EMPLOYMENT TRIBUNALS

Claimant: Mrs A McMahon

Respondents: 1. Redwood TTM Limited
2. Mr Darren Pilling

Heard at: Liverpool **On:** 10-11 September 2018
and (in chambers) 12 October 2018

Before: Employment Judge Wardle
Ms F Crane
Mr A Wells

Representation
Claimant: In person
Respondents: Ms K Skeaping - Solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's complaints of automatically unfair dismissal contrary to section 100 of the Employment Rights Act 1996 (ERA) for a health and safety reason, of automatically unfair dismissal contrary to section 103A of ERA for making a protected disclosure, of having been subjected to a detriment contrary to section 44 of ERA for having brought to her employer's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety and of indirect discrimination on the grounds of her sex contrary to section 19 of the Equality Act 2010 (EqA) are not well-founded and fail but that her complaint in respect of direct discrimination on the grounds of her sexual orientation contrary to section 13 of EqA is well-founded and succeeds.

REASONS

1. The claimant by her claim form brings complaints of automatically unfair dismissal contrary to section 100 of the Employment Rights Act 1996 (ERA) for a health and safety reason, of automatically unfair dismissal contrary to section 103A of ERA for making a protected disclosure, of having been subjected to a detriment contrary to section 44 of ERA for having brought to

her employer's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety, of indirect discrimination on the grounds of her sex contrary to section 19 of the Equality Act 2010 (EqA) and of direct discrimination on the grounds of her sexual orientation contrary to section 13 of EqA.

2. The respondent, by its response, resists the claim in its entirety.

3. The Tribunal heard evidence from the claimant and on behalf of the respondent it heard from Mr Darren Pilling, Managing Director and Mr Darren Rose, Finance Director. Each of the witnesses gave their evidence by way of written statements, which were supplemented orally by responses to questions posed. The Tribunal also had before it a bundle of documents in two lever-arch files, which it marked as “R1” and "R2".

4. Having finished taking the evidence fairly late into the afternoon of the second day of hearing with insufficient time remaining to receive closing submissions, the parties agreed to submit these in writing and they were given until 2 October 2018 to file them. Having subsequently sat in chambers on 12 October 2018 and having considered the evidence, the submissions and the applicable law the Tribunal has been able to reach conclusions on the issues requiring determination by it.

5. Having heard and considered the evidence it found the following facts.

Facts

6. The claimant was employed by the respondent as a Quality Manager with effect from 2 May 2017 until 22 December 2017 when her employment was terminated ostensibly by reason of redundancy.

7. The respondent is a relatively large company engaged in the manufacture of specialist fabrics based in Skelmersdale. At the time of these events it had some 170 employees reducing to 140, of which 40 or so were on the indirect side i.e. not involved in the production of the fabrics.

8. It had not had a Quality Manager since 2014 but on Mr Pilling's evidence he believed that the business would benefit from having an experienced Quality Manager on board and he began the recruitment process for this role around mid-2016 looking for someone who could drive change, improve efficiencies, review quality assurance procedures overall and help with his plans to bring in sales from a wider market by supporting the business in obtaining the updated ISO 9001:2015 registration. ISO 9001 is the international standard that specifies requirements for a quality management system and it is used to demonstrate the ability to consistently provide products and services that meet customer and regulatory requirements. The period to transition to the updated standard ended in September 2018. An offer was made to another individual in December 2016 but the individual concerned chose to stay with her existing employer.

9. The claimant subsequently applied for the role in or around March 2017 and after an interview process she was offered the role and entered into a contract dated 11 April 2017 with an employment commencement date of 2 May 2017.

10. According to the claimant, whose sexual orientation is towards persons of the same sex, she was asked during her first week of employment by Mr Pilling, having shared her sexual orientation with him, not to make it common knowledge that she was gay as the owner of the business (Mr Brian Atherton) was old school and that the company did not have any other gay people working for it. She says that despite finding the request to be odd and uncomfortable she complied with it as she was mindful of the impact of it on her job having only just started. In contradiction it was Mr Pilling's evidence that no such conversation took place and that the claimant never made him aware of her sexuality. He says that the first time that he became aware of her sexual orientation was when the claimant appealed the decision to make her redundant.

11. The claimant further maintains that during the second week of her employment she was asked by Mr Pilling to remove her radio from her office on the understanding that all staff throughout the factory would be losing their radios too but that some 5 or so weeks later there were approximately 8 radios still being played around the site in different departments, which led her to feel that she was being discriminated against and caused her to relay her concerns to Mr Pilling, whom she says responded that it was his rule for her as he employed her and that when she asked him if the denial of a radio to her was because she was gay and he was uncomfortable with this he stuttered and went bright red before saying no though he was unwilling to allow her to bring her radio back in until everyone else's radios were removed. She says that all the radios were removed around the end of June or the start of July 2017 but despite the decision being quickly overturned by Mr Atherton she says that she alone continued to be denied the opportunity of having a radio in her office and that approximately 11 weeks after her radio had been removed she was advised by Mr Pilling that if she wanted it back she should seek permission from Mr Karl Roberts, the Operations Manager, the need for which she questioned with him as it was he who had asked her to remove it, to which he responded that it would be courteous and which saw her telling him that she had asked Mr Roberts some weeks ago if he had a problem with her radio and that he had said that he had not but that Mr Pilling continued to insist that she ask Mr Roberts' permission.

12. Mr Pilling in his evidence in relation to this issue of the removal of the claimant's radio accepted that she was asked to remove it but as part of his plan to require all radios on the site to be removed explaining that during his time working in China he had found that the workforce performed better without distractions and that he was keen to introduce this approach within the company but that when the change was effected it was not well received and a number of complaints were made to the board. As a consequence his decision was overruled in respect of staff working on the factory floor but in the case of office staff it was agreed that as strong feelings had been expressed both for and against the use of radios in the past that the situation would be considered on an individual basis taking account of those working nearby. He says that his request for the claimant to discuss the issue of her radio with Mr Roberts reflected this approach as it would allow him to take into account the feelings of those working in the vicinity of the claimant's office and that his approach to the issue of radios in the workplace in no way related to the claimant personally or her sexual orientation.

