Case Number: 2201018/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Dritan Myziri **V** **Harrods Limited**

Heard at: London Central **On**: 8, 9, 10 and 31 October 2019 and 1 November 2019 in chambers

Before: Employment Judge Joffe
Mr M Baber
Mr D Carter

Representation

For the Claimant: In person

For the Respondent: Ms H Davies, counsel

RESERVED JUDGMENT

1. The claim for detriment under s 47 E Employment Rights Act 1996 is dismissed on withdrawal.

2. The claimant's claims for detriment under s 47B and s 44(1)(c) read with s 48 Employment Rights Act 1996 are not upheld.

REASONS

Claims and issues

1. The claimant brings claims of detriment for having made protected disclosures and for having brought to the respondent's attention circumstances connected with his work which he believed to be harmful or potentially to health and safety. The issues had been agreed at case management hearing in front of EJ Goodman on 3 May 2018 and are as set out below. The respondent had conceded at the hearing on 3 May 2018 that it did not have a safety committee, however it adduced evidence at the full merits hearing that it did have such a committee. The issues have been adjusted to reflect that change in position.

2. At the outset of the hearing, the claimant indicated that he was no longer intending to pursue a claim under s 47E Employment Rights Act 1996 and that claim was dismissed on withdrawal.

<u>Ss 43B and 47B ERA 1996, public interest disclosure claims</u>

1.1 What did the claimant say or write which allegedly amounted to a protected disclosure?

1.1.1 As described by the claimant at the case management hearing, he attended a meeting with managers on 16 September 2016 about proposals to rotate workers between the early and late shifts. The claimant attended as one of two representatives of the early shift and spoke against the proposal (which was supported by representatives of the late shift) asserting it was unhealthy or unsafe for workers with health conditions and older workers to do heavy tasks at work on a late shift, and unfair to staff with already agreed hours for childcare responsibilities.

1.2 In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show one of the following:

1.2.1 The respondent was likely to fail to comply with a legal obligation (an agreement about flexible working) to which he was subject or

1.2.2 The health and safety of any individual (named individuals with health conditions; older workers) was likely to be put at risk

1.3 If so, did the claimant reasonably believe that the disclosure was made in the public interest.

1.4 Was the claimant subjected to a detriment in any of the following:
- 1.4.1 Being given a first written warning on 20 September 2016
- 1.4.2 The warning being extended on 1 March 2017
- 1.4.2 Being suspended from work on 15 August 2017
- 1.4.3 Being given a final written warning on 12 September 2017
- 1.4.5 His manager (Paul Fraser) not speaking to him between 15 August and the appeal on 26 November 2017
- 1.4.6 Not being allocated overtime work between 12 September and 18 December 2017
- 1.4.7 Being investigated with a view to disciplinary action on 28 March 2018?

1.5 If yes, was that done on the ground that he made a protected disclosure on 16 September 2016?

Section 44(1)(c) ERA 1996

1.6 Did the claimant (in the meeting on 16 September 2016) bring to the respondent’s attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

1.7 Did the respondent have a safety committee?

1.8 If it did, was it not reasonably practicable for the claimant to raise the health and safety concerns relied on by that mean?

1.9 If it is found that he was subjected to any of the detriments at 1.4 above, was that on the ground that he acted as he did at 1.1.1?

Time / limitation issues – ERA s 48(3)

1.10 Are all or some of the detriments listed in 1.4 a ‘series of similar acts or failures’? If yes, what is the date of the last in the series?

1.11 Is the last date of any series within three months of the claim being presented, as extended by the early conciliation process, and so in time?

1.12 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

1.13 For any detriment that is out of time, does the claimant show that it was not reasonably practicable to have presented it in time?

1.14 If he does, is it shown that it was presented within a reasonable period thereafter?

Remedy

3. Other issues of remedy were left until after the decision on liability.

Findings of fact

4. The Tribunal heard evidence from the claimant and, on behalf of the respondent, Sarah Berkeley, area manager for direct fulfilment, Faisal Alam, Knightsbridge receiving manager, Jake Mournehis, senior manager, Knightsbridge warehousing, Daniel Igoe, business process partner, Paul Fraser, assistant manager, store distribution, and Camilla Cross, distribution operations manager: transport and facilities. There was an agreed bundle of some 989 pages and we received a small number of further documents during the course of the hearing.

5. There were a number of documents in the bundle which had been redacted and the claimant asserted that the redacted elements were likely to be relevant to his claims. Most of these documents were then produced by the respondent in unredacted form and added to the bundle, however objection was taken to removing the redactions from two emails between Mr Mournehis and Mr Fraser dated 3 August 2016. The emails were shown to the Tribunal and we concluded they were or might be relevant to the issues we had to consider since they might indicate the attitude of various levels of management to the proposal for shift rotation in distribution which might in turn be evidence as to the attitude of management to statements made by the claimant at the meeting on 16 September 2016. We therefore ordered that they be disclosed in unredacted form.

6. During the course of the claimant's evidence, Ms Davies objected to what she said was a widening of his case in relation to some of the alleged detriments so that he was complaining not simply about the sanctions imposed in disciplinary proceedings but the instigation of disciplinary investigations. After some discussion, Ms Davies asked to have further time on day two to cross examine the claimant and the Tribunal agreed; we agreed that we would consider whether this was a widening of the issues which put the respondent at a disadvantage. Ms Davies did not urge us in her submissions not to look at the issues in this broader way, it appeared to us that all of the relevant witnesses from the respondent had been called and we could not see that the respondent was ultimately at any disadvantage in responding to the claim on the broader basis. Further it seemed to us that the claim form encompassed such a claim; the claimant said there was a 'concerted effort to get rid of me'. We have therefore, where relevant, considered whether the claimant was subjected to a detriment on a prohibited ground in the instigation of various disciplinary proceedings.

7. The respondent runs a department store in Knightsbridge. The claimant started working for the respondent on 6 November 2004. The claimant is a warehouse operative working in Store Distribution, which is the department responsible for replenishing stock across the store. Stock is moved through a tunnel network from the receiving building prior to being moved into stock rooms and then onto the shop floor.

8. The distribution operatives are divided into two teams doing early and late shifts. The claimant works on the early shift, the hours for which are 6:30 am

to 3 pm or 2:30 pm if the operative chooses not to take a break. The late shift is 2 pm until 10:30 pm.

9. From 2014 the claimant has had a flexible working arrangement to enable him to collect his daughter from childcare. There was a change to his contract terms in June 2014 although this was expressed to be ‘until further notice’. The claimant works 6:30 am to 12:30 pm Monday to Friday and a 7.5-hour shift on Sunday.

10. The line management structure as at 2016 was that Camilla Cross was head of distribution operations. Reporting to her was Danny Murphy, area manager for store distribution and store receiving. In turn, Jake Mournehis, senior manager, store distribution manager, reported to Mr Murphy. There were then three assistant managers, Paul Fraser, Paul Dyer and Louis Mehany, and then several team leaders above the operative level. Mr Dyer managed the early shift and Mr Mehany the late shift. Mr Fraser was on the middle ‘shift’ but covered the other shift patterns when needed. He also covered Sundays.

11. The claimant had a clean disciplinary record until 4 April 2016 when he received an informal warning for lateness.

12. In about April 2016, the respondent had what it called a ‘Dragon’s Den’ competition to encourage employees to bring forward ideas for improving the work in distribution. This was an initiative by a director, Simon Finch. One idea which was brought forward was rotating the late and early shifts. This idea did not win the competition, but Mr Finch thought it was worth investigating further.

13. Many operatives on the late shifts wished to work early shifts as the shifts were more attractive for work/life balance and there were more opportunities to do overtime. Those doing early shifts appear in the main not to have wished to do late shifts. When vacancies arise on the early shift, they are usually filled by someone on the late shift and a vacancy is then advertised on the late shift. Many on the early shift had very long service; a number had health issues and several had flexible working arrangements or childcare commitments.

14. The shift rotation proposal was controversial and there were differences of view amongst management as well as amongst operatives, although the differences in view amongst management were not known to the claimant and other operatives.

15. On the morning of 3 August 2016, Mr Mournehis wrote to Mr Murphy a draft of an email to Camilla Cross ‘For you to edit’.

16. The draft made it clear that Mr Mournehis thought rotation ‘would cause massive unrest, and this would be a great risk to the business’. Mr Murphy replied ‘I wouldn’t consider sending any of this…’ Mr Mournehis forwarded Mr Murphy’s email to Mr Fraser, saying: ‘They ask for my opinion and recommendation and this is how I get censored. Why bother? They just need to tell me what to do.’ Mr Fraser replied to that email: ‘He’s changed his tune he didn’t want to rota but because Liz wants to, he is now under her spell!’ The reference to ‘Liz’ was a reference to Elizabeth Hall, an employee in the respondent’s HR department.

17. Also on 3 August 2016, Mr Mournehis sent Ms Cross a heavily edited version of the draft email. He said ‘The main topic of debate in the staff meeting yesterday was rotation, I was very careful as to what I disclosed to the team, but there is an element of paranoia setting in.’

