EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Ms C Dias	**AND**	Genus UK Ltd t/a Select

Heard at: London Central **On**: 3, 4, 5, 6 and 11 April 2017

Before: Employment Judge JL Wade
Ms C Ihnatowicz
Mr S Ferns

Representation
For the Claimant: Mr E Macdonald (Counsel)
For the Respondent: Mr D Stephenson (Counsel)

RESERVED JUDGMENT

1. The Judgment of the Tribunal is that the Respondent:

   1.1 Did not directly discriminate against the claimant or discriminate because of something arising from her disability, or victimise her.

   1.2 Did unfairly dismiss the claimant.

2. Should the parties require a remedy hearing they are to apply.

REASONS

1. The claimant alleges unfair dismissal and disability discrimination.

Unfair dismissal

2. The reason given for the dismissal was misconduct which is a potentially fair reason but the claimant says that the dismissal was nonetheless unfair.

Disability discrimination

3.1 The respondent has conceded that the claimant was disabled at the material time. Her impairment is migraine and vertigo.

3.2 Claimant says that she suffered direct discrimination in comparison with a hypothetical comparator or an actual comparator, Nicolette Bowe. She says that the dismissal and the failure to uphold her appeal against the disciplinary decision were discrimination. The claimant does not pursue her allegations in relation to two alleged detriments arising from the grievance.

3.3 The claimant did not in fact compare herself with Ms Bowe although this was the comparison set out in the list of issues. The respondent suggested that Ms Lia Williams was a more appropriate comparator.

3.4 She repeats these allegations in relation to Equality Act section 15 and says that she was treated unfavourably because of her sickness absence which arose from her disability.

3.5 Finally, the claimant says that she was victimised. Her protected act was an allegation of discrimination in her grievance of 12 May and, again, the same allegations are made.

The evidence

4. We heard evidence from the claimant. She summonsed two witnesses, Lia Williams, former senior buyer and Mr Cafer Mahiroglu, Managing Director.

5. Lia Williams was concerned about the effect of her attendance on the settlement agreement which she had signed with the respondent. The respondent confirmed that it did not disagree that the legal requirement to attend under the witness order meant that this witness was obliged to come and to give evidence and so was not in breach. It also confirmed that it would not use these proceedings to explore more widely whether the agreement had been breached or use material arising at the hearing against her.

6. For the respondent we heard from Sue Fox, Head of Retail who dismissed the claimant and Nicolette Bowe, Head of Buying and the claimant's former line manager.

7. Laurie Williams, Head of HR provided a statement for the respondent but did not attend to give evidence. Debra Castle, former Head of Buying, gave a statement for the claimant and also did not attend.

The facts

8. The respondent is a company owned by Mr Cafer Mahiroglu. It trades as "Select" and sells "women's fashion trends at affordable prices". He has a

worldwide workforce of up to 3,000 employees and a turnover of £100 million, so it is a substantial operation with the size and administrative resources capable of conducting a fair dismissal process. Some of the clothes are made by a factory called "Calvin" in Turkey which is run by someone called Ismail.

9. The claimant was first employed by the respondent in June 2011 as a graphic designer. In October 2013 she was promoted to Design Manager at a salary of £40,000 a year.

10. In June 2013 Lia Williams started working for the company as a senior buyer.

11. On 12 May 2014 the claimant was promoted to Head of Design and in October 2015 Mr Mahiroglu increased her salary to £60,000 and, at least for the period after the Head of Buying, Debra Castle, left she was managed direct by him. When he came to give evidence on a witness order he denied this but many witnesses attested to his hands-on style.

Ms Bowe becomes the claimant's line manager, December 2015

12. Nicolette Bowe started working for the respondent as the new Head of Buying in the autumn of 2015. On 23 December, on instruction from Mr Mahiroglu, she told the claimant that she was now her line manager which effectively meant that the claimant would be Design Manager again rather than Head of Design. Ms Bowe was a bit concerned about how the claimant would take this but Mr Mahiroglu had told her that he was not happy about the claimant's unpredictable movements and her visibility in the office so that she needed a line manager who could keep an eye on her.