13. The claimant further says that around the beginning of June 2017 she was asked by Mr Pilling to consider taking on the health and safety role on top of her role as Quality Manager explaining that he wanted to get rid of the current Health & Safety Manager (Will Caddick) and two other employees as part of a redundancy. Such request is not disputed by Mr Pilling stating that he recognised that the claimant would be well positioned to carry out health and safety audits at the same time as her quality audits and that he acknowledged that aspects of health and safety would sit well within the quality team due to the similarities in the types of reviews performed. He also thought that Mr Caddick could benefit from receiving support from the claimant and that it was a potential means of her growing her role within the business but that when he discussed this with her she raised two main concerns; the first being the need for external support, particularly on the legislative requirements of the role, as she was not a health and safety expert and the second being her expectation of additional remuneration for taking on this role, which he was not in a position to accommodate and he did not therefore push the issue at that time.

14. From mid-2017 it was Mr Pilling's evidence that the business began to encounter increasingly difficult trading conditions which directly impacted on its profitability. As a purchaser of materials around the world he explained that the business was highly exposed to changes in the exchange rates and to the uncertainty in the markets resulting from the Brexit vote and that when preparing budgets and forecasts following the referendum it was recognised that if the pound to the euro exchange rate fell below 1.15 it could have a massive impact on the cost of raw materials and on the cost of production overall. The rate did fall below the level of 1.15 in June 2017, he says, which necessitated a thorough review of the budget in an effort to cut costs and counteract the impact of the now significant increase in the costs of raw materials.

15. As part of this process he says that he reviewed both the direct headcount i.e. individuals whose time is completely attributable to the production of goods for sale and the indirect headcount i.e. those not directly engaged in production and that it was the direct headcount which was first impacted by the difficult trading conditions, which saw him reducing the use of temporary and casual workers whilst also allowing natural wastage to reduce permanent staff costs in this area and which he believed resulted in a reduction of around 25-30 direct members of staff when compared to peak staffing levels. At the same time he says that he and Darren Rose, the Finance Director, were seeking to reduce non-staffing costs wherever possible and that these steps had some initial success as the company did achieve some profit in August and September 2017 but not at the level of the previous year or at predicted budget levels. However in September 2017 the pound/euro rate fell to 1.08 and the profitability percentage of the business fell to some of the lowest levels ever seen at 2.6%. In tandem with these negative trading conditions caused by the devaluation in the pound the business was also seeing a significant reduction in sales, which meant a review and reduction of pricing models and a consequent impact on profit margins overall.

16. On 16 June 2017 the claimant says that she was asked to carry out an audit of training records of all employees by Mr Pilling , which is evidenced

by his email to her at page 196, by which he indicated that in the light of the Sarri Duke incident he wanted to confirm to the board at its meeting on 27 June 2017 that all employees had valid training records. Such audit was carried out by her with Mr Caddick on 21 June 2017 before she provided Mr Pilling with a report on 23 June 2017, which he found to be very comprehensive. She was further asked by him in the light of a few glaring gaps in documentation, which required urgent rectification to set target dates for completion.

17. On the claimant's case she maintains that during July 2017 it became apparent that the business was sending inferior quality product out and that each time she tried to stop it she failed, which led her to incorporate concessions within the company's non-conformance log/procedure, which required in the case of any product to be released out of specification to be signed off by 2 senior managers before despatch. She says in reference to this concessions procedure that in relation to a non-conformance issue with a product known as Parkhouse-Gel-Kool+-002 she asked Dave Rose and Mr Roberts to sign their agreement but that the former was not prepared to do so although he was verbally agreeable to it going out, which the document was intended to stop and the latter would only sign if Mr Pilling did so, which led her to give it to him only for it to sit on his desk for 3 days. In the meantime she says that she was told by Mr Roberts that the product had gone out, which led her to visit Mr Pilling's office, at a time when he was off site when she saw the document on his desk unsigned, which she followed up with an email at page 202 asking if he and Mr Rose had or had not approved for the product to be sent out with the inferior material used. She claims that Mr Pilling subsequently turned this around by making it sound in his email in response to hers at pages 201-2 that she had put him in a position that he was unaware of and that she knew from here that she would need to watch her back She further claims that the product should have been recalled as not being safe within the public hospital environment.

18. In relation to this email exchange Mr Pilling's evidence was that it was an example of the claimant having notified him of quality issues and of their having disagreed on the action to be taken. More particularly he says that she told him that 30 covers, on a much larger order, had gone out to a client with the advanced rather than the extreme fabric ordered explaining that both are high quality products made with the same sub-strain fabrics but with the difference that the extreme fabric is treated with a chemical that is more resistant over time to chlorine cleaners and in respect of which the business charged more. He further explained that the client had previously bought the advanced covers but that the business had up-sold the extreme covers and claimed that the advanced covers were entirely fit for purpose and that their use would have no effect on the health of public patients using the covers in question.

19. He further explained that the claimant had suggested that the 30 covers should be recalled but that he disagreed as this approach would have required a much wider product recall, which in his opinion would have damaged the relationship with the client and that his preferred approach was to wait to see if the client raised any issue with the quality of the covers supplied as part of that batch. He did though say that he was unhappy that this situation had arisen as the business had recently introduced a new system of control based on the claimant's recommendations that should

have prevented these products being despatched, which prompted him to question her in this regard by the above-mentioned email dated 14 July 2017 at pages 201-2, which led to a meeting being held with her and Mr Rose and Phil Gimbert to see what steps could be taken to prevent the situation re-occurring, which he felt was a positive one.