18. There were two meetings with the operatives from the early and late shifts, the first on 22 August 2016. The claimant said that at this meeting, Ms Cross asked Mr Mournehis to pass out a blank shift rota and asked the operatives to work together to put names to the rota so that rotation could commence. Mr Mournehis said that the draft rota document was not given out until the later meeting on 16 September 2016. The respondent kept no minutes or other records of this meeting. We concluded that the claimant had a better recall of the content of the two meetings; he was able to describe them in significantly more detail than other witnesses, probably because he was very concerned about the rotation proposal and therefore focussed on what happened at the meetings, and we concluded that the draft rota pattern had been handed out at the 22 August meeting and the operatives asked to put names to it.

19. The claimant felt that management was pressing ahead towards implementation of the rotation pattern and that handing out the draft rota document was evidence of this. Mr Mournehis described the draft rota in evidence as being a document for discussion: ‘almost Utopian’.

20. An email from Elizabeth Hall in HR to Ms Cross on 14 September 2016 about the rotation states: ‘When we first discussed doing this it was back end May early June and we were going to try implement in October... however my understanding was that this meeting on Friday was scheduled to progress with representatives from this team from both shifts the plan to rotate shifts from a future date (early next year) and share proposed rotas with the individuals and gain feedback.’

21. There was then a further meeting on 16 September 2016 with the representatives from the late and early shifts. Ms Cross attended by video conference call. Mr Fraser attended in person as did Mr Mournehis. The

claimant and Eric Stewart were chosen by the early shift to represent their interests.

22. The respondent took no minutes and made no written record of this meeting. However, the claimant prepared a handwritten script of what he wanted to say at the meeting and this was in evidence before us. The document contained the following relevant passages:

    We have worked in this shift for such a long time that the current arrangements you could argue are part of our contract. When we changed our contract 3 years ago and were told by our union representative that we would not alternate even when the rest of the department did Simon Finch was asked and… also said would not be shift rotation in store distribution.

    The document then lists thirteen early shift operatives with their ages and lengths of service. Eight are in their fifties and sixties and they have lengths of service ranging from ten to 36 years. Against four names, health conditions are recorded, which include high blood pressure, cancer, diabetes and heart attack. Against three names, including the claimant's, is recorded 'A/child' which the claimant explained to us meant agreed childcare, by which he meant agreed flexible working arrangements of the kind he had himself. Two further names have 'childcare responsibilities' mentioned. Next to the claimant's name there is a note: '(constructive unfair dismissal)'

    The notes continue:
    The guys mentioned above will provide a report of their conditions from their doctors. A shift rotation will [be] detrimental to their health. Studies have shown that older workers are especially vulnerable to shift rotation (extreme in this case), disturbance of body rhythm, unable to adjust to sleeping patterns and plagued by fatigue especially worker with pre existing health conditions and workers taking medication.

23. Ultimately differences between the claimant's witnesses and the respondent's witnesses as to what the claimant said narrowed over the course of the hearing. Although, in his witness statement, Mr Fraser said that the claimant 'mentioned one person on the early shift who had a heart operation, so I suppose he was raising it as a health and safety concern', in oral evidence he agreed that he remembered the claimant reading the health and safety issues and 'names of guys'.

24. Ms Cross said she could not remember health and safety concerns being raised but in an email dated 19 September 2016 to Mr Mournehis, she asked for 'a list of the medical conditions, that were identified in the meeting on Friday, along with recommendations that have been made for each of them by Corporate Health?' She did remember the early shift representatives raising childcare as an issue, as did Mr Fraser.

25. Mr Mournehis in his witness statement said that he did not remember the claimant asserting that shift rotation would be unhealthy or unsafe 'although I cannot say for certain he didn't' or raising concerns about childcare responsibilities .In oral evidence he said that 'possibly' the claimant had named the people with medical conditions and that in respect of the childcare issue he was 'sure Dritan would have relayed this'.

26. In submissions the respondent conceded that the claimant had made the statement about health and safety summarised at the case management hearing but not that he had said anything alleging a breach or potential breach of a legal obligation in respect of the childcare issue.

27. As a result of the various concessions made by the respondent's witnesses and the email of 14 September 2016, we concluded that the claimant's evidence was more reliable on this issue and we were satisfied that the claimant's notes were used as a script by him and that he would have read out or paraphrased all of the content recorded above, including the reference to 'constructive unfair dismissal'.

28. The claimant said that he had had a conversation with Mr Mournehis around this time to say that the respondent would have to respect the flexible working arrangements. He says that Mr Mournehis had replied that he 'didn't know' if this would happen.

Management's views about the rotation issue

29. It was relevant for us to make findings as to what the view of management was on the desirability of shift rotation in store distribution was.

30. Mr Murphy, in an email to Ms Cross dated 11 July 2016, reviewed the pros and cons and concluded that 'Whilst it [rotation] is achievable the Store Distribution managers as well as myself feel that the negative aspects outweigh the benefits.'

31. Mr Mournehis clearly took a very negative view of rotation as at 3 August 2016, as evidenced by the draft email of that date, although in his witness statement he had said 'My own view was that [rotation] would probably be a good thing, overall, although I knew I would be in for a bumpy ride during transition' and he told us in oral evidence that he can now see clear benefits but at the time he was sitting on the fence. He suggested February to introduce the change as it was the quietest time and they could cover the shortfall if people started going sick. We found, based on the draft email, that he was, around August - September 2016, opposed to shift rotation.

32. Although the idea was suggested by late shift operatives, it was clear senior management were keen and were hoping for an early implementation date as indicated by Ms Hall's email to Ms Cross of 14 September 2016.

33. Ms Cross told the Tribunal that the rotation proposal chimed with what management at director level thought would be efficient and that it was being championed at director level. It was considered desirable that the system in distribution should match that in other areas of the business. We noted that the impression created in the respondent's witness statements was that the idea was being explored because late shift operatives had suggested it and the enthusiasm for the proposal at senior management level only emerged in oral evidence. We found that the situation was as Ms Cross described and that shift rotation was being pressed for at director level.

34. In terms of the impression created in the meetings as to how firm the proposal for rotation was, the claimant's evidence was that until he raised issues at the meeting on 6 September, the respondent was pushing towards implementation of the proposal: 'the drive was to get it done'. Mr Mournehis denied that this impression was being conveyed 'I think you misunderstood. This was just brainstorming'. He conceded that although he was not at the time in favour of rotation, he may have 'been more subtle' in how he expressed that at the 16 September meeting given that he felt need to fall in line with higher management. We concluded that the impression given to employees was that the proposals were going to be implemented within the foreseeable future and that the differences in view amongst management were, understandably, not shared with the operatives, who would have been given the impression that management at all levels were seeking to implement the shift rotation proposal.

35. On 3 August 2016 there had been email correspondence between Ms Cross and Mr Mournehis with a discussion about introduction of shift rotation in February. Mr Mournehis asked in this correspondence whether they could cancel the existing flexible working requests if rotation were introduced. 'Do we have the prerogative to deny all requests?' On 3 September 2016 Mr Mournehis forwarded to Ms Cross the claimant's flexible working request outcome form.

36. On 20 October 2016, Ms Cross sent to more senior managers, Mr Healy and Mr Finch, 'a first draft of the proposal to implement a rota in store distribution.' This draft referred to '2 flexible working requests in place on the AM shift' and '6 employees identified as having had medical issues of which 1 has had an adjustment to his working times based on medical advice from CHS.' The tenor is that the rotas will be implemented and there will be a need to work out how many flexible working requests can be accommodated.

37. On 28 November 2016, Mr Murphy wrote to staff to say that, against the background of concerns raised including 'flexible working arrangements already in place' and given that the store was about to enter the busiest period of the year, the proposal was being put on hold for three months. After that, there would be a period of individual consultation during March and April 2017 and any proposed change would not be implemented before August 2017.

38. On 1 March 2017, there was an email between Caroline Andrew, employee relations specialist, and Ms Cross, Mr Murphy and Mr Mournehis attaching a script and FAQs for a store distribution rotation meeting kicking off formal consultation with individuals, although we heard no evidence that this occurred and the document was not referred to in evidence; Ms Davies mentioned it in submissions. We were unable to make any findings as to whether there was a meeting or any individual consultation at that time.

39. We were told and accepted that a limited degree of rotation has now been introduced in the sense that existing employees on the late shifts are now rotating amongst vacancies which have arisen on the early shift.

The disciplinary relating to the cracked screen

40. On about 8 or 9 August 2016, Paul Fraser was alerted by someone outside the distribution department (Terry Peters, a digital signage technician) that a display screen with a value of £1995 had been damaged. CCTV footage showed that the claimant had swung a cage into the screen whilst delivering stock.

41. Mr Fraser held a brief investigation interview with the claimant on 11 August 2016.

42. Faisal Alam, Knightsbridge receiving manager, invited the claimant to a disciplinary hearing to be held on 2 September 2016 on 22 August 2016.