13. The claimant says that some of her absences in December were due to ill-health but there is no evidence that Mr Mahiroglu knew this when he made his decision. Ms Bowe knew she was suffering from vertigo but was nothing but supportive and neither she nor the claimant had concerned that it was serious and could not be accommodated.

14. If the respondent had turned against the claimant as alleged and was looking for an excuse to dismiss her, on her own case this happened in December before it was possible for her disability to be a triggering reason. Indeed, in her grievance of May 2016 she did not allege that the change of line management had anything to do with her ill-health.

15. Ms Bowe says that from December 2015 onwards the claimant was obsessed with the idea that she was being managed out, but this was not the case and instead she was being supported. This view is consistent with the evidence which we have seen and we do not agree that the claimant faced a campaign to exclude her from the company at this time.

Sick leave, January 2016

16. On 10 January 2016 that the claimant's husband contacted the respondent to say that she had been diagnosed with vestibular migraine and vertigo. The claimant was off sick from 8 to 25 January and we find that this was the first time it was possible for the respondent to know that the claimant might have a disability. Ms Bowe was supportive and offered flexibility on return to work; she knew about this particular condition and took a positive view that, with time, it could be managed. During the early part of 2016 the claimant also suffered from kidney stones so her migraine/vertigo were not the only condition causing ill-health absence and they are not alleged to be a disability.

Objectives meeting, which the claimant records, February 2016

17. On 16 February the claimant met with Ms Bowe who set her objectives for the forthcoming period. Ms Bowe's position, which is logical, is that she would not have taken steps to manage the claimant out unless and until she failed to meet her objectives so that 16 February was the beginning rather than the end of a process. Nevertheless, the claimant recorded the meeting on her phone without Ms Bowe's knowledge or permission. The claimant made a rather half-hearted suggestion that she might have told her beforehand, but there is no evidence.

18. The claimant told the respondent in her grievance that she had recorded the meeting to assist her because her illness means that she sometimes struggles to remember things. She says she had nothing to hide and did not do think she was doing anything wrong. We find that she cannot have thought that it was acceptable to record without permission. It is widely understood that such action is hostile and destructive of the employment relationship. The claimant told the respondent several times that her father is a prominent employment lawyer and we are especially surprised that she made this elementary error when she had advice available.

19. The claimant signed her new contract as Design Manager on 16 February. We only mention this because she told us in her evidence that she was marched upstairs and forced to sign that day. When it was pointed out that she dated her signature 22 February she said that this was a forgery, but on reflection said she had been mistaken. Regrettably this knocked a hole in the claimant's credibility and leads us to conclude that she was just trying to undermine the respondent's reputation.

20. A new company handbook was published in April which made it clear that it was gross misconduct to remove select stock without prior payment irrespective of its value or to commit any other serious breach leading to loss of trust and confidence.

The claimant asks Lia Williams to buy her some badges

21. Also in April, at the claimant's request, Lia Williams started to look out for a supplier of "badges" as Ms Dias wanted to buy some. In the claimant's world

badges are small embroidered shapes such as a smiley face, a unicorn, a bag of chips or a rainbow. Badges were regularly used by the respondent for its clothing and sewn onto T-shirts or trousers and this was very fashionable at that time.

22. The respondent says that the claimant and Lia Williams conspired together to source some badges from the respondent's supplier, Ismail at Calvin in Turkey. However both the claimant and Lia Williams said that they had discussed possible suppliers as far away as China so that as far as the claimant was concerned the source of the badges was unimportant. Ms Williams did not hear the claimant's evidence and did not prepare a witness statement because she attended on a witness order and told us that she had not wanted to come at all. We therefore gave considerable weight to the notable similarities between her evidence and the claimant's.

23. In her evidence the claimant attributed responsibility to Ms Williams and said that the detailed arrangements had been made without her knowledge. We had expected Ms Williams to be upset about this and to deny it, but she did not, and although the respondent has asserted both that the claimant *was* involved and that the documents prove it, we do not agree.