20. On 1 August 2017 Mr Pilling wrote to the claimant to confirm that with immediate effect clause 2.2 of her contract, which provided for the first six months of her employment to be a probationary period terminable on one week's notice, was no longer applicable and that her notice period in line with clause 2.1 would be three months, which he stated was in recognition of the positive start that she had made in her role. The circumstances giving rise to this early termination of her probationary period thereby enabling the lengthier notice period were different according to the accounts of Mr Pilling and the claimant. On Mr Pilling's evidence it came to his notice through LinkedIn notifications that the claimant in her profile referred to her role with the respondent as being on a contract basis, which he says he queried with her and was told by her that because her employment could be terminated on week's notice during her probationary period she considered herself the equivalent of a contract employee. Whilst finding this view to be unusual he assured her that she was a permanent employee and that the contract that she had been issued with was entirely standard for the company but that he would speak to Mr Atherton about bringing her probationary period to an end early, which he did. On the claimant's evidence, given in cross-examination, she disputes that Mr Pilling was responsible for this amendment to her contract saying that she felt insecure about only having one week's notice and that she went to see him on more than one occasion about it before mentioning it to Mr Roberts, who in turn mentioned it to Mr Atherton, who then spoke to Mr Pilling and that it was this intervention that led to her probationary period being cut short.

21. On 11 October 2017 the claimant had a review of her work to date with Mr Pilling, which saw him advising her in an email dated 13 October 2017 upon consideration of a quality update report she had prepared that he was fine with her approach and that she was starting to introduce some good disciplines whilst at the same time emphasising the need to continue to move forward. He also advised that he would put a review catch up in the diary for January.

22. During October and November 2017 the claimant says that the respondent's H&S Manager, Mr Caddick, was either off ill or in the warehouse operating as a forklift truck driver and that the site was suffering detrimentally. she says further that the respondent was due to implement new safe systems of work due to an accident in the welding room, which required help from Mr Caddick to prepare a safe work instruction but that Mr Pilling would not take him off his warehouse duties. She also says that on 6 November 2017 she was asked again by Mr Pillling to take on the role of health and safety as he was now ready to make redundant the current H&S Manager and two other employees and as she had complained enough about health and safety not being carried but that she declined the role as she had enough to do with her own job and had just been asked to look at taking on a new ISO accreditation. She claims that declining this role changed everything and had an impact on the way Mr Pilling spoke and dealt with her.

23. For his part Mr Pilling disputed that the site was suffering due to health and safety not being properly managed. In relation to the implementation of new safe systems of work (SSOW) his evidence was that Mr Caddick was tasked with reviewing and improving the SSOW applied across the business including those adopted within the welding department, where there had been an accident in May 2017 adding that he had asked him to carry out this task in response to feedback the claimant had provided arising from her quality audits. He acknowledged, though, that there was slippage in the timeline provided to Mr Caddick to complete this task but that upon being made aware of this slippage he gave him a new timeline and monitored his progress on a weekly basis until the task was completed pointing to an email sent by him to Mr Caddick on 9 August 2017 at page 205 asking for an update at the end of each month on status and stressing the need to avoid any slippage in timelines. He also disputed that Mr Caddick, despite carrying out other duties not directly related to his health and safety role between August and December 2017, failed in his health and safety responsibilities or was unavailable to assist staff with matters of health and safety during this period pointing out that his only absences due to sickness were on 17 and 21-24 November 2017.

24. In regard to his asking the claimant again to take on the H&S role he accepted that he did revisit this with her in or around November 2017, which saw her declining for a second time but disputed that her refusal to assume the role had any effect on his approach to her from that time on.

25. In illustration of the change in Mr Pilling's approach to her the claimant claims after she turned down the H&S role she was asked to start coming in 15 minutes before and staying 15 minutes after her contracted hours, which were 8.45 a.m. to 5.15 p.m. 'to be seen' adding that he knew that this would be a struggle as she had explained during her interview that she had a son who attends a special school and that he was picked up and dropped off at home, which led her to say that while she was willing to come in earlier and stay later when the job demanded it she could not do it just to be seen and saw him stating that the owner Mr Atherton liked to see his senior managers in the factory earlier and later. She further claims that she said to him that this had never been mentioned before she turned down the H&S role, which saw Mr Pilling suggesting that if she could not do it in the morning she could make it up in the evening.

26. In regard to the claimant's level of visibility and timekeeping Mr Pilling accepted that he did speak with her in or around October/November 2017, the main purpose of which he says was to advise her of the requirement for her to be more visible within the factory and that he also raised with her his concern that she was often seen with her computer off and coat on at her clocking off time, which suggested that she must have started closing out her work and preparing to leave prior to this and that there had been occasions when she was not at her desk ready to work at her start time. He was, he says, looking for the claimant to set a more positive example for her team and highlighted the importance of her arriving at work on time and ready to work and that she should not always to be seen as the first person in the office to leave in the evening. He also says that whilst the claimant did say she often worked through her lunch to make up lost time he did not recall her referring to any issue with child care as being the reason for her

approach to her hours of work and that she never asked for specific flexibility on a permanent basis to support her child care commitments.

27. In terms of this alleged request for the claimant to begin her work 15 minutes earlier at 8.30 a.m. and to remain until 5.30 p.m. whilst there were fewer core time infringements committed by the claimant from 6 November to 7 December 2017, after which the claimant went off sick following a fall, it was noted from the document at pages 550-551, showing her total daily hours for this period that on no occasion did the claimant actually work these hours.