43. Mr Alam was outside the claimant's line management chain, at the same management level as Mr Mournehis. He had started work as an operative in distribution and had previously worked both alongside the claimant and as an assistant manager in distribution; he had also covered work in distribution as a duty manager since 2011. Mr Alam said that he was aware of the shift rotation proposal but was not at the meeting on 16 September 2016. He said and we accepted that he was not aware of what was said or proposed at the meeting although he knew the gist of the meetings and everyone was talking about the rotation issue. He himself could understand the point of view of both the early and late shift operatives. He thought management's views were 'a mixed bag' as everyone could see the pros and cons.

44. Mr Alam said that his decision at the disciplinary hearing had nothing to do with shift rotation issues or flexible working requests.

45. The initial investigation was felt to be too cursory and Mr Fraser held a further investigation meeting on 23 August 2016 where the claimant was shown the CCTV footage of his cage hitting the screen. The claimant had no recollection of damaging the screen.

46. The claimant was invited on 1 September 2016 to a disciplinary hearing on 20 September 2016. He was warned in the invitation letter that the disciplinary could lead to a formal written warning.

47. A disciplinary hearing was held on 20 September 2016. Mr Alam's outcome letter is dated 20 September 2016. He said his main concern was whether the claimant had failed to report damage he was aware of. He accepted that the claimant had not realised he had caused any damage. Mr Alam found, however, that the claimant had failed to devote his full attention to his duties resulting in a damaged plasma screen. He gave the claimant a first written warning.

48. The claimant appealed against this warning. The appeal was heard by Michael Newton, senior warehouse manager (Knightsbridge), on 9 November 2016. It was not upheld in a letter of 16 November 2016. There was no complaint about the appeal before the Tribunal.

49. The claimant gave evidence to the Tribunal about occasions when damage to stock or fixtures had not lead to any outcome other than informal counselling, including an occasion when some pallets had been dropped and damaged a display, a pallet of food had been left outside so that it spoiled, an occasion when an employee named Ranjit shattered a glass fixture and occasions when pallets of alcohol were dropped and bottles broke. Mr Alam's evidence was that he had not been involved in these matters and could not comment. He said that he had taken advice from HR on the sanction he imposed.

Extension of the written warning

50. On 16 January 2017 the claimant had a confrontation with Azedine Moulla, receiving assistant manager. Mr Moulla emailed Mr Mournehis that day saying that the claimant had called him 'James Healy' [a director level manager of the respondent] and 'tough man' in a sarcastic way. Mr Moulla says he told the claimant to calm down and the claimant called him a 'a fucking stupid' and that 'he was really squaring up and was aggressive.'

51. In Mr Mournehis' email of 17 January 2017 responding to Mr Moulla and copying in Mr Murphy and Sophie Marston in HR he says 'surely this is gross misconduct' and asks Ms Marston for her advice. Mr Mournehis' oral evidence about this email was that 'That was my opinion at the time, if someone is shouting and swearing. That is why it was investigated. That is why I asked Sophie for clarification.'

52. Mr Mournehis held an investigation meeting with Mr Moulla on 19 January 2017, with Mr Nottage as note taker. Mr Moulla related the incident with the claimant and said that he himself had been calm and composed.

53. When Mr Nottage sent the notes to Mr Mournehis on 19 January 2017, Mr Nottage said in an email, 'I have had exactly the same situation between myself and Dritan whilst I worked in Distribution. I also know that I'm not the only one, he had a similar confrontation with Faisal Alam previously as well.'

54. Mr Mournehis raised the other incidents Ms Marston on 20 January 2017 but was advised by Ms Marston to focus on the incident with Mr Moulla only.

55. Mr Mournehis interviewed the claimant on 20 January 2017. The claimant said he called Mr Moulla 'Boss, boss', denied swearing and raised an issue about the night before the incident when he said Mr Moulla had been rude to him and asked him to move a fixture. Both had been taking part in work for sale takeout overnight. He said that he called Mr Moulla 'Boss boss and 'James Healy' as a result of the incident the night before. The claimant said Mr Moulla was aggressive and shouting when he said, 'calm down, calm down' and was gesticulating, He said that he did say 'are you stupid?' to Mr Moulla and that he also had shouted. He mentioned the presence of a female shop assistant but did not identify her.

56. CCTV footage was looked at but there was no audio.

57. Mr Moulla was interviewed again by Mr Mournehis on 26 January 2017 and this time he also mentioned that there had been a 'girl from the shop floor' present. He had not previously mentioned her presence.

58. Mr Mournehis emailed Ms Marston in HR on 27 January 2017: 'I've spoken with Danny and we feel this needs to be dealt with formally'.

59. Mr Moulla was interviewed a third time on 2 February 2017 and asked if he had shouted at, made gestures towards or been rude to the claimant.

60. On 4 February 2017 the claimant was invited to a disciplinary meeting to be held by Daniel Igoe. He was told that the hearing could lead to a final written warning. The hearing was held Mr Igoe on 7 February 2017, with assistance from Ms Marston. The claimant mentioned the young woman who had seen the incident and provided a name for her. He said that he had not told Mr Mournehis the name of the witness during the investigation.

61. Mr Igoe interviewed Paul Dyer on 10 February 2017 to discuss an allegation which the claimant had made that Mr Moulla had made an inappropriate remark when acting as notetaker in the claimant's disciplinary hearing for lateness: 'don't tell us how to do our jobs'.

62. On 22 February 2017, Mr Igoe interviewed Silvana Simes, the shop assistant identified by the claimant, who gave evidence that both the claimant and Mr Moulla were shouting 'the same'. She did not hear swearing but she was on the phone and she thought both were being unprofessional.

63. The claimant was critical of the fact that Mr Mournehis had failed to locate and interview Ms Simes. Mr Mournehis gave inconsistent accounts of why he had

not done so. In oral evidence, he said that it seemed unlikely to be useful. She was ‘swanning past with her head to her mobile phone’ and ‘wouldn’t have added anything’. He thought that it was not worth including in the investigation at the time.

64. The claimant raised with Mr Mournehis the fact that, in Mr Igoe’s statement, Mr Igoe reported that Mr Mournehis told him that he had tried to interview Ms Simes, but she did not want to speak to them. Confronted with this inconsistency, Mr Mournehis said that he believed he asked her and she said she did not remember anything.

65. Mr Igoe met with the claimant on 1 March 2017 and told him he would receive an extension to his existing written warning.

66. Mr Igoe wrote to Mr Murphy on 2 March 2017 saying ‘it is my opinion that Azedine’s behaviour also needs to be looked into and appropriate action taken. The witness statement from the alleged incident is attached, where she states that she heard Azedine also shouting and acting inappropriately, this contradicts Azedine’s statements in the interview (attached) where he stated that he did not shout.’

67. On 3 March 2017, Mr Igoe sent the claimant an outcome letter extending his first written warning for speaking ‘ in an inappropriate and unprofessional manner’. Mr Igoe said he felt it was appropriate to extend the written warning rather than issuing a second written warning because he felt that the fact that the claimant had been working an overnight shift the night before was a mitigating circumstance. He said he would be recommending to Mr Moulla’s manager that the incident be addressed.

68. Mr Igoe’s evidence, which we accepted, was that he was not aware of the 16 September 2016 meeting nor of anything which the claimant had said about the shift rotation proposal.

69. Ultimately the Tribunal did not hear evidence as to what if any action was taken in respect of Mr Moulla’s behaviour during the incident complained about.

Suspension and final written warning

70. The respondent has a Samples, Tester and Food Tasting policy which says amongst other things:

- For the avoidance of doubt, any food items or other products left in or around the compactor remain company property and are not to be taken by any employees.

- 'Testers are primarily for the use of customers to try products. It is acceptable for you to use testers within the department during usual trading hours, However, this should be conducted at the relevant counter. Under no circumstances should these testers be moved from one counter to another.'
- 'It should be noted that at no time are you allowed to consume any food or beverage that has not been paid for or food that has been left over by customers. Any contravention of these guidelines will result in action under the People Management policy and may result in dismissal.'

71. The respondent has a practice of selling off some food which would otherwise go to waste to staff at a discounted price. This is called a' cake sale' or 'bake sale'. Food which is not sold is destroyed.

Change to policy

72. In spite of the Samples, Testers and Food Tasting policy, there was, prior to 2017, a practice of staff eating some leftover food and using or consuming some samples and testers (including using perfume / cosmetics testers). The ambit of the practice was not altogether clear to us and possibly the ambit of what was acceptable was not entirely clear to staff.
73. There were some emails in the bundle from 4 and 5 April 2017 which show that Mr Fraser was looking at CCTV 'to look about who are buying the cakes on the shop floor' and reporting to Mr Mournehis and Mr Murphy. The claimant and two other employees, Michail and Ishmail, are observed with food hall bags believed to contain cakes. Mr Murphy asks Mr Mournehis to question the employees about what they were doing. We did not hear evidence to suggest any action was taken at that time. Mr Mournehis in evidence said he could not recall this matter.
74. Mitul Shah became general manager of distribution at Knightsbridge in April 2017. In May 2017 Mr Shah saw a member of staff accept a free tea sample from another member of staff and decided that the Samples, Testers and Food Tasting Policy needed to be enforced. Managers were instructed to send the message to all staff that staff taking or accepting free food or samples would no longer be tolerated and would lead to disciplinary action.
75. On 24 May 2017, there was an email from Mr Mournehis to Mr Shah: 'all staff will be told at Thursdays team brief that accepting food or gifts from suppliers, drivers, vendors or shop staff is to stop with immediate effect. [sic] failure to do so will lead to disciplinary action.'

