident did not happen as alleged.
108. As to issue 3.6.3 (ii), we have found that Mrs Stevens and the claimant did have telephone calls at around 9.00pm in the evenings to discuss the matter. Mrs Stevens thought this suited them both, and the claimant did not explain that she would have preferred not to have had work calls at that time. On at least one occasion the claimant asked Mrs Stevens to call her in the evening. The evening calls was not a detriment to the claimant. Even if they had been, they were not done on the ground that the claimant had made a protected disclosure. The calls were made at that time because Mrs Stevens was working those hours for personal reasons and she did not realise that the claimant would prefer not to speak at that time. We are satisfied that the fact that the claimant had made protected disclosures did not materially influence Mrs Stevens' treatment of the claimant in calling her in the evenings.
109. Issue 3.6.4: the claimant said that Ms Cooper spoke negatively about the claimant to Natasha Dos Santos stating, "What has that woman caused now!!".
110. We have found that Ms Cooper said something like this to Ms Dos Santos in the context of a customer complaint which was unrelated to the incident in January 2020. It was a comment made in frustration that a complaint had been received. It was not made to the claimant herself. It was not a detriment to the claimant.
111. Issue 3.6.5: the claimant said that members of the management team spoke negatively about the claimant in electronic communications, as follows: (i) a former support manager stating she wished the claimant had cancer and that she could take the claimant's place as manager.
112. The claimant did not specify which electronic communications she was referring to. We have not found that members of the management team spoke negatively about the claimant in electronic communications.
113. As to the former support manager 'bad mouthing' the claimant, there was not a sufficient evidential basis on which to make findings about what was

actually said on this occasion. In any event, this happened in August 2019, before the claimant made protected disclosures. The treatment cannot have been materially influenced by the protected disclosures.

114. Issue 3.6.6: On 12 February 2020 Alison Cooper threatened the Claimant that she would extend her probation period in a face to face visit to the Church Crookham store.
115. We have found that the claimant's probationary period was extended on 12 February 2020. We accept that the reason the claimant's probationary period was being considered at this time and not in December 2019 was because the claimant was off sick in December 2019 and had a period of 8 weeks off work. That meant that the adjusted 6 month period fell in early February 2020. We also accept that the reason why Ms Cooper decided to extend the claimant's probationary period was because she was concerned about falling sales in the claimant's shop. We accept this because it is consistent with what was discussed with the claimant in her probationary review in October 2019, and with the sales figures from the shop.
116. When she was first told about the extension of her probation, the claimant did not think that her protected disclosure was the reason for it. Her first thought was that it might have been because one of the shop's support managers had given her resignation.
117. It would certainly have been better if Ms Cooper had told the claimant in December that her probation would be extended, and if she had dealt with the extension in January 2020 when the claimant returned to work, rather than waiting until 12 February 2020. However, we accept that Ms Cooper's decision to extend the claimant's probationary period was not materially influenced by either of the claimant's protected disclosures.
118. We have not found the claimant to have been subjected to any detriment on the ground of having made a protected disclosure. The complaint of protected disclosure detriment fails.

Protected disclosure dismissal

119. We have not found the claimant to have been subjected to any detriment on the ground of a protected disclosure.
120. In her resignation email, the claimant did not refer to any protected disclosure or any alleged detriment because of protected disclosure. The reasons she gave for her resignation related to the respondent's expectations in respect of sales and footfall, and issues with previous staff. The protected disclosures made by the claimant were not the principal reason for that treatment.
121. The principal reason for the claimant's resignation was the expectations of her in respect of sales and footfall, and her view that the expectations were

not realistic. This was not related in any way to the protected disclosures she made.

122. On that basis, even if the claimant's resignation amounted to a constructive dismissal, the protected disclosures made on 21 January 2020 were not the principal reason for the constructive dismissal. This means that the complaint of automatic unfair dismissal for making a protected disclosure cannot succeed.