28. By November 2017 on Mr Pilling's evidence it was increasingly clear that some form of staff reduction was likely to be necessary to make the significant reductions in overheads required and that at this stage he was considering a two stage process with a limited number of redundancies in phase 1 in November/December 2017 to address the urgent action needed to cut costs with further potential redundancies in phase 2 in March 2018 if the situation did not sufficiently improve. In illustration of this he referred to his notes for a board meeting on 14 November 2017 at page 218 reflecting the initial proposals under discussion at that time. At this stage he says that the individuals being considered for redundancy in these two phases were changeable but that during this meeting he had discussed the possibility of making six indirect members of staff redundant as part of phase 1 and that the claimant was one of those named at this stage.

29. Following the meeting Mr Pilling wrote to Mr Rose on 16 November 2017 at page 219 referring to their discussions on Tuesday (14 November 2017) seeking his input regarding the draft actions to be taken, included amongst which was the need for Mr Pilling to stress the seriousness of the current situation to the senior management team and the need for them to bring forward cost saving ideas/ initiatives for their departments. In this connection Mr Pilling says that he held such discussions with all his managers and in support thereof he referred to the email he sent to the claimant on 17 November 2017 at page 221. In this he refers to their discussion on Tuesday (14 November 2017), which for the record appeared to have taken place on Wednesday as she was not in work on the Tuesday but recalls going to see him on the Wednesday to see what she had missed the day before and asks her to send her proposal plan for improvement, including cost saving initiatives and ideas. In reply the claimant emailed him later that day asking if his request could be picked up the next time he was in the office and stating that she did not remember being asked for an improvement plan but that she was happy to put one together.

30. At this stage Mr Pilling says that he was undecided as to whether the claimant should be placed at risk in phase 1 or 2 because he still felt that the role of Quality Manager could assist the company in implementing efficiencies that could support the business through the difficult trading conditions it was encountering. It was, he says, one of those instances where he was seeking to balance the short term cost cutting gains in terms of the removal of the claimant's salary of £50,000 from payroll against the longer term needs of the business should it survive this difficult period and that he had made his fellow directors aware of his uncertainty in this respect at the meeting on 14 November 2017. It was for this reason, he says, that Mr John Atherton, Director, in an email to him dated 21 November 2017 at

page 226-227 outlining his concerns regarding the company's profitability and stressing the need for him to provide clarity on his plans to return the business back to a satisfactory level of profitability drew attention to the need for him to have arrived at a view on this at the next board meeting on Thursday 23 November 2017 in the context that the role of Quality Manager had previously been discussed as being an indirect member of staff, who represented a significant expense to the company and whose effectiveness Mr Atherton felt there were questions about.

31. On 22 November 2017 Mr Rose emailed Mr Pilling at page 257 to provide him with some updated financial information and to underline his opinion that the phase one proposals should achieve savings of at least £200,000, which was a higher level of saving than Mr Pilling's initial proposals would achieve. Mr Pilling prepared a written overview of his proposals in advance of the board meeting at pages 228-256. The proposed changes were intended to increase the EBITDA (earnings before interest, taxes, depreciation and amortization) figure from £374,700 to £409,300. His intention remained to achieve the overall head count reduction required in two phases. The redundancy proposal placed four members of the indirect headcount at risk of redundancy, which did not include the claimant, who was named as part of the phase 2 proposals. At the board meeting on 23 November 2017 Mr Pilling says that he was put under some pressure to explain this approach given the substantial cost saving that could be achieved by including the claimant in phase 1 and that he agreed to consider the options further.

32. On 24 November 2017 the claimant sent an email to Gill Baldwin asking if she could be removed from the list of attendees at the company's Christmas party and if there was any chance this could happen without a penalty. Ms Baldwin responded on 29 November 2017 to say that the final numbers had gone in on Thursday (23 November 2017) and that if nobody else wanted her place she thought that she would be charged for the ticket before suggesting that she had a word with Mr Roberts (Operations Manager). The claimant says that she was upset about this as the reason she had changed her mind about going was because of the uncomfortableness of not being able to talk to anyone at a social event about her personal life because of Mr Pilling telling her to keep her sexual orientation quiet. She therefore wrote to Ms Baldwin challenging the company's right to charge her for the event as she had not signed anything agreeing to pay should she not be able to attend because of a change in circumstances. In so doing she copied in by mistake a supplier contractor, which error was pointed out to her by Mr Roberts, whom she had also copied in, which saw her take steps to retract it before, she says, she went to see Mr Pilling to tell him about sending the email to a supplier instead of him in haste born out of her frustration about having to keep quiet, at his request, that she was gay. She says that she vented this frustration at Mr Pilling but that he merely sat there, stared and shrugged his shoulders before saying that it was her problem. For his part Mr Pilling, whilst acknowledging that the claimant did come to see him about the matter refuted that she had mentioned that the reason she was unhappy to attend the party was because he had made her uncomfortable discussing her private life with her colleagues.

33. The claimant says following this and feeling devastated by Mr Pilling's response she went downstairs to her office and told her two colleagues Silva

(Pealing) and Molly (Bloomfield), who were having a conversation about partners that she was gay and referred to page 497 as evidencing this. However, there was no mention here of her disclosing her sexuality to them and although Ms Bloomfield stated when later questioned in connection with this disclosure as part of the consideration given to the claimant's appeal against her dismissal at page 532 that while they were chatting about types of people the claimant just said that she was gay and that she hadn't told anyone and didn't want to make a big deal about it no attempt was made to establish with her when this remark was made.

34. On 4 December 2017 Mr Rose provided Mr John Atherton and Mr Brian Atherton with an update on the impact of the initial cost saving and profit improvement plans at page 269, which advised that whilst there was some improvement it was not at the level required and noted that the headcount reduction was still to be finalised.

35. On this same date the claimant responded by an email at pages 266-268 to a request by Mr Roberts for her to look into packing and inspection methods to see if they could be speeded up without putting the company's reputation at risk as part of the steps that were being taken to increase output and profitability. On her case this amounted to her reporting that the company needed to make big changes as it could not diligently carry out traceability and that they were putting high risk products into the market place and putting the business and customers at risk, which was met with a refusal of acceptance despite her pushing for a reply over the course of the next two days and her telling Mr Roberts and Mr Pilling that if they did not take on board her report she would have to take it Mr Brian Atherton.