76. Mr Mournehis said that he conveyed the message in the next few staff meetings that there was a new zero tolerance approach. He said that his practice was to put the points from the meeting on the store distribution notice board. We had one example of such a notice in the bundle which was dated 3 August 2017. This included an item in bold 'Do not accept food or samples from any other departments or staff'. There is no mention of disciplinary consequences. The claimant was on holiday between 24 July and 12 August.

77. This notice was updated every week from an electronic template and the old notice would be taken down and kept in a paper file. We were not provided with any other / earlier notices and what had happened to these was not explained.

78. Because the claimant had usually left by 2 pm when staff meetings were held, he would almost always come into Mr Mournehis' office to ask whether he was going to miss anything important and say when he was available for overtime. Mr Mournehis said, and we accepted, that he remembers reading out the important points from the staff meeting to the claimant. The claimant asked if the message came from Mr Shah or from security.

79. There was a difference between Mr Mournehis and the claimant as to what was said which narrowed. The claimant said he was told 'no freebies' but it was not emphasised that it was a serious matter and that it could lead to disciplinary consequences. He was not told it covered cosmetic testers.

80. Mr Mournehis in oral evidence said that possibly he had conveyed the message using the term 'freebies: 'I would have asserted no freebies, thought he knew, no need for me to be more specific. That should have been enough.' But he also said in answer to Mr Baber's question that he would have mentioned disciplinary action to the claimant. He said that the change to the practice was 'the talk of the town'.

81. At some stage during this period Mr Mournehis distributed cocoa dusted almonds that he said had arrived through legitimate channels. It appears that the legitimate nature of the almonds was not necessarily made clear to staff: 'If anyone asked I would have said where they came from.' The claimant also said that he continued to use a damaged coffee machine which was ex store stock.

82. We concluded that Mr Mournehis had conveyed to the claimant a message which was along the lines of 'no freebies' and that it is likely that the claimant would have been aware of other employees talking about the new practice. Because of the inconsistencies in Mr Mournehis' evidence on the point and the claimant's firm evidence to the contrary, we were not persuaded that Mr Mournehis told the claimant in terms that failure to follow the policy was likely to lead to disciplinary action and we accept that there may have been confusion about enforcement of the policy or its ambit arising from the distribution of the almonds.

83. In early July 2017, there were a number of occasions (between 1 and 6 July 2017) when Mr Fraser seems to have been watching the claimant's movements on CCTV. This is revealed in a series of emails between Mr Fraser, Mr Mournehis, Mr Dyer, Mr Murphy and Mr Mehany. It was said that the first occasion arose because Mr Shah had seen the claimant in an area where he should not have been on Saturday 1 July 2017 and the emails support that account. The monitoring carried on over several days and Mr Fraser appears to be reporting on the claimant spending insufficient time on work. He comments on how long he spends in the toilet on several occasions for example and how long the claimant takes to deliver a single rail. In an email of 6 July 2017, Mr Dyer tells Mr Fraser 'Jake is going to see him later today or tomorrow.'

84. When asked by the claimant in cross examination why the claimant was being monitored, Mr Mournehis said he could not recall what the issues were and that he could only assume it related to stock not moving quickly enough. Mr Fraser seemed to accept in his evidence that he would not now, having had some training or information about GDPR, use CCTV to follow an employee's movements but would contact the respondent's security department to 'get proper authorisation'. He said he was originally asked to check the claimant's movements by Mr Shah on the Saturday when the claimant was perceived to be in the wrong place and that he must have been asked to carry on watching the claimant. He told us 'I was just following instructions' and 'If managers tell me to do something, I just do it.' We address this explanation in our conclusions.

85. On 12 July 2017 Mr Mournehis noticed some staff hanging around the area of corridor known as 'Hans Road'. He told them to get out onto the shop floor but then noticed them 'dart back' towards the area called infill. He asked Mr Fraser to look at the relevant CCTV footage. On 13 July 2017, Mr Fraser emailed Mr Mournehis and Mr Shah to report that footage from 12 and 13 July showed 'guys' waiting for the cake sale to end then Ishmael and the claimant taking bags and then returning to Hans Road with full bags. Other CCTV showed the claimant eating and sharing food with others. He also reported that there was CCTV footage of the claimant in a tunnel taking his shirt off and looking at himself in a mirror.

86. In Mr Mournehis' email of 13 July 2017 to Mr Fraser, copying in Mr Murphy and Mr Shah, he said : 'My suspicions were correct. I am angered, disappointed disgusted but not entirely surprised' 'I am not having the likes of Dritan and Ishmael deceive me and think they are cleverer than me…We need to check with HR and possibly suspend following this investigation…Paul, from next week I need you on the early shift to support Paul Dyer to monitor the staff. Enough is enough.'

87. Mr Shah emailed Alan Cartner, an investigator in the respondent's security department, on 17 July 2017 requesting 'camera coverage'. In the email he identifies that six individuals were seen consuming leftover food but that two

including the claimant seen to be 'more pro-active in reclaiming the food from the waste bin. The rest seem to take from the bags knowing they should not be doing this.'

88. On 18 July 2017, Mr Fraser checked CCTV on the 4th floor to see how much stock was left to be delivered. The claimant and a colleague called Blessing were supposed to be working in this area from 6:30 am. Mr Fraser saw Blessing arriving from the lifts. Mr Fraser went to the fourth-floor infill area to wait for the claimant. He asked the claimant where he had been when he arrived at 6:55 and the claimant said he been on the shop floor to spray on aftershave. Mr Fraser asked if that was fair to his colleague who had started work already and the claimant said that he could deliver much quicker than his colleague and so would be doing more work even though he was starting later. Mr Fraser emailed Mr Shah, Mr Murphy and Mr Mournehis about this incident on the same day.

89. Mr Mournehis emailed Mr Shah and Mr Murphy with a summary of 'current flexibility requests' on 28 July 2017. Most of this email is redacted but it appears that Mr Shah was told that the claimant and another employee had current flexibility arrangements. Mr Mournehis' oral evidence about this was that Mr Shah had recently taken over and was checking what the situation was.

90. On 31 July 2017, Mr Shah emailed Mr Mournehis and Mr Murphy, subject 'Dritan': 'I have checked with HR and it seems Dritan is only on an extended first warning issued in March this year. What is this Final Warning you have mentioned to me several times?' Mr Mournehis replied saying that he did not think that claimant was on a final written warning, but he would check his file.

91. Mr Shah replied on 31 July 217: 'Yes you have both up to now been pretty adamant he is on a final'.

92. On 4 August 2017 Mr Murphy emailed Mr Shah and Mr Mournehis 'Bearing in mind his last warning was an <u>extension</u> to a First Written warning for inappropriate conduct to a Manager … after already being on a First for behaviour I think we should – putting the cake acquirement story aside – look at him being seen asap for a potentially Second WW again for behaviour.' Mr Shah's email in reply states 'Danny – according to letter warning expires 3rd March 2018. We have plenty of time and let's wait to see where the cakes incident goes.'

93. Mr Mournehis in oral evidence said he could see how the emails looked (as if the respondent desired a particular outcome, ie the claimant's dismissal). However he said that there was 'no underlying agenda'

94. On 7 August 2017, Mr Shah asked security for the CCTV footage surrounding both the 12th and 13th July cake incidents and the 18 July aftershave incidents to be saved to disc.

95. In an email of 9 August 2017 to Mr Finch and Mr Healy, Mr Shah provides a 'high level update' on store distribution. This includes an account of the cakes incidents. Two operatives including the claimant are identified as 'the worst offenders'.

96. The claimant was interviewed about the incidents by Phil Nottage on 15 August 2017. Mr Nottage was the fashion warehouse manager.

97. The claimant reported that what Mr Mournehis had said about the change of policy was 'no freebies'. He said that everyone used the perfume testers and that the use of testers had not been mentioned by Mr Mournehis when saying that there should be no freebies. He said food had been mentioned but not perfume. He raised the fact that Mr Mournehis had distributed some cocoa dusted almonds. He did not feel the taking off shirt incident was inappropriate as there was no one around at the time. He raised other examples of people failing to follow policies. In relation to the incidents on 18 July 2017, he said that he had applied some face cream, some hair product and some perfume.

98. The claimant said that he felt singled out and he was concerned that he was being 'followed' on CCTV inappropriately.