24. Ms Williams gave a detailed account of how she had spoken to Ismail and decided that what he had to offer sounded good. She understood that he would not be making the badges himself and would be sourcing them from a "trims" supplier who specialised in making trimmings for clothing. She was, however, surprised to receive a WhatsApp from him in mid-May to say that he had already dispatched the badges because they had not yet agreed a price.

25. Ismail gave a price of £87.50 for badges at 25p each which meant that there were about 350. Ms Williams checked with the claimant who said that she would pay that price. Much was made by the respondent at the hearing of part of the investigation notes which could be read to say that Ms Williams had provided details of who the supplier was to the claimant, but both denied it and the notes are ambiguous.

26. We find that the notes are neither proof of the claimant's involvement or of inconsistency. In fact, both Ms Williams and the claimant were remarkably consistent across a number of different interviews. Ms Williams assiduously read through minutes before she signed them and made corrections and we accept her comment that the minute taker was not always very accurate. Also, the WhatsApp messages, which were seen by the respondent at the time, corroborate Ms Williams's story and we are not sure why they were not believed.

27. Ms Williams says that she met the claimant's husband on around 15 May when the money was handed over. She told us the date instantly and said that before coming to this hearing she had checked her diary so she was sure of the date. However, when asked during the interviews she was unsure about the date and we find that rather strange.

28. The claimant says that she has a bank statement of the same date showing that she had taken a relevant amount of cash out of her bank on that day but she did not show that to the respondent. Apparently, her union representative actually advised her not to provide this evidence because it was personal. This was also rather strange.

29. So by the end of May 2016 the claimant had commissioned Ms Williams to obtain some badges, the source of which she did not know. Ms Williams had made a private arrangement with Ismail that he would supply badges and she would pay him £87.50 and the claimant had paid cash to Ms Williams. The badges were yet to be provided.

30. Ms Williams says that she did not know what the claimant was going to do with the badges but she thought they were for personal use and most of the answers she gave during interviews say this. Both the claimant and Ms Williams say that people who are creative like to do craftwork and it was not surprising that the claimant wanted to experiment with a popular fashion item in her personal time. There is one controversial note where the note-taker recorded that "she supposed that the badges were for sale" but she crossed the phrase out (rather badly) and wrote that she believed they were personal use in the margin. The claimant was acquiring about 350 badges which is a large number and we can understand why the respondent thought that this was too many to be for personal use.

31. When Lia Williams found out that the badges were coming from a company supplier she did not ask permission or even notify the respondent that she had made a private arrangement with Calvin and she did not check whether they were being sent through the "internal post", which was not sensible. However, this was her and not the claimant's responsibility. We also question whether Ismail at Calvin should also have behaved more carefully so as to allay any suspicion that he was doing an unauthorised private deal.

Possible redundancies

32. Meanwhile, the company was going through some difficult times. In March 2016 it made losses of £1.6 million in the UK and 9.7 million globally. Each senior manager was asked by Mr Mahiroglu to find savings in their team of 10%.

33. Ms Bowe first looked at her most expensive members of staff who were the claimant and Lia Williams, both earning £60,000 a year. She believed that the claimant was unhappy and thought that she might like to leave with a settlement package. Therefore, a protected conversation took place between her and the claimant on 19 April in which she asked whether Ms Dias would like to depart and it was left that the discussion would be progressed with HR.

34. The claimant says that Ms Bowe told her that if she did not take a package she would be managed out and that "I will be watching you". The claimant says that this was further evidence that a decision had been made from December and this was just the next attempt to get her out. We disagree firstly because it does not make sense that a protected conversation should talk about a

settlement and managing out at the same time. Secondly, Ms Bowe's narrative is coherent and her assertion that she did not talk about managing the claimant out is corroborated by:

a. The fact that the claimant's objectives had only just been set in February and it was too early to make judgements about her performance.
b. Ms Bowe is an experienced manager.
c. The email exchanges with HR leading up to the conversation and
d. Ms Bowe's notes of the conversation.
e. At this meeting the claimant asked if she could take notes so that she could share them with her father who was a prominent lawyer. The notes have not been disclosed.