36. It was Mr Pilling's evidence in response that whilst it was true that the claimant had highlighted an issue as to the traceability of products he did not agree with her interpretation of this issue or accept that her email was an example of her having raised health and safety concerns. His position is that the claimant was directly responsible for the quality of products sent out to the market and that the matters raised in the email were an example of her carrying out those responsibilities adding that nowhere in the email does he consider her to be pointing to issues of health and safety or the compromising of the safety of patients of customers but that rather her concerns related to quality matters such as non-conformity of products, mislabelling and inaccurate reporting, which he agreed were valid areas for improvement within the packing department. He also denies that the claimant chased him for a response or threatened to raise the issue with Mr Brian Atherton or that her email played any part in the redundancy discussions taking place at that time pointing to the email and its attachments at pages 271-279 which he sent to Mr John Atherton on 6 December 2017 revealing that he was still in two minds about whether to include the claimant as part of the phase 1 or phase 2 reductions.

37. At this stage Mr Pilling had refined his redundancy proposal to the placing of two members of his indirect staff at risk as part of phase 1 in December 2017 and a third as part of phase 2. The three members of staff concerned were Kevin Ratcliffe, Technical Administrator, Mr Caddick, Health & Safety Administrator and the claimant.

38. On 7 December 2017 having been provided with updated sales and profit

and loss information by Mr Rose, Mr Pilling provided the directors with a meeting agenda and accompanying documentation for a board meeting on 11 December 2017. On the same day the claimant had an accident in work involving her slipping on a piece of floor mounting when descending the stairs causing injury to her spine, which saw her being signed off until Monday 18 December 2017.

39. The board meeting proceeded as planned on 11 December 2017 and on Mr Pilling's evidence it quickly became clear that the on-going financial pressures on the company were such that his preference to effect the planned reduction in indirect headcount in two phases would not achieve the required reduction in the necessary time frame and that he therefore accepted that it was necessary to place all three named individuals at risk of redundancy with the intention to complete the process before the end of the year.

40. He therefore met with Mr Ratcliffe and Mr Caddick on 12 December 2017 to inform them that they were at risk of redundancy and that the company would be entering a period of formal redundancy consultation. In the case of the claimant, who was signed off work, Mr Pilling advised her of the situation over the telephone and wrote inviting her to a first consultation meeting on 14 December 2017. Following an email exchange this meeting was rescheduled at the claimant's request tied in with her injury to take place on 19 December 2017. As part of this exchange the claimant requested a copy of the company's redundancy procedure and the selection criteria and how the three names of those at risk had changed from their previous discussions. Mr Pilling replied to say that the company did not have a redundancy policy and that as she was the only Quality Manager it was considered that she represented a pool of one, which did not require the application of selection criteria. He also challenged her contention that she had been party to the redundancy discussions stating that he had not had any such specific discussions with her but rather that his discussions with her had been those which he had had with all senior managers in order to stress the importance of cost saving and the necessity of improvements in efficiency following the loss of major contracts.

41. On 14 December 2017 Mr Pilling provided Mr John Atherton and Mr Rose with draft minutes of the profit improvement plan meeting from 11 December 2017 at pages 359-360 for approval, which confirmed the decision to place the three indirect headcount employees at risk of redundancy with effect from 12 December 2017.

42. On 18 December 2017 the claimant provided a further fit note, which signed her off for a further week and she asked if her consultation meeting could be postponed to the new year. She also said that she did not have any contact details of any of her colleagues and would not therefore be able to arrange for a companion until she was back in work, although it is the case that she had a mobile number for her colleague Ms Pealing, who later accompanied her at her appeal hearing before Mr Rose, as the documents at pages 343-346 show an exchange of texts between them on 8 December 2017 initiated by the claimant to explain about her accident. Mr Pilling was not prepared to further reschedule her consultation meeting and told her so in an email on the morning of 19 December 2017 explaining that he did not accept that her unfitness meant that she was unable to attend the meeting but that he was

willing to hold it by telephone conference or to allow her to rely on a written statement, in response to which the claimant continued to say that she was unable to attend not only because of her unfitness but also because she had her son at home due to a failed transition from special to mainstream school. This saw Mr Pilling repeating his offer regarding holding the meeting by telephone conference or allowing her to make representations in writing but ultimately the claimant confirmed that she would not be attending for the reasons given and that she was unsure what she needed to say by way of representations.

43. On 20 December 2017 Mr Pilling wrote to the claimant and the other two at risk employees to confirm that having considered the proposal further together with the representations provided by the other two members of staff he had decided to progress with the redundancy proposal and to invite her to a further consultation meeting on 22 December 2017, at which she would be entitled to be accompanied by either a trade union representative or work colleague. The claimant again advised that she would be unable to attend for the previously given reasons and that she regarded the process as completely unfair believing that he could and should have waited until the new year, to which Mr Pilling responded that in his opinion she had been given every opportunity to contribute to the redundancy consultation meeting but had chosen not to do so despite being aware a decision could be taken in her absence and that her request to postpone the further meeting was declined although he was still open to it being held by telephone conference or by way of written representations. The claimant subsequently sought clarification of what he expected of her by way of written representations, to which he responded that their purpose was to allow her the opportunity to ask any questions or make any submissions in respect of the redundancy proposal itself, the proposed pool of one applied to her role, the redundancy process and alternative employment.