99. At the end of the meeting the claimant was suspended. There was a letter of 16 August 2017 confirming the suspension. Two other employees were also suspended in connection with the cake incidents. Mr Nottage did not give evidence to the Tribunal.

100. It is convenient to record at this stage what the claimant told us about his theory about these events. The claimant's view was that Mr Nottage was close to Mr Mournehis and Mr Fraser and would have been aware of what the claimant said at the 16 September 2016 meeting. He felt that Mr Shah was also seeking to influence the process as Mr Shah was seeking to introduce shift rotation. He felt that the emails showing he had been followed on CCTV were further evidence of a desire to get rid of him on the part of Mr Fraser and Mr Mournehis. He felt that although other employees were disciplined in respect of the 12/13 July allegations, extra charges were levelled at him which arose from the viewing of CCTV.

101. On 24 August 2017 the claimant was invited to a disciplinary meeting about the incidents involving cakes on 12 and 13 July 2017, the use of beauty product testers on 18 July 2017 and the removal of his shirt on 12 July 2017. He was told that the allegations were considered gross misconduct and a possible outcome was dismissal without notice

102. Also on 24 August 2017, Mr Shah sent two emails to Laura Coles in HR; the first said 'Apologies for being [in] a strop yesterday! I appreciate you are only giving me the best advice which I did reluctantly accept but understand it's for our best long-term interest. I am having a nightmare with this bunch of operatives so trying to be swift with some action…'

103. The second email, sent four minutes later, said 'I shall be less stroppy! Let me know when we can discuss after Dritan the next tier of operatives and what we should look to do… [redacted]…talk soon and thank you also for your support.' The Tribunal did not hear evidence from Mr Shah.

104. On 29 August 2017, the claimant attended a disciplinary meeting held by Sarah Berkeley, area manager for direct fulfilment about the cakes. Ms Berkeley worked in a different department and had not worked directly with the claimant. The claimant had been given an opportunity to view CCTV footage in advance of the hearing. Amongst other things the claimant told Ms Berkeley that there had been a practice of eating leftover food and using testers, which had included managers, and that the new 'zero tolerance' policy on these matters had not been clearly communicated. The claimant raised the question of what involvement security had and what role management had played in viewing CCTV. Ms Berkeley told the claimant that the CCTV footage had been gathered by the security department but she was in error on that point.

105. The claimant also said that he was being targeted as a result of what he had said at the shift rotation meeting on 16 September 2016.

106. On 4 September 2017, Sarah Berkeley held an investigation meeting with Mr Mournehis.

107. On 5 September 2017, Ms Berkeley held an investigation meeting with Paul Fraser.

108. On 8 September 2017, the claimant was invited to a reconvened disciplinary hearing to discuss the further evidence which Ms Berkeley had gathered. That hearing was held on 12 September 2017.

109. Ms Berkeley said that she followed up a number of matters raised by the claimant which she did not consider directly relevant to the charges.

110. In an email of 7 October 2017 to Mr Shah, Ms Berkeley raised a range of points which seem to have arisen from the disciplinary hearings which she had conducted (for the claimant and two other employees). She referred to 'mixed messages' having been conveyed on the food and samples issue.

111. Ms Berkeley concluded that the claimant had taken an unauthorised break to use testers in breach of the Samples, Testers and Food Tasting Policy and the Behaviour Policy, that he had accepted leftover food in breach of the Samples, Testers and Food Tasting Policy and that he had demonstrated inappropriate behaviour in removing his shirt in a tunnel. Having considered the claimant's long service and his assurance that he would adhere to policies in future, Ms Berkeley decided that a final written warning would be the appropriate sanction and she notified the claimant of this at the hearing on 12 September 2017 and followed up with a letter dated 28 September 2017.

112. Ms Berkeley conducted two other disciplinaries arising from the cake incident. We were told that both employees received final written warnings. One employee, who was a team leader, was demoted. That employee was subsequently reinstated to his team leader position but Ms Berkeley played no part in that decision and was unable to comment on it. Neither had previous formal warnings in place. She says that no one told her to 'conduct anything other than an ordinary disciplinary process' and she said she did not think there was anything unusual in the way the claimant was treated.

113. Ms Berkeley had not been at the 16 September 2016 meeting. She told the Tribunal that she knew that the issue had been discussed but not about specific meetings or that the claimant had made representations about the rotation issue.

114. The claimant appealed against his final written warning on 9 October 2017 and attended an appeal hearing with Philip Farrington, head of food safety, on 18 October 2017. Mr Farrington dismissed the appeal in a letter dated 5 December 2017. There was no complaint before the Tribunal relating to the appeal process.

115. Mr Farrington emailed Mr Murphy and Mr Shah on 4 December 2017 raising issues which arose from the disciplinary appeals he had heard. Mr Murphy invited Mr Mournehis to comment on the issues raised and he did so on the same day by writing comments in the email itself. On the issue of CCTV usage, Mr Mournehis said 'We only ever use CCTV for stock movement and any health and safety concerns. I am fully aware and responsible of the uses, breach of policy and the laws regarding CCTV. You may remember all the literature I forwarded to you some time ago.'

116. We were shown the respondent's information management policy which included a section on monitoring. That section states:

Harrods undertakes some monitoring of staff activities to ensure that legal requirements, rules and policies are being complied with and that customer service levels are being maintained.

There is then quoted a paragraph from the Data Protection Act 1998, section 2, Code of Practice for Monitoring at Work.

Paul Fraser not speaking to the claimant between 15 August 2017 and 26 November 2017

117. The claimant was suspended between 15 August 2017 and 13 September 2017. The claimant told us that he returned to what he described as a hostile environment because Mr Fraser did not speak to him. The claimant said he was talking about ordinary civility such as saying good morning.

118. Mr Fraser's evidence was that he could not remember speaking to the claimant during this period. He said that after the claimant's suspension, he was trying to stay out of the claimant's way because he had heard that the claimant blamed him for the suspension. He says that he would have spoken to the claimant if there had been a work-related reason to do so. Mr Fraser's undisputed evidence was that taking into account the claimant's suspension (four weeks), his own holiday and the shifts he worked, he only worked on eight shifts with the claimant, which were all Sundays. He said that he did not need to speak with each operative individually and that they would be directly managed by the team leaders.

Overtime

119. We heard some not entirely clear evidence about the types of overtime available to distribution operatives. It appeared that there was overtime which could be overnight during / prior to sale periods (the post-Christmas and summer sales). Hours worked overnight were paid at double rate. There might be ad hoc overtime after an early shift, particularly if someone on the late shift was unwell or otherwise absent. There might be overtime on Saturdays. These other types of overtime were paid at 1.5 times the normal hourly rate,

120. The claimant's complaint is that he was not allocated overtime during the period 12 September to 18 December 2017. This excluded the winter sale period that year which the claimant chose not to work. The claimant said in evidence that by not speaking with him during this period, Mr Fraser also excluded him from overtime. He felt that he should have been offered more Saturdays and that Mr Fraser was primarily responsible for allocating Saturday overtime. The claimant would have worked one Saturday in three under his usual shift arrangement, with Friday as his day off on weeks he worked Saturday

121. The records show that the claimant did 14 hours of overtime paid at 1.5 times ordinary rate during the period about which he complains. His colleagues during that period appear to have done anything from no overtime of that sort to 123 hours. The 1.5 hours seems to cover the ad hoc type of overtime. The double rate / sale overtime did not arise during this period.

122. The only other records we had for comparison were records for 16 September 2016 – 1 July 2017. In this 9.5 month period, the claimant did 87.5 hours at the 1.5 rate. His colleagues did from 0 – 360 hours.

123. Mr Mournehis said that overtime had dropped dramatically over the last two or three years as part of a drive to increase efficiency and reduce costs. He said that because of the claimant's 12:30 finish time, it might not be apparent that someone was required to cover the late shift by the time the claimant left work. Mr Fraser said that it was also less cost effective to use the claimant for

overtime on the late shifts as he would have to be paid for two hours between 12:30 and 2:30. He said that he would try to use someone for that sort of overtime who had a rota day (day off) the following day. He said that if the claimant did overtime on a Saturday, he could end up working thirteen days in a row because of his pattern of work (which included Sundays and one Saturday in three) which was not something the respondent would encourage. We comment on these explanations in our conclusions.

Disciplinary investigation in March 2018

124. On 11 February 2018, Mr Fraser was telephoned by Rafal Peicha from Dotcom Fulfilment who was trying to track an urgent item they were waiting for. Mr Fraser checked the system and found it had last been scanned at the Basement 3 freight lists. Mr Fraser emailed Mr Peicha to say that the item was on its way and asking to know when it had been received.

125. Mr Peicha then telephoned Mr Fraser to say that he had left his department to go to the freight lifts to collect the item. Mr Peicha said that when he arrived the driver of the truck was talking to another member of staff. Mr Fraser checked the CCTV and saw that the driver was the claimant.