35. We find it odd that the claimant did not voice-record this meeting if her need was to help her remember things due to illness because she was about to start a long period of sick leave the next day and so must have been feeling unwell. Ms Bowe, who was very angry about being covertly recorded, thinks that there may be a recording which has not been disclosed such is her lack of faith in the claimant who, she said, "chose to misunderstand me" during that meeting.

36. We find that the conversation was not a step in the campaign to dismiss the claimant and we do not draw any further conclusions from it. It probably was a conversation protected by section 111A of the Employment Rights Act but both sides have chosen to give evidence about it and there is no issue about this.

37. On 20 April Ms Bowe and the claimant spoke again and Ms Bowe directed her to HR; she understood that the discussion about an agreed exit was progressing but it seems that it was not. The claimant was not made redundant and the respondent says that other cost saving decisions were made, such as closing shops. One member of another team, also on a salary of £60,000, who was not disabled, left company following a parallel protected conversation.

The claimant's grievance, 12 May 2016

38. From 20 April to 13 June the claimant was on sick leave. During that time, on 13 May, she submitted a formal grievance dated 12 May. In that grievance, she stated that she had recorded her conversations with Ms Bowe and this resulted in Ms Bowe raising a grievance against *her* which had not been dealt with by the time the claimant was dismissed. Ms Bowe said that from then on all trust and confidence had been destroyed and she did not feel that she could work with the claimant in the future in any circumstances.

39. The claimant says that she wrote her grievance with legal advice. It is therefore notable that she makes little reference to her illness and no reference to alleged disability discrimination. When questioned, the claimant said that her whole grievance arose because of her illness, but that is not the sense we pick up and there was no reason why the respondent should have.

40. The claimant complained about demotion, reduction in workload, performance issues, undermining of her management role and about how she had been told in April that she was no longer required. In that context, she

mentioned her ill-health in passing. She also said that she had suffered "illness and discrimination". This was in relation to being left out of a particular project called the "TOWIE" (The Only Way is Essex) project because she had been off sick and because one of her managers had said that she was "not Essexy enough". The TOWIE allegation is not pursued in the particulars of claim, possibly because it would have been out of time and it was clarified in the grievance hearing by the claimant's union representative that she was mainly complaining of what he called "cultural discrimination".

41. The claimant says the grievance was her protected act for the purposes of a victimisation claim. The discrimination allegation was clarified as being cultural discrimination, in other words not a type of discrimination protected by the Equality Act. Sickness absence was however also mentioned as a partial cause of disadvantage, and so there probably was a protected act. However, given both that there were so many other allegations and that disability was not explicitly mentioned, the respondent would have had to have been extraordinarily sensitive for the protected act to have influenced its future actions, and we have detected no sign that it was.

42. The grievance was investigated by Louise Badawi, Head of E-commerce, who as far as we know did not have any input into the decision to dismiss. Allegations that the grievance process was discriminatory have been withdrawn.

The badges are delivered to the claimant

43. On 3 June a large package, A4 size but fat, arrived in the respondent's office. How it got there was not the focus of the disciplinary. After a bit of confusion Ms Williams confirmed that the parcel was hers and at some point in the next few days she met up with the claimant's husband, the claimant still being on sick leave, and handed it over to him. It is important to remember that the claimant was on sick leave throughout this time which makes it more credible that she did not have knowledge or contact with Ms Williams's supplier.

44. Alerted by a member of staff, who might have had an axe to grind against the claimant and who watched the parcel being handed over in what she said was a secretive way, someone from the respondent looked at the claimant's Instagram. They saw key rings made from badges which appeared to have been designed by the respondent, and HR started to investigate. The "home page" was titled "Messybun.co.uk" and it appeared to connect to a selling website, not least because there were pictures showing what appeared to be goods being wrapped up with the caption "busy day….". The respondent was reasonable to suspect that the claimant was selling indirectly from her Instagram account although we accept that not all Instagram sites are commercial.