Failure to make reasonable adjustments

123. The claimant has been found to have been disabled at the material times.
124. We have found that the claimant did not tell Mrs Stevens about her disability when she first met her. We have found that the respondent did not know about the claimant's disability until 17 February 2020 when she told Ms Cooper.
125. The respondent could not reasonably have been expected to know about the claimant's disability before that date. Although the claimant had a lengthy period of sick leave, the information the claimant gave the respondent about her absence did not suggest that she had a long term condition.
126. These conclusions mean that the respondent was not under a duty to make reasonable adjustments for the claimant prior to 17 February 2020. During the period from 17 February 2020 to 24 February 2020 when the claimant resigned, the respondent did not fail to make any adjustments. Had the claimant remained in the respondent's employment, the respondent would have made a referral to occupational health to consider reasonable adjustments.
127. In any event, we have found that the respondent took the steps the claimant suggested should have been taken by way of reasonable adjustments:
 - 127.1. The claimant was provided with a handover and online training when she joined;
 - 127.2. The shop did not have any IT set up when the claimant joined. When the claimant asked for this to be put in place, the respondent agreed. The claimant was put in touch with the respondent's IT support officer and she was provided with a laptop. There was a delay in getting wifi set up in the shop, but the respondent was trying to put this in place;
 - 127.3. Staffing in general was up to the claimant as the shop manager. If she had needed more staff, she could have asked Mrs Stevens;
 - 127.4. The claimant was allowed to work reduced hours: the respondent reduced her days from four days a week to three days a week from September 2019. She was allowed flexibility in terms of start and finish times, for example she could close early if she was short staffed;

- 127.5. Ms Cooper met with the claimant to welcome her back to work after her period of sickness absence;
- 127.6. The claimant had a phased return to work when she returned after a significant period of absence (she worked two days a week for two weeks).
128. As to the claimant's suggestion that the respondent should have allocated duties elsewhere, we have found that the claimant took on a lot for the respondent. She threw herself into her new role and worked hard to make the shop look good and to set up and manage eBay sales. Her family assisted her. Mrs Stevens said that the claimant was not expected to take work home with her, and suggested that she 'slow down' the eBay sales. The claimant said she was happy to carry on with these. It seemed to us that the claimant went above and beyond for the respondent, and that the respondent might have been clearer with her about its expectations. However, the respondent did not know until 17 February 2020 and could not have been expected to know that the claimant's workload and duties put her at any disadvantage because of her disability.
129. In conclusion, we have not found that the respondent was aware of the claimant's disability until 17 February 2020. We have not found that the respondent ought to have been aware of the claimant's disability before this date.
130. This means that the respondent was not under a duty to make reasonable adjustments to prevent the claimant from being disadvantaged. Even if we had found the respondent to have been under a duty, we would not have found that it failed to comply with this duty.
131. For these reasons, the claimant's complaint of failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 fails.

Discriminatory constructive dismissal

132. As we have not found there to have been any unlawful discrimination by the respondent, the complaint of discriminatory constructive dismissal cannot succeed. None of the events which gave rise to the termination of the claimant's employment were tainted in any way by unlawful discrimination.

Unauthorised deduction from wages

133. The claimant said that she had a contractual right to overtime and that the respondent had failed to pay her for overtime hours set out in an additional hours sheet.
134. The claimant's contract did not contain any right to be paid for overtime. She was only entitled to time off in lieu of additional hours worked, not overtime pay.

135. We accept the evidence of Mr Turnidge that the claimant was underpaid £80.00 but that she was compensated for this by payment of £217.00. We did not hear any evidence to suggest that there were any other underpayments to the claimant.
136. This means that the complaint of unauthorised deductions from wages cannot succeed.

Time limits

137. In light of our conclusions, we do not need to consider the question of time limits.

Employment Judge Hawksworth

Date: 9 November 2022

Sent to the parties on: 11 November 22

For the Tribunals Office

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