126. On 11 February 2018, Mr Fraser emailed Mr Mournehis and Mr Murphy setting out the course of events.

127. On 12 February Mr Peicha emailed Ms Berkeley setting out what had happened, at her request.

128. On 13 February, Mr Mournehis emailed Mr Murphy, Mr Shah and Mr Fraser. He said that the investigation notes needed to be collated ‘together with the initial email of complaint from Sarah Berkeley which prompted the investigation’

129. On 14 February 2018, Ms Berkeley emailed Mr Murphy asking him to investigate what had happened. Mr Murphy replied saying that ‘We are investigating the incident at the moment.’

130. Ady Svraka conducted an investigation interview with David Lee, the member of staff with whom the claimant was speaking, on 18 February 2018.

131. On 20 February 2018, Mr Svraka conducted an investigation meeting into the delayed item with the claimant.

132. On 23 February 2018, there was a further investigation meeting in relation to the delayed delivery conducted by Mr Svraka.

133. On 7 March 2018, the claimant was invited to a disciplinary meeting with Andy Poole, manager Knightsbridge despatch. The letter of invitation indicated that dismissal was a possible consequence of the disciplinary. The allegation was that the claimant had been speaking with another member of staff for 21 minutes when he should have been driving and delivering stock contrary to the Behaviour Policy.

134. The claimant objected to Andy Poole on the ground that he would not be impartial and the hearing was eventually rearranged with Tim Watson, sales manager, on 19 April 2018. The claimant explained that he had been waiting for a lift. Mr Lee had asked whether the relevant lift was working and the lift appeared to be delayed. If that was the case, he was under a duty to report it so he waited to see whether the lift would arrive. The claimant also only had a small quantity of goods on his truck and he was waiting for further stock.

135. Mr Watson conducted further investigations with Mr Svraka, Mr Munyaneza, a team leader who had been in the area of the lifts, and Mr Peicha. Mr Peicha reported that 'so Jake came to apologise for the poor service I think the following week and then Sarah who is my boss asked me 'do you want to tell me about the tote', I was surprised she knew about this and then she asked me to send her an email which I did.. I asked her how she became aware of the situation and she told me that she was informed.'

136. The claimant attended a re-convened disciplinary hearing with Tim Watson on 1 May 2018 and was informed that no further action would be taken on 18 May 2018 . Mr Watson said that this was: 'Firstly due to the fact that I believe that if you received adequate communication from the manager on duty that day that the tote box was a high priority, that you would have been aware of the importance and actioned accordingly. Secondly, I believe that you were assisting your colleague and wanted to ensure there were no issues with the lift however as I told you I recommend that if you are in the same situation in future, you communicate this in a timely manner with your manager.'

137. We did not hear any evidence from Mr Svraka or Mr Watson about this matter. Ms Berkeley, Mr Mournehis and Mr Fraser were able to give evidence as to their roles.

Health and Safety committee

138. In a supplementary witness statement, Ms Cross told us that the respondent had set up a health and safety committee in 2016 and there were terms of reference before the Tribunal dated May 2016. Details of the membership of the committee and its minutes were made available to employees on the respondent's intranet. The claimant was not aware that there was a health and safety committee, although he had raised health and safety issues in the past.

139. Ms Cross said that staff would have occasion to look at the intranet on a day-to-day basis e.g. to look at weekly bulletins or for extension numbers but accepted that there was nothing done to publicise the health and safety committee to staff or to draw their attention to those materials on the intranet.

The law

Protected disclosures

140. Section 43B(1) ERA 1996 defines a qualifying disclosure as a disclosure of information which in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one of a number of types of wrongdoing. These include '(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject' and '(d) that the health and safety of any individual has been, is being or is likely to be endangered.'

141. To be a protected disclosure, a qualifying disclosure must be in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

142. Guidelines as to the approach that employment tribunals should take in whistleblowing detriment cases were set out by the EAT in Blackbay Ventures (trading as Chemistree) v Gahir (UKEAT/0449/12/JOJ):

143.1 each disclosure should be identified by reference to date and content

143.2 the basis upon which the disclosure is said to be protected and qualifying should be addressed

143.3 if a breach of a legal obligation is asserted:

each alleged failure or likely failure to comply with that obligation should be separately identified; and

the source of each obligation should be identified and capable of verification by reference for example to statute or regulation

143.4 the detriment and the date of the act or deliberate failure to act resulting in that detriment relied upon by the claimant should be identified

143.5 it should then be determined whether or not the claimant reasonably believed that the disclosure tended to show the alleged wrongdoing

and, if the disclosure was made on or after 25 June 2013, the claimant reasonably believed that it was made in the public interest.

144. There is a number of authorities on what a disclosure of 'information' is. It must be something more than an allegation; some facts must be conveyed: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. There is no rigid dichotomy between allegations and facts. A statement must have sufficient factual content and specificity such as is capable of showing one of the matters listed at s 43B(1): Kilraine v Wandsworth LBC [2018] ICR 1850.

145. There is little authority on the issue of what 'likely' means in the various limbs under s 43B(1). In Kraus v Penna plc [2004] IRLR 260, the EAT interpreted 'likely' as meaning 'probable or more probable than not' and said that there must be more than a possibility or risk that an employer might fail to comply with the relevant legal obligation. We note that more recent authorities on the meaning of the word 'likely' in other employment law contexts such as in the context of the definition of disability under the Equality Act 2010 have adopted a lower test for likelihood; in respect of the definition of disability, 'likely' means 'could well happen' but accept that for these purposes we must apply the guidance in Kraus v Penna.

146. The burden of proof is on the worker to show that he or she held the requisite reasonable belief. The tribunal must look at whether the claimant subjectively held the belief in question and objectively at whether that belief could reasonably be held. The allegation need not be true: Babula v Waltham Forest College [2007] IRLR.

147. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: Darnton v University of Surrey [2003] IRLR 133.

148. Factors relevant to the issue of whether a worker reasonably believed that a disclosure was in the public interest include:

148.1 the number in the group whose interests the disclosure served (the larger the number, the more likely the disclosure is to be in the public interest)

148.2 the nature of the interests affected (the more important they are, the more likely the disclosure is to be in the public interest)

148.3 the extent to which those interests are affected by the wrongdoing disclosed (the more serious the effect, the more likely the disclosure is to be in the public interest)

148.4 the nature of the wrongdoing disclosed (the disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing)

148.5 the identity of the alleged wrongdoer (the larger and more prominent the alleged wrongdoer, the more likely the disclosure is to be in the public interest)

(1) Chesterton Global (2) Verman v Nurmohamed [2017] IRLR 837.

149. A worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his or her employer done on the ground that the worker has made a protected disclosure under s 47B ERA 1996.

Section 44 (1)(c) ERA 1996

150. An employee has a right not to be subjected to a detriment by any act or deliberate failure to act by his or her employer done on the ground that the employee has taken one of a number of types of action relating to health and safety. These include at s 44(1)(c) bringing to an employer's attention by reasonable means circumstances connected with the employee's employment which the employee reasonably believed were harmful or potentially harmful to health and safety. Under this limb of s 44(1), the employer must either not have a safety representative or committee or it must not be reasonably practicable for the employee to raise the matter in question by way of the safety representative or committee.

Causation of detriment / burden of proof

151. Where the employee complains of detriment under various provisions of the ERA 1996, including and s 47B and s 44, the tribunal will consider the complaint under s 48. S 48(2) provides that it is for the employer to show the ground on which any act or deliberate failure to act was done.

152. The worker must show:

152.1 that he or she made a protected disclosure / act falling within s 44 and

152.2 that he or she suffered less favourable treatment amounting to a detriment caused by an act, or deliberate failure to act, of the employer

152.3 a prima facie case that the disclosure / s 44 act was the cause of the act or deliberate failure to act which led to the detriment.

(International Petroleum Ltd v Osipov & others 2017 WL 03049094, EAT and Serco Ltd v Dahou 2017 1RLR 81, CA)

153. Once the worker has done that, the employer must show:

153.1 the ground on which the act, or deliberate failure to act, which caused the detriment was done

153.2 that the protected disclosure played no more than a trivial part in the application of the detriment (Fecitt v NHS Manchester [2012] ICR 372, CA).

Time issues

154. For detriment claims under s 48 ERA 1996, there is a three month time limit for the claim to be presented to the employment tribunal. Where an act or omission is part of a series of similar acts or omissions, the three month limit runs from the last of them: s 48(3)(a) ERA 1996. An act may also be regarded as extending over a period under s 48(4), in which case time runs from the last day of the period over which the act continues.

155. If the tribunal is satisfied that it was not reasonably practicable for a claimant to present the claim within three months of the acts complained of, it should consider the complaints if they were presented within such further period as the tribunal considers reasonable: s 48(3)(b).

Submissions

156. The claimant and Ms Davies made oral submissions. We have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain our conclusions.

Conclusions

Protected disclosures

Issue 1.1: What did the claimant say or write which is alleged to amount to a protected disclosure?

Health and safety

157. At the meeting about shift rotation on 16 September 2016, the claimant disclosed the ages of the other early shift operatives and the fact that four of them had serious health conditions. He also disclosed the research he had done which suggested that older workers, and particularly those with health conditions or taking medication, were apt to be negatively affected by shift rotation.