45. When interviewed, the claimant failed to allay that suspicion because she was vague about the ownership of the site and the website and Facebook page to which it was apparently connected. Also, straight after she was questioned about the Instagram pages they were removed from the site which looked suspicious.

46. On 10 June Ms Williams gave £87.50 to a colleague and asked her to take the cash to Calvin in Turkey where she was going on a work trip. She says she was not at all covert and explained that she owed Ismail some money. We accept this because there is no evidence that Ms Williams tried at any time to cover up what she was doing and she knew that the supplier worked for the respondent anyway. Her intention was to pay Ismail for the badges which he had sent her under their private arrangement.

47. We conclude that this was proof available to the respondent that there was a private arrangement and that payment was going to be made for it. However, because it was a private arrangement was no paperwork beyond the WhatsApp messages, nor was it intended that there should be. It is possible that the badges should not have been sold to Ms Williams and that they were, as Ms Bowe says, surplus stock owned by the company and removed from the factory in Turkey. In that case Ismail was as much at fault as Ms Williams, but we saw no evidence which extended the trail to the claimant.

48. We also saw no motive for Ms Williams to protect the claimant by taking all the blame. The respondent's assertion that she did so as a form of revenge is counteracted by the fact that she only came to the hearing because of a witness order and had previously resisted.

The claimant is suspended, 13 June

49. On 13 June the claimant returned to work. At her return to work meeting she said that she was completely recovered and no adjustments were needed on return. Therefore, the respondent had no disability-related motive to dismiss especially since Ms Bowe's experience was that once a migraine/vertigo condition is brought under control it does not cause difficulties. Also, given that the claimant had reported serious ill-health only in January and that she was fully better six months later it would be impossible for the respondent to know or believe that she had a disability.

50. The meeting then moved on to a fact-finding meeting about the Messybun Instagram and after a short time the claimant stopped the meeting because she said she did not feel comfortable without a union representative. She did not explain her part in the situation or try to allay fears but took the stance, which she also took at the hearing, that the respondent was overreacting and she had done nothing wrong.

51. She was suspended on full pay. In the suspension letter the respondent asked the claimant if there was anyone they would like her to call to provide evidence. This of course complies with the ACAS code and is significant in that it failed to call Ms Williams as a witness when requested to do so.

52. Although the claimant has said all along that she had asked for wholesale badges which were not copyrighted to the respondent, she agrees that at the very least some of the badges which she had acquired looked like the respondent's designs and yet she had not asked for clearance before turning them into keyrings and she never acknowledged that they had grounds for

concern. Instead she pointed out that even if she *was* selling for Messybun she was not in competition with the respondent, but she could have made life so much easier for herself by being less confrontational.

53. Lia Williams was also suspended on 13 June.

Investigation and disciplinary

54. There followed an extraordinary number of investigation and disciplinary meetings with the two women. Despite many hours being spent by managers they did not do the one thing the claimant asked which was that she be given the opportunity to question Lia Williams at one of the hearings.

55. At the claimant's next investigatory meeting, and with her union representative present, she gave a "no comment" interview which the respondent understandably thought was uncooperative and suspicious.

56. The claimant was invited to a disciplinary hearing to take place on 24 June. The charges against her were:

> "It is alleged that you have been taking part in activities which cause the company to lose faith in your integrity namely, theft/misappropriation of company property, further particulars being:
> - it is alleged that in April 2016 you arranged for a colleague to make an order, via our company suppliers, for the production of fashion badges made using designs owned by Genus UK.
> - it is further alleged that you obtained these fashion badges and were involved in advertising them via a social media site, specifically Instagram under the name of Messybun.co.uk, for sale and for financial gain by yourself or another."

These charges did not change and were repeated in substance in the dismissal letter.

57. Sue Fox, Head of Retail, had been appointed by HR to hear the disciplinary. The claimant, who was represented by her union, initially defended the allegations on the basis that the designs did not belong to the respondent and, specifically, were not copyright. The disciplinary hearings did not go well for her in several respects:

a. She said that she could produce a receipt for her purchase which is odd because there was no receipt and she knew that.
b. When a receipt was not produced Ms Fox thought that this was incriminating especially as the claimant did not provide any other corroborating evidence; a bank statement which showed that she had withdrawn £100 cash from the bank on 15 May for Ms Williams was not provided on the advice of her union representative; this was bad advice.
c. The claimant also said that there were about 50 badges which is a considerable underestimate. This was the most significant point of disagreement with Ms Williams and is not to the claimant's advantage.
d. When questioned about the "Messybun" enterprises as a whole, beyond saying that it was "a family thing" the claimant denied that she

knew who ran the site and did not take steps to find out which was either stretching credibility or extremely uncooperative.

58. There is no evidence that Ms Fox enquired about or paid any attention to the claimant's health. At time of the disciplinary the claimant had told her employer that she was fully well and was not demonstrating the need for adjustments.

59. It emerged during the Tribunal hearing that, if she was to exonerate the claimant, Ms Fox wanted written proof both that she had paid Lia and that Lia had paid the supplier *before* the goods left the respondent's office. We do not know why the claimant did not try to get a receipt from Lia after the event but she says she had been told not to contact her whilst suspended and in fact during her evidence Ms Fox said she would not have accepted documentation written after the investigation had begun. On the same basis, she also refused to accept that there was an envelope with £87.50 in it destined for Turkey on 10 June, the investigation having begun a few days before. She therefore found that the goods had not been paid for.

60. The claimant made several requests for Lia to be called so that she could corroborate her story. These requests were declined or not followed up. We find that had the respondent considered Ms Williams's evidence in a reasonable manner it would have concluded, as we have, that she has not been acting in collaboration with the claimant. The calling of Ms Williams was in fact not necessary in that she had already given coherent evidence of her solo activity when she was being investigated on her own disciplinary charge, but it was ignored or unreasonably misinterpreted. The error of the respondent was not simply a procedural failure to produce a witness requested by the claimant, but to listen objectively to what she had to say and draw reasonable conclusions from it.

61. Ms Fox saw the interview notes and the messages that had passed between Ms Williams and Ismail and understood that Ms Williams was "taking the blame" but still she believed that the claimant was involved. As she said herself, her approach was the same as she would take in a shop, she being Head of Retail. When a shop assistant is found with the company's goods and without a receipt they are dismissed but unfortunately this situation was rather more unusual and complex so this analogy was not reasonable.

62. Ms Fox did not know whether the badges were recorded as having been ordered or paid for by the respondent and rather bizarrely offered to find that out for us whilst she was giving evidence, which was obviously too late. She came to the conclusion that there had been theft on the assumption that the badges passed into the ownership of the company when they arrived at its London office but without checking for any internal paperwork and ignoring the evidence. Ms Fox fell back on a sort of "guilt by association" on the basis that she felt that the "clandestine nature" of the arrangement meant that the claimant was equally responsible.

63. She also somehow ignored, or did not understand, the very cogent explanation that Ms Bowe gave of why she believed that the badges had been stolen. She said that the respondent had ordered and paid for them from a trim merchant in Turkey but they became surplus to requirements because the white jeans which they were meant to be sewn on to had not sold. Therefore, the respondent's property was "on the floor" of the Calvin factory and had been misappropriated. She was sure that the badges which she saw on Messybun were the company's because they almost exactly matched the badges which had been ordered for the white jeans project. This was not the charge put to the claimant or Ms Williams or explored by Ms Fox.

64. Ms Fox decided that Ms Williams was guilty of gross misconduct and she would have sacked her had a settlement agreement not been signed. Ms Williams is not disabled and is therefore an unhelpful comparator for the purposes of the disability discrimination claim. The claimant's argument that Ms Williams was not dismissed is technical only and does not assist. Her employment ended on 22 July.