44. On 22 December 2017 the claimant emailed Mr Pilling at pages 400-402 to confirm that she would not be in attendance at the meeting later that day and to pose 30 questions relating to how it was intended different aspects of her role would be completed without her present. Mr Pilling in his evidence acknowledged that these were all valid questions and that in truth he did not have a clear plan as to how all of the tasks /responsibilities would be performed but that he had accepted that many of these tasks would no longer be a priority for the business and while disappointed that this was the case he was ultimately unable to ignore the financial benefits of losing the claimant's high salary from payroll when the very future of the company was at risk. As a consequence, he says, he did not answer them when he wrote further to the claimant on 22 December 2017 at pages 414-416 in confirmation of her redundancy effective from that day with pay in lieu of notice but sought to explain the full reasoning for the decision and to highlight the stark financial position the company found itself in, in respect of which he pointed to the loss of a significant number of contracts in the last 4 months, which was expected to result in a reduction in turnover of about £2m compared to last year, which had meant that the company had had to review its entire business in an effort to achieve serious cost savings. On this date he also wrote to Mr Ratcliffe in confirmation of his redundancy and to Mr Caddick in confirmation of his role of Health & Safety Officer being made redundant but offering him an alternative role as a Warehouse Operative, which he says was the only form of alternative employment

available in the business at the time.

45. By a letter dated 26 December 2017 at pages 423- 440 the claimant lodged a grievance in respect of her selection for redundancy alleging that Mr Pilling had constructed her dismissal using the redundancy process as an excuse to dismiss her and that she had been automatically unfairly dismissed; been subject to sex and sexual orientation discrimination and to an unfair redundancy process. On 2 January 2018 Mr Brian Atherton wrote to clarify whether it was in fact her intention to appeal the decision to make her redundant, in response to which she suggested that the matter should be dealt with as both an appeal and a grievance. However, this suggestion was rejected by the respondent as being inappropriate, of which the claimant was notified in writing on 4 January 2018, when she was invited to a redundancy appeal meeting with Mr Rose on 10 January 2018. The meeting went ahead on this date. Mr Rose had a note taker, Ms Clare Eaton, with him and the claimant was accompanied by Ms Pealing. Whilst there was no request made by the claimant to record the meeting she did so covertly and a copy of the transcript is at pages 455-515. The non-verbatim notes are at pages 446 - 454.

46. At the meeting it was agreed that the claimant was raising four main issues behind her selection for redundancy. These were (a) health and safety - in respect of which she believed that there was a difference in approach to her by Mr Pilling after she refused to take on additional responsibilities for it and that having discussed her concerns with Mr Pilling about the existing H&S Officer, Mr Caddick, performing warehouse work she had been selected for redundancy as a consequence of having raised such concerns (b) indirect discrimination - in respect of which she alleged that there had been a change in Mr Pilling's approach towards issues relating to her hours of work, timekeeping and holiday, which she felt was indirectly discriminatory as it failed to take account of her childcare responsibilities and contributed to the decision to dismiss her (c) discrimination by reason of her sexual orientation - in respect of which she alleged that upon joining the company and telling Mr Pilling that she was gay she was asked not to make the matter common knowledge as the company's owner, Mr Brian Atherton was "old school" and referred to the distress caused by this pointing to a number of incidents linked to her sexuality such as being asked to remove her radio from her office and feeling uncomfortable about attending the work Christmas party and (d) unfair redundancy process - in respect of which she questioned the methodology of her selection and the meaningfulness of the consultation given her repeated requests to reschedule the meetings were refused.

47. As part of his investigations into the claimant's appeal Mr Rose also met with Mr Pilling, Mr Roberts and Ms Bloomfield before arriving at his decision not to uphold it, which he communicated by a letter dated 2 February 2018 at pages 533-540. In so deciding he says that his starting point was to satisfy himself that a genuine redundancy situation existed and that while from his involvement as Finance Director in the discussions regarding the financial pressures the company was facing left him in no doubt, he felt it important to set out in his outcome letter his acceptance that a genuine redundancy situation existed within the company referring to the reduction in orders from August 2017, the discussions at management and board level about options to reduce costs across all areas and an unimproved situation resulting in the company suffering the worst results in its history pointing to a

54% drop in profits compared to the previous year and a 47% drop in profits against budgeted plans and it trading at a loss for 4 out of the 7 remaining periods up to the end of December 2017, which saw a review of the business being undertaken, in which all roles were considered in an effort to achieve reductions in staff costs and the proposal to remove the roles of Quality Manager, H&S Officer and Technical Administrator being formulated as it was felt necessary to minimise the direct impact on production capabilities as these were seen as key to rescuing the current situation.

48. In relation to the four issues raised by the claimant Mr Rose stated in the outcome letter that he did not accept that (a) Mr Pilling's behaviour changed towards her as a consequence of her refusal of the health and safety role or any of the issues she had raised and in so finding did not accept that any of these matters led to his decision to select her for redundancy or that (b) the discussions which took place in November 2017 relating to the claimant's time keeping led in any way to the decision, viewing the discussion as a standard management one that would take place with any member of staff with punctuality issues or that (c) Mr Pilling would have instructed her not to discuss her sexuality in the workplace or that the examples of poor treatment referred to by her as relating to her sexuality added up in a manner that would support her allegation of discrimination not accepting, for example, that she had been singled out in respect of the ban on radios or that Mr Pilling had not subjected her to disciplinary action for sending an angry email to a supplier in error was because he wanted to avoid discussion regarding her sexuality or that (d) the redundancy process and /or her selection was unfair or discriminatory agreeing with Mr Pilling's approach to the claimant's requests to reschedule the meetings and finding that a full and proper consultation process was adopted.

49. On 22 March 2018 2016 the claimant presented her ET1 making the above-mentioned complaints having commenced early conciliation on 5 February 2018 and having received a certificate of compliance on 5 March 2018. The respondent subsequently submitted ET3s in resistance of the complaints against the first and second respondents, which were identical in content within the prescribed period.