Childcare

158. At the meeting, the claimant named staff including himself who had flexible working arrangements in place and also named those who had childcare responsibilities without such arrangements. He said that introduction of shift rotation could lead to his constructive unfair dismissal.

Issue 1.2: Was this a disclosure of information?

Health and safety

159. As we have found, names, ages and health conditions were disclosed together with the findings of studies which the claimant had researched. This clearly constituted a disclosure of information and not a mere allegation.

Childcare

160. We were also satisfied that what the claimant said about unfairness to staff with agreed hours for childcare responsibilities constituted a disclosure of information, referring as it did to facts about other named workers and their childcare obligations and arrangements.

Issue 1.2.2: Did the information which was disclosed, in the claimant's reasonable belief, tend to show that the respondent was likely to fail to comply with a legal obligation (an agreement about flexible working) to which it was subject?

161. We concluded that the claimant did believe that the information he disclosed, in the context of what he had been led to understand was a drive to introduce rotation of shifts, tended to show that the respondent was likely to fail to comply with a legal obligation to which it was subject and that that belief was reasonable. Requiring employees with childcare arrangements requiring particular hours to rotate between early and late shifts would be in breach of their contractual arrangements and likely to make those childcare arrangements difficult or impossible. The claimant understood that an alteration to the agreed flexible working arrangements could lead to a constructive dismissal of those employees. There was no evidence before us that anything which the respondent had said at the time should have made it obvious to the claimant (or more probable than not) that the respondent would not seek to introduce rotation in breach of those arrangements. As the claimant's notes showed, he was of the view that senior management had previously promised there would be no shift rotation and had since resiled on that assurance

Issues 1.2.2: Did the information which was disclosed, in the claimant's reasonable belief, tend to show that the health and safety of named individuals with health conditions and older workers was likely to be put at risk?

162. We also concluded that the claimant had a reasonable belief that this information tended to show that the health and safety of these individuals was likely to be endangered. We concluded that the impression given by the

respondent at this stage was that management were pressing ahead with the shift rotation proposal. The claimant did believe both that the shift rotation system would more probably than not be implemented and that it was more probable than not that it would endanger the health of those with serious health conditions and the older workers amongst the operatives. Those beliefs were reasonable given the impression management had given about rotation, the seriousness of the health conditions and the age of the workers in tandem with the research the claimant had done. Indeed Ms Cross was moved to look into the health conditions of the operatives because the respondent recognised that the matters which the claimant raised were potentially serious. There was no evidence before us at this stage that the respondent had indicated that it would make adjustments to protect such workers. It appears that no investigation of the health issues occurred until after the claimant raised his concerns in the 16 September 2016 meeting.

Issue 1.3: Did the claimant reasonably believe that the disclosures were made in the public interest?

163. The respondent conceded that the claimant had a reasonable belief that his disclosures were in the public interest given that he was acting as the representative for the early shift staff generally and we were satisfied that he did have such a belief.

164. It follows that the information was a qualifying disclosure. Since it was made to the claimant's employer in the form of his managers, it was also a protected disclosure.

165. Issues 1.4 and 1.5 relating to the detriments and their causation are considered with issue 1.9 below.

<u>Section 44(1)(c) ERA 1996</u>

Issue 1.6: did the claimant (in the meeting on 16 September 2016) bring to the respondent's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety?

166. We concluded that the claimant had done an act under section 44 in raising the issues about the health of older and unwell employees at the meeting on 16 September 2016. The circumstances connected with his work were the effect of proposed rotation on the health of the older and unwell employees. For the reasons we have already stated we find that the claimant had a reasonable belief that those circumstances were harmful or potentially harmful to health and safety. We observe that 'potentially harmful' appears to set a lower bar than 'likely'. We concluded that the claimant used reasonable means to raise the issues. This was a meeting to discuss the shift rotation

issue and the claimant was acting as the representative of early shift workers. It was clearly appropriate for the claimant to raise health concerns arising from the proposal in this context.

Issue 1.7: Did the respondent have a safety committee?

167. We accepted that the respondent had a safety committee as at 16 September 2016.

Issue 1.8: Was it not reasonably practicable for the claimant to raise his health and safety concerns by way of the respondent's safety committee?

168. We also concluded that it was not reasonably practicable for the claimant to have raised these concerns with the respondent's safety committee because he could not reasonably been aware that it existed. The committee had come into being in May 2016 and its existence had not been publicised to employees. There was no reason why the claimant would have cause to discover its terms of reference or minutes, since there was no particular reason why he would have been looking at parts of the respondent's intranet he did not require for his day-to-day work. It was suggested by the respondent that the claimant could have found out from his union but this was not put to him in cross examination and we had no evidence as to when the claimant joined a union and the nature of any trade union involvement with the respondent or its safety committee. There is no provision in the terms of reference for trade union membership of the committee.

<u>Was the claimant subjected to any detriments on the grounds that he had made the protected disclosures / s 44 acts (issues 1.4, 1.5 and 1.9)?</u>

169. It did not appear to be disputed by the respondent that the matters of complaint constituted detriments, assuming each was made out as a matter of fact (the disputed areas were the allegation about Mr Fraser not speaking to the claimant and the allegation that there was a reduction in overtime).

170. In relation to each of the detriments, we have scrutinised whether the claimant has established a prima facie case that the detriment was caused in any material sense by the fact that he had made protected disclosures / s 44 acts. For convenience, these are referred to as 'the disclosures'.

171. As well as looking at each individual alleged detriment, we also stood back and looked at the matter in the round, bearing in mind the following points. The claimant's view was that there was an intensifying witch hunt by a group of managers who wished to get rid of him because of the issues he raised in response to the proposal to introduce shift rotation. This he said explained the disciplinaries occurring over a period of time and some issues such as the alleged non communication by Mr Fraser and the reduction in overtime only

arising later in the period. The managers he believed were involved were Mr Alam, Mr Shah, Mr Mournehis, Ms Berkeley, Mr Fraser and Mr Murphy. He faced what he feelingly described as a 'year of disciplinaries' after having, as we understood it, a long and clear history.

172. Against that, the respondent makes a number of points:

172.1 The proposals for rotation were at an early stage;

172.2 There were differences of view amongst managers themselves about the proposals;

172.3 It makes no sense for the respondent to ask for feedback on the rotation proposals and then take offence at receiving that feedback;

172.4 It therefore makes no sense to suggest that six or seven managers would have conducted a vendetta against the claimant as a result of him having raised concerns about the rotation proposals.

173. We bear in mind also that we do not need to go so far as to find there was a vendetta against the claimant. If, for example, we found that there was resentment by one or more managers which materially (ie more than trivially) influenced an act or failure to act resulting in detriment, that would be sufficient.

First written warning for damage to screen on 20 September 2016

174. It was not suggested by the respondent that receiving a disciplinary warning is not a detriment and we find that it was.

175. We could not see a prima facie case that there was any causative connection between what the claimant said at the meeting on 16 September 2016 and the first written warning.

176. The disciplinary process had begun well before the meeting on 16 September. The investigation meetings had taken place and the claimant had been invited to a disciplinary hearing by Mr Alam. Therefore only Mr Alam's findings and sanction could have been influenced by the disclosures.

177. We accepted that Mr Alam decided to issue the first written warning because he believed it was an appropriate sanction for the misconduct which he had found, which was financially significant damage caused by inattention. We took into account the facts that he was not in the claimant's line management chain in distribution and not directly invested in the rotation issues. We accepted his evidence that he was unaware of what the claimant had said at the meeting, that he was unaware of what had occurred in the other cases cited by the claimant of accidental damage to stock or fixtures and that he had taken HR advice about sanction. We bore in mind that Mr Alam had given the

claimant the benefit of the doubt in accepting his evidence that he was unaware that he had damaged the screen.

Extension of warning on 1 March 2017

178. Mr Igoe was not of one the managers the claimant believed to be involved in the witch hunt against him. Mr Igoe was unaware of the 16 September meeting or what the claimant had said. His decision to extend the claimant's existing warning rather than escalate the sanction seemed to us to be proportionate. Mr Igoe recommended that Mr Moulla's behaviour also be addressed.

179. The claimant's case appeared to be that it was the escalation of Mr Moulla's complaint to be the subject of a disciplinary investigation and the way in which Mr Mournehis investigated which were influenced by his disclosures. We scrutinised that possibility with some care. We bore in mind that Mr Mournehis had been inconsistent in his evidence about why Ms Simes was not interviewed and we considered carefully the implications of his 'surely this is gross misconduct' email and his impulse to add further incidents to the investigation.

180. However, we also bore in mind that what Mr Mournehis was confronted with was an allegation that the claimant had been aggressive to another manager. If he had a predisposition to accept Mr Moulla's account and to view the incident in a negative light, we took the view that this was the likely reason. The disclosures had taken place some months previously and Mr Mournehis had not expressed dissatisfaction with them or resentment of the claimant at the time. As was apparent to the Tribunal, if not to the claimant at the time, Mr Mournehis was not himself in favour of rotation at that point. The claimant's opposition to shift rotation might have caused Mr Mournehis to feel that he was between the rock of senior management and the hard place of the early shift operatives; equally the opposition of the claimant and the early shift more generally might have given him material to demonstrate to senior management the difficulties of introducing rotation. In the absence of actual evidence that he resented the disclosures, we were unable to draw an inference that one view was more likely than the other. We bear in mind that by the stage when Mr Mournehis was involved in investigating Mr Moulla's complaints, the rotation proposal was on hold.

181. The inconsistencies in Mr Mournehis' evidence about Ms Simes struck us as likely to arise from defensiveness about the quality of his investigation but did not seem to us to be material from which we could properly infer a connection with the disclosures in the absence of other contextual evidence pointing in that direction.

182. We were not satisfied that there was a prima facie case that either Mr Mournehis' investigation or Mr Igoe's disciplinary findings and sanction were materially influenced by the disclosures.

Suspension on 15 August 2017

183. In reaching our conclusions on this allegation, we have to bear in mind that the claimant's case was that he was being 'set up' in relation to this disciplinary as a whole and that management had been watching him on CCTV to find material against him. We therefore need to look at the events which led to the suspension with some care.

184. We had significant concerns about the emails showing the scrutiny of the claimant on CCTV in early July and with Mr Fraser's account that he was effectively 'just following orders' and we could well understand why the claimant had felt concerned when he ultimately became aware of these emails in the course of these proceedings. There appeared to be a tacit acceptance that the level of scrutiny had been inappropriate. However, when we considered a number of factors, we were unable to infer a connection with the disclosures. The factors that weighed with us were:

184.1 the fact that over nine months had elapsed since the disclosures;

184.2 the fact that Mr Shah seems to have been cracking down on what he viewed as infractions of policy generally, including his zero tolerance policy in relation to food and samples, and it was he who started the surveillance of the claimant after seeing him somewhere he should not have been;

184.3 the fact that the emails appear to relate to / demonstrate a concern that the claimant was slacking in his work.

185. The investigation into the cake incidents on 12 and 13 July arose from Mr Mournehis' observations of a number of employees behaving in what seemed a suspicious manner. He asked Mr Fraser to look at the CCTV and this showed a number of employees eating food but only the claimant and Ishmael originally receiving the bags of food. They were identified early on as the most culpable and those who might be suspended.

186. Further observations of the claimant by Mr Fraser on 18 July 2017 appear to have arisen again because there was a perception that the claimant might be slacking.

187. Given the background of Mr Shah's zero tolerance policy, it seemed to us that Mr Mournehis felt the need to be seen to be taking firm action. The fact that he and Mr Shah identified the claimant and Ishmael as the worst offenders seems to relate to the fact that they were both seen taking the bags of food.

188. We did not hear evidence from Mr Nottage so we had no direct evidence as to whether he knew or did not know what was said at the 16 September 2016 meeting. We note that he was not directly concerned with the issues in the distribution function.

189. Looking at those facts we were not able to find there was a prima facie case that Mr Nottage's decision to suspend was materially influenced by the disclosures. Factors which weighed with us were:

- The lapse of time since the disclosures
- The crack down on employees eating leftover food and samples
- Similar treatment of other employees perceived to be most centrally involved in the cake incidents
- The fact that the respondent perceived the charges to be gross misconduct both in the claimant's case and in the case of two further employees who received final written warnings.

190. The emails from Mr Shah on 24 August 2017 ultimately did not lead us to draw any inference that the respondent was being influenced by the disclosures because Mr Shah's frustrations were with operatives plural and not specifically or only with the claimant. The emails between Mr Murphy, Mr Mournehis and Mr Shah from 31 July 2017 to 4 August 2017 did seem to us to indicate a desire on the part of these managers to dismiss the claimant, but again it seemed far more likely that this was connected with his recent disciplinaries, a perception revealed by the CCTV monitoring that he was slacking and his perceived involvement in the taking of food. All of this was against a background of Mr Shah seeking to impose a new practice / tighten up on compliance with policies and more junior managers no doubt seeking to demonstrate that they were supporting Mr Shah. So even if we inferred that there might be pressure on Mr Nottage to suspend the claimant (and we had no evidence that there was) the reasons for that pressure seemed to be matters other than the disclosures.

Final written warning on 12 September 2017

191. As set out above, we were unable to find a prima facie case that the disciplinary investigation was commenced or sustained because of the claimant's disclosures, so the remaining question for us was whether Ms Berkeley's findings and sanction were materially influenced by the disclosures.

192. We found no evidence that they were. We accepted that Ms Berkeley had no knowledge of the disclosures. We bore in mind that she issued final written warnings to two other staff members who were involved in the cakes incidents, despite the fact that there were no additional charges against those

employees, unlike the claimant, and despite the fact that those employees had clean disciplinary records. At least one of those individuals was a team leader and we can well see how that position of responsibility might tend to increase the sanction, although a clean disciplinary record and lack of other charges would weigh against an increased sanction. Looking at those factors, we were not able to see any obvious disparity in Ms Berkeley's handling of the claimant's disciplinary which pointed to the influence of other managers or improper considerations.

193. What the claimant told us about the failure to make clear the seriousness with which breaches of the Samples, Testers and Food Tasting Policy would be regarded and confusion arising from what were perceived to be mixed messages about the changes to practice might well have been significant had the claimant been dismissed and had we been considering an ordinary unfair dismissal claim. Ultimately, given that the claimant was not singled out for discipline as a result of participation in the cakes incidents, we did not find that that evidence pointed us towards an inference that the disclosures played a part in the claimant being awarded a final written warning.

Mr Fraser not speaking to the claimant between 15 August 2017 and 26 November 2017

194. The claimant perceived this to be a detriment and we are satisfied that a reasonable employee would perceive not being spoken to by a manager with whom one had regular contact as a disadvantage. We were satisfied that this was a detriment.

195. We accepted that there would only have been eight shifts during which Mr Fraser would have had an opportunity to speak with the claimant during this period and that he did not speak with the claimant on those occasions.

196. We accepted that the reason Mr Fraser did not speak with the claimant was that he was keeping out of the claimant's way because he understood the claimant blamed him for his suspension and that he had no work-related reasons to have a discussion with him over the course of those eight shifts. It simply made no sense to us that Mr Fraser would choose this point to stop speaking to the claimant because of the disclosures when he had spoken to him from 16 September 2016 until the date of the claimant's suspension and when he spoke to him again after the period complained of. If we had found other acts causing detriment which led up to this period, it might have been explicable as part of an escalation of hostilities, as the claimant perceived it, but we have not found there were such acts.

Not being allocated overtime

197. There was no suggestion that a reduction in overtime for an employee who wanted to work overtime was not a detriment.

198. We did not find that the explanations given by the respondent clearly or fully accounted for a drop in the amount of overtime the claimant was doing during this period. However, we found no evidence from which we could infer there was any material connection between the drop and the disclosures.

199. As with the 'not speaking' allegation, it made no sense to us that, subsequent to the disclosures, there would be a period of decreased overtime sandwiched between periods about which the claimant makes no complaint, if the disclosures had played a part in the diminution. Again the decrease might have made sense as part of a pattern of escalation of hostilities but we found no such pattern. What seemed to us most likely to have happened is that the claimant missed out on overtime on Saturdays because Mr Fraser was avoiding engaging with him during this period and Mr Fraser was the manager who tended to arrange Saturday overtime.

<u>March 2018 disciplinary investigation</u>

200. We were satisfied that being subject to disciplinary investigations with the threat of dismissal is a detriment.

201. We had concerns about this investigation. It seemed to us that a matter which might have been perceived as relatively trivial had another employee been involved led to a full scale investigation because the claimant was involved. The claimant said, 'there was nothing natural about it' and we had some sympathy with that view.

202. We therefore scrutinised the evidence with particular care to see if it supported an inference that Mr Fraser or Mr Mournehis had been influenced materially by the disclosures in commencing and commissioning an investigation and encouraging Ms Berkeley and Mr Peicha to complain about the incident with the delayed tote.

203. Ultimately we could not draw the inference. Partly this was because so much time had passed since the disclosures without any detrimental actions, on our findings, having been taken in relation to the claimant. It was also because we were mindful of what had happened during the intervening period, which included a series of disciplinaries against the claimant. It was apparent from the communications we have referred to above that the claimant's managers took an at times negative view of him over the period when those disciplinaries occurred, arising from the facts giving rise to the disciplinaries, and that there was a lack of trust and a perception that the claimant was avoiding work. Those appeared to us to be far more likely causes of what seemed to us to be the disproportionate manner in which the tote incident was handled.

204. As the claims have not been upheld on the facts we have found, it was not necessary for us to go on to consider issues relating to time limits.

Conclusion

205. For these reasons, the claimant's detriment claims are not upheld.

Employment Judge Joffe
London Central Region

18th Nov 2019

Sent to the parties on:
18/11/2019

For the Tribunals Office