65. At the end of an exhaustive disciplinary process consisting of at least three meetings, Ms Bowe, who was called by the claimant as an expert witness to the copyright issue, identified that at least one of the badges was the respondent's design. Despite this the claimant did not apologise or try to provide more explanation.

Dismissal, 13 July

66. The claimant was summarily dismissed on 13 July and although the dismissal letter largely repeats the charges recorded in paragraph 56 above, in her evidence Ms Fox was clear that her main reason was "the removal of goods from company premises without payment which we believe belonged to us". She confirmed that the question of whose designs they were was secondary and agreed that staff did run small design businesses as sidelines and that if they did not compete this would usually not be a problem as long as they asked permission.

67. She also confirmed that although the dismissal letter refers to a rule in the handbook that "you should not accept presents, services or other benefits from suppliers, customers or anyone else at any time" a breach of this clause alone would not be gross misconduct meriting summary dismissal. We do not think that that clause is at all relevant here in that it is clearly in the policy to stop staff taking inducements.

68. We found Ms Fox's evidence surprising and hard follow. Her position did not make sense in that the claimant had literally no prospect of proving to her that she had not been involved in the acquisition of the badges for the single reason that she had no written receipt. Ms Fox's reason was clear, however, and we find that whilst the range of reasons in the dismissal letter played their part, the predominant reason was as set out at paragraph 66 above.

69. The claimant appealed against the decision to dismiss her. There was a reference to illness discrimination, the ill-health referred to was her kidney stones and she did not say that the dismissal was discriminatory. She also appealed against the decision to reject her grievance. She did complain that the respondent had refused to allow her to call Ms Williams as a witness and also that Ms Fox did not take into account the contradictions between how Ms Williams's statements had been represented and what she actually said, a point which we have ourselves noted.

70. The appeal was conducted by an outside consultant and despite the complaint he also failed to interview Ms Williams. He did not make good Ms Fox's error in that he concluded that it would have made no difference whether Ms Williams had been interviewed or not and he did not get to the heart of the problem in what was a review rather than a rehearing. Both the appeal against dismissal and the grievance appeal were rejected.

71. The ET1 was filed on 19 October, which was in time. Although the claimant was not made redundant at the time of the protected conversation she has not been replaced in her role and Ms Bowden told us that the company had been through a difficult time and only started to make a profit in February 2017.

Conclusions

Disability discrimination and victimisation

72. As has been explained as we have gone along, there is no basis for this claim and, to her partial credit, the claimant has not strongly pursued it although of course she could have withdrawn it which she did not do. Although the respondent has conceded that she is disabled, it had no reason at the time of the dismissal to know that she was disabled and therefore no motive to dismiss her because of her disability. A great deal was going on at the time of the dismissal and we have no evidence that her ill-health was an effective cause of her losing her job. We also have no reason to connect the dismissal to the insignificant protected act, if there was one, in the grievance of May 2016 which covered a great many more important complaints.

73. By the time the case got to the appeal stage, the claimant was not complaining of disability discrimination and there is even less chance that her disability or a protected act were relevant.

74. Further, the claimant's relevant comparators, Lia Williams and the other staff member earning £60,000 a year were treated the same as she. Ms Bowe was stated to be a comparator at the Preliminary Hearing but she was not one.

75. We therefore dismiss the disability discrimination and victimisation claims.

Unfair dismissal

76. The unfair dismissal claim has been more difficult to assess. As will be apparent from the above, we have found that the claimant's approach throughout was unhelpful and we do have some doubts about her credibility. As set out below we consider that she contributed substantially to her dismissal.

77. However, this was a rare case in that the central reason for the dismissal, as articulated by Ms Fox, parted company substantially from the rationale set out in the dismissal letter. Her decision was fatally flawed because she had refused both to call Ms Williams as a witness and to take a reasonable view of the evidence and had therefore formed the unreasonable belief that the claimant was a co-conspirator with Ms Williams who was guilty of theft until she could prove herself innocent. Having heard Ms Fox's certainty that the claimant could never prove herself innocent, we conclude that the dismissal was unfair.

78. The issue has arisen about whether the claimant has unacceptably changed her story as the claim progressed in order to win her case. In her ET1 particulars, however, she stated that the respondent had failed adequately to investigate its allegations, including not allowing her to interview a colleague, Lia Williams, so that allegation has been present from the start.

79. Applying section 123(6) of the Employment Rights Act:

> "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding"

we have decided to reduce the compensatory award by 70%. There was conduct which caused and contributed to the dismissal both before the charges were put to the claimant and during the disciplinary hearing:

1. When the claimant saw that the badges were similar to those designed by the respondent she did not check the copyright position or ask if the respondent was happy with her using them and she did not even think about checking the source.

2. She was part of an operation, Messybun, which, even if it did not sell goods, *looked* as if it sold goods and she did not clear this with the employer which would have been very simple to do.

3. She was uncooperative during the investigation and disciplinary process, conducting a no comment interview, claiming that she did not know which members of her family owned parts of the Messybun website, and then not bothering to find out, and then being dismissive when told that the respondent was concerned. This exacerbated concerns about her intentions.

4. She said she would provide a receipt and then did not do so which meant she was changing her story and looked suspicious.

5. She said there were only 50 badges when there are were six times that number.

6. She showed no understanding of the respondent's concerns nor did she try to express regret where appropriate, for example for using a design of the respondent's. Instead she made it clear that she was taking legal advice and was supported by her father so that she would not have legal costs.

7. She covertly recorded meetings with her manager.

We do not apply section 122(2) as a reduction on 70% is sufficient to produce a just result and the dismissal was unfair.

Wrongful dismissal

80. We have some concern that we do not have the full picture but we have done our very best with the material available to us. We are troubled by the fact that Ms Bowe's evidence seemed very cogent but her account of events was not at all the same as the conclusions which Ms Fox reached.

81. Whilst we understand why the respondent suspected that the claimant was displaying badges on her Instagram site for sale, there is no actual evidence of that and the website which appears to be associated has never been active. The claimant may have been in fundamental breach of contract but we cannot say that this has been proved to us on a balance of probabilities and she did not take an active part in obtaining the badges. Therefore we find the dismissal to have been wrongful. Under her contract the claimant is entitled to 12 weeks' pay.

Polkey

82. We find that had the claimant would have been fairly dismissed after 12 weeks because of the complete breakdown of trust and confidence between her and her line manager arising from her recording of meetings. This was covert recording and, whilst it did not produce any incriminating evidence against Ms Bowe, it was an intrusion and an act of disrespect; it indicates a desire to entrap somebody who had no reason to suspect that she could not speak freely. The claimant's explanation that she was doing this for health reasons is fatally undermined by the fact that she did not ask first. Ms Bowe had already raised a grievance and told us that she considered this conduct "gross" and did not feel that she could ever work with the claimant again so, given that she was senior to the claimant the next step would have been to take dismissal action for serious breach of trust and confidence.

83. There was also a possibility that the claimant could have been made redundant in that the company was having financial difficulties and another employee had left under a settlement agreement as a cost-cutting exercise. However, there is no evidence of a redundancy process taking place in the company and the fact that the claimant was not be replaced was probably opportunistic. We are not able to conclude if and when she would have been made redundant.

Compensation

84. The effect of this decision is that the claimant is entitled to a basic award of £2,395.

85. She is also entitled to compensation for wrongful dismissal equivalent to 12 weeks' net pay which we calculate to be £799.11 x 12 = £9,589.32.

86. Given the Polkey reduction, the contributory fault reduction of 70 % only impacts on the compensation we award of £500 for loss of statutory rights which is accordingly reduced to £150.

87. The above comes to a total of **£12,134.32.**

88. The figures above are not in our Judgement; we did not consider whether it was appropriate to increase the compensation under section 207A of TULR(C)A 1992 or to award costs, and recognise that the parties may wish to make representations. If the parties can resolve the question of compensation without a hearing they should do so, but if one is required they may apply with a time estimate and dates to avoid for July and August.

Employment Judge Wade
3 May 2017