Law

50. In regard to health and safety dismissals section 100 of ERA provides that an employee is automatically unfairly dismissed if the reason, or principal reason, for dismissal is that, inter alia, pursuant to sub-section (1)(c) he or she brought to the employer's attention, by reasonable means, circumstances connected with his or her work which he or she reasonably believed were harmful or potentially harmful to health and safety in circumstances where there is either no health and safety representative or safety committee or it was not reasonably practicable for the employee to raise the matter by those means

51. In regard to whistleblowing dismissals section 103A of ERA provides that an employee will be regarded as unfairly dismissed if the reason, or principal reason, for the dismissal is that the employee has made a 'protected disclosure'. The first step in establishing that a disclosure attracts protection under the ERA is showing that it meets the qualifying criteria in section 43B. Thus a qualifying disclosure is any disclosure of information which, in the

reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following: (i) that a criminal offence has been committed, is being committed or is likely to be committed - s43B(1)(a) (ii) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he/she is subject - s43B(1)(b) (iii) that a miscarriage of justice has occurred, is occurring or is likely to occur - s43B(1)(c) (iv) that the health or safety of any individual has been endangered, is being endangered or is likely to be endangered - s43B(1)(d) (v) that the environment has been damaged, is being damaged or is likely to be damaged - s.43B(1)(e) and (vi) that information tending to show any matter falling within any one of the above has been, is being or is likely to be deliberately concealed - s43(B)(1)(f). These six forms of malpractice or wrongdoing are collectively referred to as the 'relevant failures'. The disclosure must also be made in the correct manner with sections 43C-H setting out seven permissible methods of disclosure amongst which at s43C(1)(a) is disclosure to the employer.

52. In regard to protection from suffering detriment in employment section 44 (1)(c) of ERA provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act by his or her employer done on the ground that being an employee at a place where- (i) there was no health and safety representative or safety committee or (ii) it was not reasonably practicable for the employee to raise the matter by those means he or she brought to the employer's attention, by reasonable means, circumstances connected with their work which they reasonably believed were harmful or potentially harmful to health or safety.

53. The relevant law for the purpose of the discrimination claims is to be found in the Equality Act 2010 (EqA). Section 4 brings together the protected characteristics, i.e. the grounds on which discrimination will be deemed unlawful, included among which are the grounds of sex and sexual orientation.

54. For the purposes of direct discrimination 13(1) provides that 'a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'.

55. For the purposes of indirect discrimination section 19(1) provides that 'a person discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of B's and that provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if - (a) A applies, or would apply, it to persons with whom B does not share the characteristic (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it (c) it puts, or would put, B at that disadvantage and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

56. Complaints of unlawful discrimination must be presented to an employment tribunal before the end of the period of three months beginning with the date of the act complained pursuant to section 123(1)(a). There is not, however, an absolute bar on claims being presented outside the three-month period because section 123(i)(b) allows a claim to be brought within 'such other

period as the employment tribunal thinks just and equitable' although there is no presumption that a tribunal should exercise its discretion to extend time and the burden is on a claimant to persuade the tribunal to exercise its discretion in their favour. Section 123(3)(a) provides that 'conduct extending over a period is to be treated as done at the end of the period'.

Conclusions

57. Applying the law to the facts as found the Tribunal reached the following conclusions. We considered first of all the claimant's complaint that she was automatically unfairly dismissed contrary to section 100 ERA for a health and safety reason. In the circumstances here of the claimant lacking the requisite continuous service to claim ordinary unfair dismissal i.e. two years she acquires the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason. Section 100, as stated, provides that an employee is automatically unfairly dismissed if the reason or, principal reason, for dismissal is that he or she carried out one of the five 'protected acts' at sub-sections 100(1)(a) to (e).

58. The relevant contended for protected act here seemed to us to be that at sub-section 100(1)(c) that she brought to the employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety in circumstances where there was no safety representative or safety committee at her place of work.

59. The matters upon which she relies in support of this contention are as follows. First of all there was the incident in July 2017 where 30 covers, as part of a much larger order, had gone out to a client with the advanced rather than the extreme fabric ordered. In this regard it seemed to us that the claimant's concerns at the time were that the products with the inferior material had gone out without an approval signature on the concession form, which she had introduced as a requirement in respect of any product released that was out of specification and which should have stopped these products being dispatched, rather than the covers' release compromising the health of patients despite her suggestion that they be recalled. In this further regard we accepted Mr Pilling's evidence that whilst the advanced covers were slightly less resistant over time to chlorine cleaners they were nonetheless entirely fit for purpose having previously been purchased by the customer and that they posed no risk to patients' health.

60. Secondly there was the situation in December 2017 when the claimant brought up an issue relating to the traceability of products arising from her being asked by Mr Roberts to look at packing and inspection methods to see if this could be done more quickly as part of the drive to increase output/profitability. In this regard we could not readily see from the email that the claimant sent to Mr Roberts dated 4 December 2017 at pages 266- 268 in response to his request that she was doing any more than highlighting concerns of a quality nature around the business' practices such as packing records' numbers being different to what was actually being packed; batch works orders operational cards not matching numbers that had gone out of the door or the packing records and products being dispatched with the wrong works orders etc which may have had reputational and traceability consequences but not health and safety ones as far as we could see.

61. Thirdly there was her contention that the site was suffering detrimentally particularly during October and November due to health and safety not being properly managed. She attributed this to Mr Caddick, the H&S officer, either being off ill or in the warehouse as a forklift driver and gave as an example of health and safety issues not being addressed the failure to implement new safe systems of work due to an accident in the welding room when a lady was burnt alleging that Mr Pilling would not release Mr Caddick from the warehouse to prepare a safe work instruction thereby leaving staff at risk. In this regard it was Mr Pilling's unchallenged evidence that aside from Mr Caddick's sickness absence on 17 and 21-24 November 2017 he was otherwise present during October, November and December and that he was tasked with reviewing and improving safe systems of work applied across the business including those adopted within the welding department arising from feedback given by the claimant from quality audits undertaken by her, which was evidenced by reference to an email exchange on 8 and 9 August 2017 between Mr Pilling and Mr Caddick at page 205 showing a schedule for completion of a risk assessment and safe systems of work having been prepared by the latter and his being asked to provide an update at the end of each month on status to avoid any slippage in time lines. In the light of this evidence we did not feel that we could safely find that the site was suffering from a health and safety perspective notwithstanding Mr Caddick being used on warehouse duties alongside his health and safety duties.

62. We accordingly concluded that the claimant had failed to discharge the burden of showing that her dismissal was not by reason of redundancy as averred by the respondent but for a health and safety reason.

63. Turning to her second complaint of automatic unfair dismissal contrary to section 103A ERA for making a protected disclosure the matters upon which she relies as disclosures qualifying for protection were confirmed by her in cross-examination as those identified under her section 100 complaint relating to the covers sent out in July 2017 not to specification and to the issues that she raised concerning the business' practices in December 2017 pointing to the 'relevant failure' as being that at section 43B(1)(d) that the health and safety of any individual has been, is being or is likely to be endangered. Having regard to how we viewed the matters relied upon by the claimant as protected disclosures as being no more than instances of her flagging up issues of a quality control nature which posed no risk of endangerment to the health and safety of any individual and not being satisfied that she reasonably believed that they were made in the public interest as required by the section we did not consider that the disclosures were qualifying disclosures for the purposes of gaining statutory protection and we therefore concluded that the claimant had again failed to discharge the burden of showing that her dismissal was not because of redundancy but because she made a protected disclosure.

64. As with her first complaint the claimant's third complaint of having suffered a detriment contrary to section 44 ERA was premised on her having brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety. The detriment, which she claims to have suffered as a consequence as confirmed by her in cross-examination was

the alleged requirement imposed by Mr Pilling of her starting and finishing work 15 minutes before and after her contractual hours, which she claimed to have been subjected to after she refused for a second time to take on the additional responsibilities of health and safety officer on 6 November 2017. In this regard given our findings in respect of her section 100 ERA complaint we further concluded that this alleged detriment, which the claimant also labels as an act of indirect discrimination on the grounds of her sex and which we will address further under that limb of her complaints, could not be laid at the door of her having brought to her employer's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety.

65. In regard to her complaint of indirect discrimination premised on the imposed amendment to her contractual hours as described above, whereby she says that she was required by Mr Pilling to extend her working day by 15 minutes at each end from 6 November 2017 onwards, there are as provided for by section 19(1) EqA four conditions that have to be satisfied before this form of unlawful treatment can be established. The first of these requires the claimant to show the application of a provision, criterion or practice (PCP) to her. Such an amendment to her hours would we considered be capable in principle of constituting a PCP but when we analysed the claimant's start and finish times for the period between 6 November 2017 and 7 December 2017, which was her last day in work as a result of the accident that she suffered on this date we could not, as noted in our findings of fact, identify any occasion when she actually began work at 8.30 a.m. and finished at 5.30 p.m. In the light of this evidence we did not consider that the claimant had discharged the burden on her to show that the PCP she relied upon had been applied to her, which negated the need for us to go on to consider the further three conditions.

66. Turning finally to the claimant's complaint of direct discrimination on the grounds of her sexual orientation contrary to section 13(1) EqA. Her case in this regard is that this discrimination took several forms beginning with when she made Mr Pilling aware in the first week of her employment that she was gay she was asked by him not to make it common knowledge as the owner (Mr Brian Atherton) was old school. She says further that her sexual orientation was a factor in her being asked to remove her radio from her office and being the only person in the factory without one for several weeks prior to their blanket removal and after their reinstatement as a result of Mr Pilling's insistence that she seek permission from Mr Roberts before bringing it back in despite his having told her to remove it in the first place and that her venting her frustrations on Mr Pilling about being required to keep her sexuality quiet and the indecision that this had caused her around attending the company's Christmas party was a contributory factor in her selection for redundancy.

67. In terms of these alleged discriminatory acts we believed that the claimant did make Mr Pilling aware of her sexuality early into her employment, despite his protestations to the contrary and whilst not considering him to be homophobic in any way we also believed that he did suggest that she kept it under wraps as we felt that the reference to Mr Atherton being 'old school' had a ring of authenticity about it, which we found support for in the references to him wishing to see more visibility from the quality control team on the factory floor. We did not consider however that the claimant's

sexuality played any part whatsoever in the removal of her radio as we accepted that the prohibition on them was intended to be factory wide and that the claimant was not singled out even allowing for her being asked to speak to Mr Roberts before reintroducing hers, which we accepted was no more than a courtesy request. Nor did we consider that the discussion that the claimant had with Mr Pilling on 29 November 2017 regarding her having emailed a supplier contractor by mistake when remonstrating about having to pay for the Christmas party ticket despite not attending and the frustrations that she was experiencing played any part in her selection for redundancy as the evidence showed that the company was genuinely struggling at the time as a result of increasingly difficult trading conditions which saw it having to cut costs across a range of areas including staffing ultimately and that throughout the process Mr Pilling was reluctant to lose the claimant's role.

68. In such circumstances we concluded that the claimant had been directly discriminated against on the grounds of her sexual orientation in respect of this one matter as we considered that she had been less favourably treated by being asked not to disclose her sexuality by comparison with a hypothetical person not sharing her protected characteristic in the employment of the respondent as we could not conceive that such a person would have been asked this and that with such discriminatory treatment having lasting effect until the termination of her employment there were no time issues in respect of the presentation of her complaint.

69. Her remedy in respect of this one successful complaint, in the form of an injury to feelings award, will be determined at a hearing to be arranged.

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Employment Judge Wardle
7 November 2018

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

8 November 2018

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS