EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss L Cremin	**v**	Re-New Surface Systems Ltd

Heard at:	**Reading** and **In Chambers**	**On:** 30 April, 1, 2 and 3 and May 2018 and 4 May 2018
Before:	Employment Judge S Jenkins Members: Miss J Stewart and Ms J Nicholas	

Appearances
For the Claimant: In person
For the Respondent: Mr M Curtis of Counsel

RESERVED JUDGMENT

1. The Claimant's claims of unfair dismissal, wrongful dismissal, protected disclosure detriment, protected disclosure dismissal, harassment related to sex, victimisation, direct sex discrimination, unauthorised deductions from wages and breach of contract fail and are dismissed.

REASONS

BACKGROUND

1. The Claimant brought several claims before the tribunal, asserting unfair dismissal, wrongful dismissal, protected disclosure detriment, protected disclosure dismissal, harassment related to sex, victimisation, direct sex discrimination, unauthorised deductions from wages and breach of contract. They largely arose out of her dismissal, ostensibly on the ground of gross misconduct, in September 2016, although some of her claims, particularly those relating to sexual harassment, related to earlier periods.

EVIDENCE

2. We heard evidence from Mr Robert Griffin, Director; Mr Martin Hurcombe, Director; Mr Mark Pisani, Office Supervisor; Ms Gail Bloomfield, HR

Consultant; and Ms Chloe Carey, HR Consultant on behalf of the Respondent, and we heard evidence from the Claimant on her own behalf.

3. There was before us a bundle spanning more than 1,000 pages and we read the documents within the bundle to which our attention was drawn, either by the various witness statements or orally during the course of the hearing.

PRELIMINARY ISSUE

4. At the start of the hearing, before we commenced our reading of the statements, the Claimant raised an issue as to whether the Respondent had complied with an "Unless Order", issued on 16 April 2018, which stated that unless the Respondent complied with paragraphs 13 and 14 of a case management summary and orders made on 21 August 2017, then the Respondent's response to the Claimant was to be struck out. Those paragraphs provided as follows:

Disclosure of specific documents

*13. No later than **2 October 2017** the Respondent shall disclose to the Claimant the following documents or provide an explanation as to why such documents cannot be disclosed:*

13.1 The recommendation by Shane McDonald of Citation that the Respondent should allow the Claimant to meet with Occupational Health;

13.2 Any air tests which have not yet been disclosed;

13.3 The quarterly bonuses awarded for 2015 and 2016.

Hearing Bundle of Documents

*14. No later than **30 October 2017** the Respondent shall send to the Claimant an indexed, paginated bundle of the disclosed documents for use at the hearing.*

5. The Respondent contended that the recommendations by Shane McDonnell at paragraph 13.1 had been provided orally and not in writing and therefore there was nothing to disclose; that all tests, for the purposes of paragraph 13.2, had been disclosed; and that a schedule of quarterly bonuses awarded for 2015 and 2016 had been disclosed. With regard to paragraph 14, the Respondent had provided the Claimant with a further copy of the bundle that had originally been prepared for the anticipated hearing of this case in August 2017 (at which point it had been postponed due to the obvious insufficiency of the scheduled time for hearing).

6. The Claimant contended that, with regard to paragraph 13.2, she had been in touch with the Health and Safety Executive ("HSE") and had received an email from them in February 2018 which noted that the HSE

inspector had been informed by the Respondent that "they were now carrying out regular air monitoring as well as monitoring employees' lung function every six months".

7. Mr Curtis, on behalf of the Respondent, confirmed however that the Respondent's position was that whilst they had talked to the HSE about carrying out regular air tests, it had ultimately been decided that it was not something that was required to be undertaken, albeit that regular lung function tests were being carried out.

8. The Claimant also contended that there were gaps, she identified seven, in her witness statement where she was waiting for specific documents to be disclosed and could not therefore update the particular reference to a document within her witness statement.

9. On exploring this with her however, it seemed that all the documents she referred to were ones she herself had in her possession. Mr Curtis, on behalf of the Respondent, noted that whilst paragraph 14 of the 21 August 2017 order potentially envisaged the provision of a new bundle, the same bundle had been used as had been prepared for that particular hearing with no amendments.

10. We adjourned to consider whether the Respondent had complied with the Unless Order and concluded that there had been material compliance by the Respondent and that the claim did not therefore stand struck out and fell to be considered.

ISSUES AND LAW

11. The issues that we were to decide were identified by Employment Judge Chudleigh in a case management summary issued following a hearing on 26 March 2018. These were as follows:

> *3.* ***Public interest disclosures***
>
> *3.1 It is common ground that the Claimant made complaints to the Respondent and/or the Health and Safety Executive on the following dates:*
>
> *(1) 5 July 2016 orally to Martin Hurcombe;*
> *(2) On or about 23 and 24 July 2017 to the Health and Safety Executive;*
> *(3) On 25 July 2016 in writing to Bob Griffin;*
> *(4) On 3 August 2016 orally at a grievance meeting;*
> *(5) On 15 August 2016 in writing to the Respondent's agent Handover HR Ltd;*
> *(6) On 19 August 2016 to Shane McDonald, a health and safety advisor for the Respondent;*
> *(7) On 24 August 2016 in writing to Handover HR Ltd; and*
> *(8) On 7 September 2016 in writing to Handover HR Ltd.*

3.2 It is agreed by the Respondent that the public interest element of the test in section 43B(1) of the Employment Rights Act 1996 ("the ERA") is satisfied in this case in relation to the complaints made by the Claimant and listed above.

3.3 The Respondent also admits that the Health and Safety Executive is a prescribed person within the meaning of section 43F of the ERA.

3.4 It is for the tribunal to determine whether in the reasonable belief of the Claimant the disclosures she made on the occasions set out above tended to show matters within the meanings of sections 43B(1)(a), (b), (d), (e) or (f) of the ERA/

*4. **Protected acts***

4.1 The Claimant alleges that her grievances on 25 July 2016 and 9 and 24 August 2016 were protected acts. The Respondent admits that the Claimant's complaints of sex discrimination and inequality in pay in those grievances were protected acts within the meaning of section 27 of the Equality Act 2010 ("the EqA").

*5. **Unfair dismissal***

<u>Automatic unfair dismissal</u>

5.1 The Claimant was dismissed on 14 September 2016.

5.2 Whether the reason or principal reason for the dismissal was that the Claimant made a protected disclosure(s).

<u>Victimisation</u>

5.3 Whether, in breach contrary to section 27 of the EqA, the Claimant was victimised the Claimant was dismissed because she did a protected act.

<u>Ordinary unfair dismissal</u>

5.4 Whether or alternatively the Claimant was unfairly dismissed in the "ordinary" sense. The Respondent asserts that the reason for the dismissal was a reason related to conduct which is a potentially fair reason under section 98 of the ERA. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal. Also there are issues arising as to reasonableness under section 98(4) of the ERA. In addition, the tribunal will be required to determine whether dismissal was a fair sanction, whether dismissal was

in the range of reasonable responses for a reasonable employer.

5.5 If the dismissal was unfair, whether the Claimant contributed to the dismissal by culpable conduct.

5.6 Whether or not the Respondent can prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event and/or to what extent and when.

6. ***Wrongful dismissal***

6.1 Whether or not the Respondent was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct.

7. ***Sexual harassment – section 26 EqA***

7.1 Whether the Respondent subjected the Claimant to sexual harassment as described in the Claimant's Scott Schedule as follows:

*7.1.2 During 2017 [*sic – this should have been 2014*], Bob Griffin told Bethany Joyce and the Claimant that he liked "lilac underwear";*

7.1.3 In 2014, Martin Hurcombe informed Bethany Joyce and the Claimant that "he had a big one but he didn't brag about it" and laughed;

7.1.4 On 30 January 2015, Bob Griffin said "I'll show you mine if you show me yours";

7.1.5 On 1 May 2015, Bob Griffin told the Claimant to visit his friend's shop in Bournemouth if she liked "classy underwear". He also told her that a transvestite is one of his friend's most regular customers;

7.1.6 On 15 August 2015, Bob Griffin said that he would not recruit the male candidate over Namra Khalid as he wanted "eye candy";

7.1.7 On an uncertain date but after Bethany Joyce had left the company, Martin Hurcombe told the Claimant that he had a good working relationship with some of the technicians and that he knew when they had sex;

7.1.8 On 26 November 2015 after the Claimant informed Dennis Atherton that she was ready to help him with his query, Dennis Atherden said that he would "come in slowly"

as he made a sexual gesture and then came walking towards her which the Claimant found highly offensive.

7.1.9 In approximately the fourth quarter of 2015 the Claimant saw Dennis Atherton watching porn at work;

7.1.10 On an unspecific date Martin Hurcombe touched the Claimant's knee;

7.1.11 On 27 January 2016, Bob Griffin put his hand on the Claimant's shoulder for a prolonged amount of time;

7.1.12 At approximately the end of June 2016 Bob Griffin leered at the Claimant;

7.1.13 On 17 August 2016 or on a number of occasions, Bob Griffin leered at the Claimant in particular when discussing Crest Nicolson Herts project; and

7.1.14 On 19 August 2016 Bob Griffin looked the Claimant up and down when she asked him why he was delaying her appointment with occupational health.

7.2 Was any of the conduct referred to above related to the Claimant's protected characteristic of sex?

7.3 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7.4 If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7.5 In considering whether the conduct had that effect, the tribunal will take into account the Claimant's perception, the circumstances of the case and whether it is reasonable for the conduct to have had that effect.

8. ***Whistleblowing detriment***

8.1 If the protected disclosures are proved, was the Claimant, on the ground of any protected disclosure found, subject to detriment by the Respondent in that:-

8.1.1 It failed to pay the Claimant sufficient commission for July 2016 and failed to pay the Claimant any commission in August and September 2016;

8.1.2 Failed to investigate the Claimant's grievances and let the Claimant meet occupational health;

8.1.3 Failed to pay the Claimant a bonus in 2016;

8.1.4 Failed to let the Claimant into the company's pension scheme from August 2016 onwards;

8.1.5 On 4 August 2016, Bob Griffin raised his voice to the Claimant. He accused her of causing Wayne offence if he was to read an email she had sent to Martin Hercombe. Bob Griffin also criticised the amount of calls she had made and informed her that he was worried about the technicians as they all had bills to pay and families to feed and look after. His manner was aggressive and intimidating;

8.1.6 On 9 August 2016, Bob Griffin sent the Claimant an email stating "the core numbers for the week are way down on what is expected". However, the Respondent was overloading the Claimant with too much work and was continuing to set unrealistic revenue targets.

8.1.7 On 27 July 2016, Bob Griffin implied that the Claimant was confirming works with customers without confirmation from Wayne Norris and undermining her work.

9. ***Direct discrimination***

9.1 Whether the Respondent discriminated against the Claimant because of her sex by:-

9.1.1 Failing to pay the Claimant a quarterly bonus in 2015 (times 4) and 2016 (times 3);

9.1.2 The Claimant relies on any allegations of sexual harassment that do not succeed as complaints of sexual harassment;

9.1.3 Failing to include the Claimant in the company's pension scheme.

10. ***Victimisation***

10.1 The Claimant relies on the same complaints set out above in relation to Detriment and Direct sex discrimination.

11. ***Unlawful deduction of wages/Breach of contract***

11.1 Whether on 29 July 2016 the Respondent failed to pay the Claimant the commission she was entitled to. She was paid £65.00 when she should have been paid £700.00;

11.2 The Respondent failed to provide the Claimant with full company sick pay on 29 July 2016 for her absence from 5 to 25 July 2016;

11.3 The Respondent failed to pay the Claimant quarterly bonuses in 2015 and 2016.

*12. **Time limits***

12.1 The claim form was presented on 31 October 2016. Accordingly and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 1 August 2016 is potentially out of time, so that the tribunal may not have jurisdiction.

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

12.3 Was any complaint presented within such other period as the employment tribunal considers just and equitable?

FINDINGS

12. We observed that there were not many areas where there was a significant dispute between the parties as to the facts that occurred, with the areas of dispute being more to do with the interpretation and analysis of events rather than the events themselves. We nevertheless record our findings, on a balance of probabilities, as follows.

13. The Respondent is a company which carries out resurfacing work for its customers in relation to the repair of glass and other hard surfaces. It has a warehouse and office in Slough, at which the Claimant worked, but most of its work for its customers is undertaken at their sites.

14. The Claimant worked for the Respondent as a telesales executive which involved both proactively contacting customers and potential customers to obtain work and dealing with queries and enquiries from existing and new customers. She would also deal with the administration arising from that. The Claimant was paid a salary but also earned commission based on work procured and she started work for the Respondent in March 2014.

15. The events which principally gave rise to the Claimant's claims occurred in July, August and September 2016, although her sexual harassment claim relates to earlier periods and we deal with those aspects separately. It is

however appropriate for us to record certain findings in relation to prior matters as they have some bearing on our conclusions.

16. The Claimant's contract contained provisions requiring the Claimant not to use or disclose any confidential information concerning the business of the Respondent, which was defined to include sales reports, business contacts, lists of customers and suppliers and details of contracts with them and budgets, management accounts, trading statements and other financial reports. The Respondent's handbook also contained a provision relating to data protection, noting that its employees should not disclose client data or company information unless it was a necessary part of their job and was done in the proper performance of their duties.

17. The Claimant's contract contained a reference to a salary of "*£18,000 plus commission, plus quarterly bonus (if available), per annum*", although her salary had increased to £22,992 by the time of her dismissal. The contract confirmed that, with regard to sick pay, the Claimant would be entitled to statutory sick pay subject to meeting the qualifying conditions and that any payment over and above SSP would be made "*at the absolute discretion of the Company*". The contract also confirmed that the Respondent operated a stakeholder pension scheme to which the Claimant could contribute after successfully completing her probationary period. The Respondent's staging date for auto-enrolment purposes arose after the Claimant's employment had ended, in February 2017.

18. With regard to commission, the arrangements with the Claimant changed during the course of her employment, but those applicable for the first half of 2016 were that she would receive 5% of orders taken above the level of £50,000 per month, payable quarterly in arrears. The Claimant did not reach that threshold for the first quarter of 2016, i.e. January to March, but the Respondent paid her an ex gratia sum of £700 by way of commission for that quarter. The Claimant also only just exceeded the target in the second quarter, which led to an entitlement to commission of some £65. The Respondent did not however make any additional discretionary payment to the Claimant at that point.

19. In a document entitled "Sales Commission notes", prepared by Mr Hurcombe, he noted that the payment of the contractually entitled £65 rather than £700 was "*because her relationship with Re-New was very difficult due to her current claim*". Mr Hurcombe amplified that in his response to questions from us, and did so very candidly, in that he confirmed that the decision not to exercise discretion to increase the bonus to £700 for the second quarter was due to the Claimant's attitude and that if that had not been a cause for concern, the Respondent would probably have made the extra discretionary payment.

20. The Claimant confirmed that she had had some periods of sickness absence prior to July 2016 but had always used her holidays in relation to any such absences to retain her entitlement to full pay. She confirmed that that was also done by others, and Mr Pisani in his evidence also confirmed that that was habitually done. The Claimant contended that another

employee, Wayne Norris, had received additional sick pay in that an unexplained adjustment, of just over £1,000, appeared in a schedule of payments made by the Respondent, but we were satisfied, following sight of a clarificatory email from the Respondent's payroll company, that that adjustment had arisen for another reason. Ultimately, we found that there was no practice on the part of the Respondent to pay additional sick pay beyond SSP, as otherwise the employees, including the Claimant herself, would not have used their holiday entitlement for periods when they were absent due to sickness.

21. With regard to bonuses, we were satisfied from the evidence that the Respondent paid quarterly bonuses to all its staff in 2014 relating to a particular level of profit that had been made in 2013. However, that did not occur at any other time. The Respondent did operate an incentive bonus scheme for its operational staff in 2016 but we did not consider that this applied to any other staff. We also noted that the Claimant herself had a commission scheme which was specific to her role.

22. We also found, and indeed it was accepted by the Claimant herself, that the Claimant was not someone who had any difficulty in raising issues of concern in the workplace when she felt it was required. She was, to coin a phrase, "not slow in coming forward".

23. Turning to the events from July 2016 onwards, again we observe that the facts are not significantly in dispute but our findings will have a bearing on the interpretation of those facts and, in particular, on the issue of whether the Claimant could reasonably have believed that various disclosures she had made tended to show that one or more of the matters listed in section 43B(1) of the ERA had been made out.

24. The particular issue which triggered the various disclosures by the Claimant was the transmission of window frames from a customer's premises in Bristol. The Respondent's client in that particular case, Wates Smartspace, had emailed Mr Griffin on 3 July noting that asbestos survey results showed deposits of crystolite within the glazing compound, i.e. the putty on the windows. The email noted that this was a non-reportable substance and that they had taken advice from analysts with regard to safe removal of the window. The email went on to say that it had been agreed that the windows could be safely removed if the glazing was kept intact and that that had been achieved. The email also confirmed that the advice had been to polythene wrap the components and then have them disposed through a licensed disposal site. There was a subsequent email sent to Mr Griffin asking for details of where the windows were located in order that they could be disposed of and the windows were removed for disposal on 9 July, the windows having arrived at the Respondent's premises on 4 July 2016.

25. The presence of the particular windows became known within the Respondent's office on 5 July 2016. At that point, Mr Griffin was absent due to sickness, but Mr Hurcombe was present, as was the Claimant, Mr Pisani and at least one other office-based employee, Mr Denis Atherton.

The Claimant alleged that Mr Hurcombe and Mr Atherton had informed her that the windows had not been wrapped; however, we did not find that that was the case. Mr Hurcombe's evidence was categoric that they had been wrapped, and Mr Pisani confirmed that the windows had been wrapped when they had been delivered on 4 July. There was also a photograph within the bundle which showed that the windows had been wrapped, although that wrapping did not seem to be particularly effective, the explanation from the Respondent being that the wrapping had become disturbed when the windows were removed from the Respondent's warehouse into the back of a van just outside. Nevertheless, we found that the window units had been wrapped on arrival at the Respondent's premises.

26. We found that a conversation took place between the Claimant and Mr Hurcombe on 5 July 2016 as he himself in his evidence noted that he had spoken to her because Mr Atherton had told him that the Claimant was concerned about the frames being in the warehouse and that it was his intention to reassure the Claimant that there was no danger to staff and that there would only be a danger if the frames were being worked on, which was not going to be the case. Nevertheless, the Claimant did not appear to accept the explanation provided by Mr Hurcombe and, being fearful for her health, left the premises at approximately 10.15am. She subsequently sent an email to Mr Griffin at 10.57am informing him that she had left "*due to asbestos being left in the warehouse yesterday*". She concluded the email by saying that she would not be back at work until she had assurance that the building was safe to work in.

27. The Claimant went to her GP that same day and submitted a fit note to the Respondent covering the period to 12 July 2016 noting that she was unfit due to "*asbestos exposure*". We noted however that there was never any evidence that the Claimant had indeed been exposed to asbestos and we found that the GP therefore simply proceeded on the basis of what the Claimant had told them.

28. There followed an email exchange between the Claimant and Mr Griffin on that day and subsequent days. Mr Griffin sought to reassure the Claimant that asbestos specialists had confirmed that the windows were safe to be removed as long as the glass was not disturbed, that the risk of contamination was extremely low, and that the frames were safe to handle and be stored in the warehouse whilst awaiting collection. He observed that the windows themselves had been in the premises for over 40 years without any concern and were only being replaced because of the poor condition of the timber frames, and that many people lived in houses, indeed he lived in his own house, which contained asbestos but where there was no risk as long as that asbestos was contained and not disturbed. He subsequently that day forwarded the email he had received from Wates.

29. The Claimant emailed Mr Griffin early on 6 July noting that she had been signed off, that she had spoken to the HSE and was concerned that asbestos was present in the air in the Respondent's premises. She asked

for contact details of the Respondent's external health and safety adviser, Shane McDonnell. Mr Griffin replied by repeating that the Respondent had not exposed anyone to any threat of contamination by asbestos from the putty in the window frame.

30. Early on 7 July, the Claimant emailed Mr Pisani and Mr Griffin asking for details of her commission/bonus for March to June 2016, and Mr Griffin replied almost immediately that it would be dealt with by Mr Hurcombe.

31. On 7 July 2016, an external testing company, Spectra Analysis Services Limited, attended at the Respondent's premises to carry out air tests. They tested the place within the Respondent's warehouse where the windows were initially stored (a section of the warehouse near the external doors), an area of the warehouse nearer the office and toilet locations, and the van to which the windows had been moved and where the windows were present at that time. The test results were recorded as satisfactory. The Claimant contended that the disclaimer within the test report, that the inspection did not cover areas of the property which were covered, unexposed or inaccessible, meant that the report was insufficient. However, we found that such disclaiming wording was entirely common within any form of survey report and was merely there to make it clear to the reader of the report the areas that had been tested.

32. In the afternoon of 7 July, Mr Griffin emailed the Claimant with copies of the test reports noting that all three areas were classified as "normal". He concluded his email by noting that as it had been confirmed that the building had not been contaminated with asbestos and was safe for her return to work, he wanted the Claimant to let him know what day she intended to return.

33. The Claimant emailed Mr Griffin on 8 July noting that she had been informed by the external health and safety consultant that the Respondent needed to authorise her ability to contact them. Mr Griffin replied by email later that day noting that he was the director responsible for health and safety, that the air test reports had not shown any sign of contamination by asbestos and therefore he was happy with those findings. He confirmed that he was due to meet Mr McDonnell for their annual review on 25 July and that the Claimant was more than welcome to talk to him then. He concluded that, as far as he was concerned, the matter was closed as the air in the building was normal and did not constitute a threat to health, and that he was expecting the Claimant to return to work by no later than 12 July as indicated in her fit note.

34. The Claimant however obtained a further fit note on 11 July 2016 covering the period up to 18 July 2016. She emailed the Respondent on 11 July in the evening to confirm that and asked for Spectra Analysis to provide evidence in writing confirming that there was no asbestos present, noting the disclaimer wording we have referred to above. She also asked for copies of the Respondent's asbestos certificates/checks for the duration of her employment and she concluded by asking "*due to the seriousness of*

this issue" for Mr Griffin to confirm that she would be receiving full company sick pay for the absence.

35. That email led Mr Griffin to contact Spectra and he received an email from Mr Darren Chinnery, Spectra's Contracts Director, on 14 July 2016. In this email, Mr Chinnery confirmed that the material was classed as a non-licensable material by the HSE, that anyone could remove it, but that there were regulations and duties regarding its disposal. He confirmed that the air tests recorded a level some ten times lower than the current control limits set by the HSE and that the air tests were "*quite clearly well within the acceptable tolerance levels as set by current HSE guidance/legislation*". He also clarified the disclaimer wording and that Spectra were required to visually inspect work enclosures for any sign of dust or debris but that their work did not extend to any other asbestos-containing materials that might be present at the premises.

36. Mr Griffin sent an email to the Claimant on 14 July 2016 noting the comments from Mr Chinnery that the air in the building was normal and did not constitute a threat to the welfare of its occupants. He also attached a copy of an asbestos survey conducted by the Respondent's landlords in October 2005 which noted that the building did not contain any asbestos material. He also confirmed that any work to the building subsequent to that had not included the use of asbestos. He concluded by saying that they would provide statutory sick pay to the Claimant for her absence as the company did not have any other sick pay policy and he looked forward to her return by no later than 18 July 2018.

37. The Claimant replied on 18 July 2016 noting that she would not be returning to work as she was awaiting results from a chest x-ray as she had had difficulty breathing and shortness of breath. She emailed Mr Griffin again in the evening of 18 July noting that she felt that the 2005 survey was no longer sufficient or valid and asking the Respondent to confirm that she could meet Mr McDonnell on 25 July, and if the Respondent was willing for checks to be undertaken for asbestos via an electron microscope, whether the Respondent was willing to arrange a "four stage clearance check" of the building, whether the Respondent would allow her to meet with occupational health, whether the Respondent had reported the asbestos exposure at work, whether ventilation equipment was working to ensure a supply of fresh air, and whether the Respondent would provide her with health and safety training regarding dangerous substances. She also obtained a further fit note on that day covering the period up to 27 July 2016.

38. At this stage the Respondent engaged the services of its external HR consultants, Handover HR Ltd, and that company sent a letter to the Claimant on 21 July 2016 noting that the company believed that it had fulfilled all its obligations with regard to asbestos and had provided evidence from qualified parties to that effect. The letter went on to say that the company was satisfied that it had established conditions to enable her to return to work and that it was expected that she would return on 26 July 2016. The letter concluded that any further absence from work in relation

to that issue without permission and without just cause would be regarded as a serious disciplinary matter.

39. The Claimant subsequently contacted the HSE on 24 July 2016 and submitted a form which stated that the Respondent had not provided her with air test results when ACMs (asbestos-containing materials) were stored in the warehouse, that the Respondent had exposed her to silica and lead dust when colleagues were grinding and polishing glass and cutting aluminium frames, and that the Respondent had never provided her with any health and safety training regarding carcinogenic substances.

40. The Claimant also submitted a grievance letter to Mr Griffin on Monday 25 July spanning five pages and running to 23 numbered points. This letter primarily related to the asbestos incident and testing matters but also referred to exposure to fibreglass and aluminium dust undertaken in the premises, the fact that she was never provided with personal protective equipment to reduce the amount of dust inhaled when she walked through the warehouse to get to the kitchen or toilet, that the Respondent had failed to authorise Mr McDonnell to discuss the work environment with her and had failed to allow her to meet with an occupational health adviser.

41. The grievance also noted that the Respondent had failed to confirm if the ventilation equipment in the Claimant's office was now working, had failed to provide sanitary waste disposal bins for the female toilets, had left her to work on her own in the building on numerous occasions, had not provided her with an eye test or contributed to the cost of glasses, had failed to pay her full pay during her absence, had failed to provide her with quarterly bonuses in contrast with male colleagues, had failed to provide her with details of commission, and had created an intimidating and hostile working environment by copying the email to her of 5 July to other staff. She also sought confirmation as to how issues were dealt with where she alleged that she had informed Mr Griffin and Mr Hurcombe of instances whereby another member of staff had made highly inappropriate and offensive comments and sexual gestures towards her.

42. The Claimant received a reply from the HSE on 25 July 2016 raising further questions about the Claimant's notification. The reply confirmed that if the survey in 2005 had identified that asbestos was present, where it was and how it was managed, then that was an adequate report and remained valid unless the asbestos had been disturbed in any way. The response also confirmed that silica dust and lead were not produced from grinding and polishing glass and cutting aluminium frames, although the Claimant subsequently clarified that she had mistakenly referred to silica dust and lead when she had meant to refer to fibreglass and aluminium. The email confirmed that the HSE would require evidence that the Claimant had been exposed to asbestos in order to take the matter forward.

43. The Claimant initially returned to work on 26 July but Mr Hurcombe indicated that as her fit note did not expire until 27 July, she should come back the next day, albeit that she would be paid for 26 July.

44. On 27 July, Mr Griffin circulated an email to the Claimant and to Mr Norris noting that they should co-ordinate their work with regard to site visits. The Claimant referred to this as one of the aspects of detrimental treatment as noted in the issues above, but we did not find anything untoward with that email.

45. It appears that the Claimant did meet with Mr McDonnell on 28 July although no evidence of the content of that discussion was before us. Mr Griffin did however send an email to the Claimant on the evening of that day noting that it appeared that there was some confusion over the air test reports and confirming that the air was tested on 7 July and then a further test was undertaken on 9 July in the van where the windows were stored after they had been removed. He confirmed that this second test confirmed that the air in the van was normal and that no other tests were completed in the Respondent's property.

46. One of the Handover HR consultants, Gail Bloomfield, wrote to the Claimant on 1 August 2016 inviting her to a meeting on 3 August 2016 to discuss her grievance. That meeting then took place on that day with another Handover HR employee, Jenny Fradgley, acting as notetaker.

47. On 4 August 2016, an incident occurred between Mr Griffin and the Claimant which led to Mr Griffin raising his voice. Mr Griffin accepted that the incident had occurred, indicating that he had been frustrated by what he perceived to be the Claimant's focus on her complaints and grievances as opposed to getting on with her work. He was concerned at the drop in sales and the impact that that would have on the Respondent's performance. The Claimant then sent a further email to Handover HR on 4 August 2016 raising a formal grievance about Mr Griffin's behaviour.

48. On the same day, the Claimant sent a further concern report to the HSE noting that the Respondent would be undertaking fibreglass polishing in the warehouse and had not provided her with personal protective equipment and had only just provided a sanitary waste disposal bin. The report went on to say that the company had on numerous occasions left her in the building by herself and to lock up the premises on her own and also that she did not think the Respondent's insurance covered employees working with asbestos.

49. Over this period, the Claimant sent several emails to Mr Griffin and then to Handover HR with regard to her attendance at an appointment with an occupational health specialist. No such appointment ever took place. Mr Griffin explained that initially there were difficulties in obtaining availability of such a specialist. Ms Carey of Handover HR then noted that the formal request did not arrive with her until 10 August, and that due to other reasons and her absence from holiday between 16-21 August, it was not picked up until her return and at that point the disciplinary process noted below was under way and therefore the arrangement of the occupational health appointment was missed.

50. The Claimant also submitted several emails to Handover HR during this period, some seeking to clarify points raised at the discussion with Ms Bloomfield on 3 August but others raising fresh grievances and the way that Handover HR were proposing to deal with the grievances, which was to respond to them all in one go.

51. After undertaking some further investigations, Ms Bloomfield prepared a lengthy letter dated 8 August 2016 responding to the various points raised by the Claimant. She arranged to meet with the Claimant on 9 August to go through the document. Before arriving however, the Claimant sent an email to Ms Bloomfield noting that she wished to raise a formal grievance complaint against the Respondent on the basis of subjecting her to sexual harassment.

52. Ms Bloomfield's response in relation to the various points regarding the asbestos issue was that she was satisfied that the Respondent had taken all appropriate steps to deal with the issue and to provide reassurance to the Claimant. She made some recommendations that the external health and safety consultant should be consulted and noted that an occupational health appointment was being sourced. She also confirmed that a sanitary disposal unit had been placed in the Ladies' toilet, that the Respondent had always tried to ensure that there was additional cover when the Claimant was alone in the office, that the company only had an obligation to reimburse the cost for eye tests as and when undertaken, that there was no obligation to pay company sick pay, that there was no obligation to provide a bonus and that the commission point had been clarified. Finally, with regard to the assertions of offensive comments and gestures regarding sex, Ms Bloomfield noted that this was a serious accusation and she recommended that the Respondent should further investigate the matter.

53. Ms Bloomfield confirmed in her evidence that during her discussion with the Claimant, when asked as to what the next steps were, she suggested that a possible mediation discussion could take place with Mr Griffin and Mr Hurcombe at which she would be present but the Claimant did not wish to undertake that.

54. On 9 August, the Claimant also raised a query with Handover HR regarding the Respondent's pension scheme and why details regarding pension contributions were not shown on her payslips. She also emailed Mr Griffin and Mr Hurcombe on that on the same day and Mr Hurcombe replied confirming that the company only had a stakeholder pension scheme to which employees could contribute but to which the company did not contribute. He also confirmed that a new pension fund was to be set up to comply with the auto-enrolment legislation which would commence in February 2017. Further emails passed between the Claimant and Mr Hurcombe later that month and a meeting took place during which Mr Hurcombe provided the Claimant with details of this scheme. No evidence was put before us to question the Respondent's assertion that its staging date for auto-enrolment purposes was February 2017.

55. In view of the fact that the Claimant had raised several grievances, Handover HR, as the Respondent's HR advisers, considered that it would be best for all of them to be dealt with in one go and the Claimant was given leave for two days on 23 and 24 August to compile a detailed list of the issues, complaints and requests for information which she believed to be outstanding. The Claimant was then given a further period of absence of five days to undertake further work on that.

56. Also on 9 August 2016, the Claimant received a reply from the HSE noting that they were not going to follow up the matter and that any shortcomings in compliance with health and safety law were not serious enough for them to take any action.

57. Over the period 1 August 2016 to 9 August 2016, the Claimant sent several emails to her personal email address attaching a variety of documents. These included the Respondent's annual accounts, its employer's liability insurance certificate, material safety data sheets, contracts with customers, quotations and service forms with various customers which included their details and the names and numbers of their managers. The Claimant also sent emails to Mr Griffin and Mr Hurcombe and Handover HR on 10 August and 16 August attaching copies of these documents and these emails are again copied to her home email address. The Respondent's witnesses noted that they did not appreciate that the emails had also been copied to the Claimant's own email address and certainly did not take any action in response to them.

58. However, on 23 August 2016, Mr Pisani, on checking through the Claimant's Outlook system to see if there were any outstanding emails from customers, noted that her "Sent" folder and her "Deleted" folder were empty. He raised this with Mr Griffin and Handover HR were notified. An investigation took place and an external IT consultant, Riven, examined the Claimant's computer and recovered the sent emails. This led to the discovery of the emails that the Claimant had sent to her home email address at the start of August.

59. In the meantime, the Claimant had submitted her appeal against the initial grievance outcome but, as noted above, the Claimant was asked to provide full detail of her appeal and her grievances before they were to be considered. That was then provided in a letter dated 24 August 2016 which contained the initial nine-page grievance appeal, a further two pages regarding additional information relating to her appeal, and a further five pages relating to harassment and sexual harassment.

60. In the meantime however, and in light of the emails that the Claimant had sent to her personal email address, the Claimant was suspended by letter dated 30 August 2016 in relation to allegations that she had breached the Respondent's IT and confidentiality policies. Handover HR wrote to the Claimant on the same day advising her that the company was deferring any action in relation to the grievance appeal and other issues pending the outcome of the investigation into the allegations of gross misconduct.

61. Ms Bloomfield was tasked with dealing with the disciplinary matter and one of Handover HR's other employees, Emma Davy, undertook an investigation. That then led to the Claimant being written to on 2 September 2016 inviting her to a disciplinary meeting on 6 September 2016. Details of the allegations were provided to her, she was notified that action up to and including dismissal could ensue, and was told that she was entitled to be accompanied by a work colleague or trade union representative. The Claimant responded by email dated 5 September 2016 seeking additional time and noting that she felt that the disciplinary meeting was linked to her grievances which should be resolved first.

62. The disciplinary meeting was therefore rescheduled to 9 September 2016 by letter dated 6 September 2016. The letter also enclosed another copy of the investigation pack as requested by the Claimant and repeated the Claimant's ability to be accompanied by a work colleague or trade union representative. The Claimant then submitted a further grievance letter spanning four pages on 7 September asserting that the Respondent was continuing to discriminate against her by instigating a disciplinary meeting and raising various other breaches of confidentiality and data protection.

63. The disciplinary meeting took place on 9 September 2016. Ms Fradgley was again present to take notes on behalf of the Respondent and the Claimant was accompanied by a colleague, Mr David Delgado. Comprehensive notes were taken although the Claimant took issue with their accuracy. We noted however that Mr Delgado had confirmed by email that he was content with the Respondent's notes.

64. The essence of the Claimant's response to the allegations was that she had sent all the documents purely to support her grievances in relation to both the health and safety matters and the commission matters. She also sent some further emails to Ms Bloomfield including one in particular on 13 September which included assertions that colleagues had similarly breached IT and confidentiality policies. However, we did not find that the issues raised by the Claimant in that email related to matters which were similar to those which the Claimant faced, i.e. relating to breaches of confidentiality.

65. Ms Bloomfield ultimately concluded that the Claimant had admitted forwarding company documents to her personal email address and then had admitted deleting the sent emails and then deleting the deleted emails. She concluded that the documents contained confidential and commercially sensitive information and that the Claimant's explanation as to why she had sent them was not adequate. She took into account the Claimant's clean disciplinary record and her reason for deleting the sent emails, i.e. to prevent other employees seeing the emails which referred to her grievance. However, Ms Bloomfield concluded that the Claimant had committed acts of gross misconduct and that she should be summarily dismissed as a result. Ms Bloomfield confirmed this in a letter of 14 September 2016, which advised the Claimant of her ability to appeal to Chloe Carey of Handover HR.

66. The Claimant did appeal to Ms Carey by letter dated 21 September 2016; Ms Carey confirmed that an appeal hearing would take place in October 2016 and that it would take place as a re-hearing and not as a review.

67. The meeting took place on Monday 3 October 2016 with again Ms Fradgley being present to take notes on behalf of the Respondent and Mr Delgado accompanying the Claimant. Lengthy notes were taken of this meeting and again the Claimant took issue with the accuracy of those notes, although again Mr Delgado in an email confirmed that he was content with them.

68. Following the meeting, Ms Carey looked at the disciplinary matter afresh and concluded that the decision that the Claimant should be dismissed should be upheld. She confirmed that the Claimant had admitted sending confidential and sensitive information to a personal email account in breach of the company's policies and the Data Protection Act. She concluded that the Claimant's explanation was not credible as the Claimant could have asked for permission to take copies of the data or could have extracted specific information rather than send the entire documents outside the organisation. She also considered that the documents themselves did not provide any particular evidence relating to the Claimant's grievance. She noted that the Claimant, during the appeal hearing, had accepted that she had asked Mr Griffin for some of the documents (the material data) and that following the refusal of that request, she had sent them to her email address anyway. She also confirmed that there was no evidence of any other of the Respondent's employees undertaking any similar action. Ultimately therefore she concluded that the appeal should be dismissed and confirmed that by letter dated 18 October 2016. In an additional letter sent on the same date, Ms Carey confirmed to the Claimant that following the termination of her employment, the internal grievances would not be progressed.

69. Whilst not in chronological order, we also note our findings in relation to the sexual harassment allegations as outlined in the issues above. With regard to the numbered allegations, we found as follows:

7.1.2: During 2014, Bob Griffin told Bethany Joyce and the Claimant that he liked "lilac underwear".

70. Whilst the reference to "lilac underwear" in 2014 did take place, we found that it took place in the context of painting the office and in circumstances where the lilac bra strap of the Claimant's female colleague was visible, we did not find anything untoward with that conversation.

7.1.3: In 2014, Martin Hurcombe informed Bethany Joyce and the Claimant that "he had a big one but he didn't brag about it" and laughed.

71. We were not satisfied that this allegation was made out.

7.1.4: On 30 January 2015, Bob Griffin said "I'll show you mine if you show me yours".

72. We were also not satisfied that this allegation was made out.

7.1.5 On 1 May 2015, Bob Griffin told the Claimant to visit his friend's shop in Bournemouth if she liked "classy underwear". He also told her that a transvestite is one of his friend's most regular customers.

73. Mr Griffin explained that the reference here arose during a conversation when the Claimant had said that she was to visit Christchurch near Bournemouth during which he noted that his friend's daughter owned a ladies' underwear shop in that town. We therefore found that the reference to the Claimant visiting that shop "if she liked classy underwear" as having been made in the context of that general conversation and we did not find anything untoward in that.

7.1.6: On 15 August 2015, Bob Griffin said that he would not recruit the male candidate over Namra Khalid as he wanted "eye candy".

74. We did not find anything to support this allegation.

7.1.7: On an uncertain date but after Bethany Joyce had left the company, Martin Hurcombe told the Claimant that he had a good working relationship with some of the technicians and that he knew when they had sex.

75. We were satisfied with Mr Hurcombe's evidence in relation to this allegation that the conversation he had had with the Claimant related to his ability to understand the employees due to his experience of working with them.

7.1.8: On 26 November 2015 after the Claimant informed Dennis Atherton that she was ready to help him with his query, Dennis Atherton said that he would "come in slowly" as he made a sexual gesture and then came walking towards her which the Claimant found highly offensive.

76. No particular evidence was put before us surrounding this particular incident and we could not therefore come to any conclusions in relation to it.

7.1.9: In approximately the fourth quarter of 2015 the Claimant saw Dennis Atherton watching porn at work.

77. There was evidence that the Claimant had raised an issue with Mr Pisani regarding the colleague found watching porn at work on one occasion.

7.1.10: On an unspecific date Martin Hurcombe touched the Claimant's knee.

78. Mr Hurcombe confirmed that he had inadvertently touched the Claimant's knee on one occasion and had apologised for doing so.

7.1.11: On 27 January 2016, Bob Griffin put his hand on the Claimant's shoulder for a prolonged amount of time.

79. We found no evidence that there was anything untoward in this.

7.1.12: At approximately the end of June 2016 Bob Griffin leered at the Claimant;
7.1.13: On 17 August 2016 or on a number of occasions, Bob Griffin leered at the Claimant in particular when discussing Crest Nicolson Herts project;
7.1.14: On 19 August 2016 Bob Griffin looked the Claimant up and down when she asked him why he was delaying her appointment with occupational health.

80. All these relate to "leering" or "looking up and down". However, the Claimant's own evidence did not clarify what she meant by "leer" and the two incidents in August took place when there was clearly an unsatisfactory relationship between the Claimant and Mr Griffin and we do not consider that any "looking up and down" would have had any form of sexual connotation.

81. Importantly, with regard to the allegations of sexual harassment, we noted that the Claimant had made no allegation, other than a reference to Mr Pisani regarding the assertion at 7.1.9, at any time during the course of her employment, whilst some of the allegations went back to an early period in the time of her employment. As we have noted above, the Claimant was not someone who was reluctant to raise points within the workplace.

CONCLUSIONS

82. With regard to the issues identified above, in light of our findings, we made the following conclusions.

Public Interest Disclosures

83. We were satisfied that the oral conversation between the Claimant and Mr Hurcombe did amount to a protected disclosure for the purposes of section 43B(1) of the ERA. We were conscious that in making a disclosure, an individual does not have to be correct in the assertion that they are making, they only have to hold a reasonable belief that the disclosure they are making tends to show one or more of the various matters and is in the public interest. In that regard, the Respondent accepted that the references to health and safety satisfied the public interest element.

84. Whilst our conclusions in relation to the reasonableness of the Claimant's belief after the 5 July were that we do not consider that she could reasonably have believed that any danger to health and safety arose, we were satisfied that in this initial discussion she did have the required reasonable belief. She was aware that window frames containing asbestos were present on the premises and, whilst her reaction may be viewed as

having been a little excessive, at that time, and without any further reassurance, we concluded that it was objectively reasonable for the Claimant to be concerned that there could have been a breach of health and safety obligations and that she imparted that information to Mr Hurcombe.

85. However, as we have already indicated, we were not satisfied that the same could be said about the Claimant's subsequently alleged disclosures in relation to the asbestos incident. After having left work on 5 July, the Claimant received emails from Mr Griffin which gave a clear and cogent explanation of the situation. Air tests were carried out and were provided to the Claimant on 7 July which confirmed that the air in the Respondent's premises was normal. Furthermore, the Respondent provided the Claimant with a copy of the 2005 asbestos report which confirmed that the building did not contain any asbestos-containing materials. Ultimately therefore, whilst we appreciated that the Claimant herself subjectively believed that there was an ongoing issue with regard to health and safety, we did not consider that it was objectively reasonable for the Claimant to maintain that view. Nevertheless, as we have said, we were satisfied that the first asserted disclosure, that made on 5 July 2016, was a protected disclosure.

86. We were conscious that in the Claimant's subsequently asserted disclosures, she went beyond the matter of asbestos. She raised issues with regard to the presence of silica and dust to the Health and Safety Executive, she raised issues regarding the absence of sanitary disposal facilities in the Ladies' toilets, she raised issues regarding lone working and she raised issues regarding the employer's liability insurance. However, we were not satisfied that in relation to any of those it was reasonable for the Claimant to believe that there were any dangers to health and safety or the environment or any breaches of legal obligations.

87. We noted that the Claimant had worked for the Respondent for well over two years and that she confirmed in her evidence that dust occasionally arose within the workshop. She also confirmed in her evidence that she had suffered with rhinitis prior to the incidents in July. In our view, had the Claimant reasonably believed that the presence of dust in the air in the Respondent's workshop raised an issue of health and safety then she would have said so at a much earlier stage. Indeed, we noted that this issue appeared to arise as something of an afterthought following clarification of the asbestos situation. Similarly, with regard to sanitary disposal facilities, whilst the Respondent was under a duty to provide such facilities, we noted that the Claimant had worked for well over two years without raising any such issue. Again therefore, we concluded that the Claimant had not reasonably believed that there was any such breach.

88. With regard to the issue of lone working, the Claimant was unable to specify any specific legal obligation and we were not, in any event, satisfied that she could reasonably have believed that there had been any breach of any such obligation. Again, we noted that the Claimant had worked for the Respondent for over two years without raising this as an issue, that she herself confirmed in her evidence that she had only been

required to lock up the Respondent's premises on four occasions, and that whilst she was alone during lunchtime and at other periods, they were periods when no work was being undertaken such that no issues with regard to the operation of machinery or the management of chemicals could possibly have arisen. We again noted that this issue was raised after the Respondent had addressed the Claimant's concerns over the asbestos issue and that it was first raised after the Respondent's HR consultants had written to the Claimant noting that if she did not return to work she would face disciplinary action. We consider that this undermined the Claimant's contention that she could reasonably have believed that this was an issue.

89. Finally, with regard to the insurance certificate, the Respondent had a certificate of employer's liability insurance and the Claimant's assertion in this regard was simply that it was not clear whether that certificate covered asbestos. However, there was no limitation on that certificate and therefore we did not consider that there could have been any reasonable belief on the Claimant's part that there had been a breach of legal obligation.

Protected Acts

90. We noted that the Respondent accepted that the references to sexual harassment within the Claimant's grievances did amount to a protected act for the purposes of section 27 of the Equality Act 2010. We deal with the victimisation issue below.

Unfair Dismissal

Automatic Unfair Dismissal

91. Notwithstanding that we were satisfied that the Claimant had made a protected disclosure in the form of her conversation with Mr Hurcombe on 5 July 2016, we were not satisfied that the reason or principal reason for her dismissal was that she had made such a disclosure. We were satisfied that the Respondent had grounds for considering that the Claimant had committed acts of gross misconduct in the form of the emails that she sent to herself in the period 1 to 9 August 2016.

92. Mr Curtis in his submissions referred us to the case of Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 in which the Employment Appeal Tribunal noted that the employment tribunal had not erred in treating the consequence of the claimant's complaints as separable from the fact that he had made protected disclosures. We consider that there were clear parallels with that case in this instance in that, whilst the "die was cast" by the Claimant's initial concern over asbestos, the action she undertook in sending confidential emails to her home address was not sufficiently connected to that disclosure to cause us to conclude that it was the reason or principal reason for her dismissal. We were conscious that we were not to apply a "but for" test but were to identify what we considered the reason to be for the Claimant's dismissal, and we were

satisfied that the reason for that dismissal was the Claimant's misconduct in the manner identified.

Ordinary Unfair Dismissal

93. With regard to this aspect, we first had to identify whether the Respondent had established that it had dismissed the Claimant for a potentially fair reason pursuant to section 98 of the ERA, that reason being conduct. As we have identified above in relation to the automatic unfair dismissal element, we were so satisfied in that the reason for the disciplinary action taken against the Claimant and her ultimate dismissal was her conduct in the form of sending emails containing confidential material to her home email address.

94. We then considered whether dismissal for that reason was fair in all the circumstances and were conscious to apply the long-established test of British Home Stores v Burchell [1978] ICR 303, which required us to consider whether the Respondent had a genuine belief of the Claimant's guilt, whether that was based on reasonable grounds and whether those grounds were derived from a sufficient investigation.

95. In that regard, we were satisfied that the test had been satisfied by the Respondent in this case. As we have noted above, we did not think that the Respondent's actions demonstrated that it proceeded because of any ulterior motive derived from the Claimant's disclosure or indeed her subsequent grievances, even though they themselves were not considered to amount to disclosures. We were satisfied that the Respondent reacted to concerns that had arisen in the workplace and ultimately formed a genuine view of the Claimant's guilt.

96. We were also satisfied that the Respondent had undertaken a reasonable investigation in that the Claimant had admitted sending the emails and it had looked into the content of those emails and the rationale that the Claimant advanced for sending them to her home address. We then concluded that that investigation gave reasonable grounds for the Respondent to believe that the Claimant was guilty of the disciplinary offences.

97. In particular, we noted the points made by Ms Carey at the appeal that the Claimant could have obtained material for her grievance in a different manner, and that the material did not particularly support her grievances in any event. We also noted that the Claimant had taken the step of deleting her sent items and her deleted items when, if her concern was that she did not want others who might look at her emails to be aware of her grievances, then she could simply have deleted those emails. In deleting all her sent and deleted items, it was certainly possible that even those which were of importance to the business were lost and it seemed to us that the Respondent could draw support for its conclusions on the Claimant's misconduct by virtue of her actions.

98. We then considered whether the sanction of dismissal was appropriate in the circumstances, applying the test of Iceland Frozen Foods v Jones [1983] ICR 17. In this regard, and indeed in assessing the compliance with the BHS v Burchell test, we were conscious that we were not to substitute our own view for that of the Respondent but were to judge its actions and conclusions in the light of what a reasonable employer would have done in the circumstances. In that regard, whilst it seemed to us that some employers might potentially have been more lenient and have imposed a sanction below that of dismissal, we could not say that the sanction imposed by the Respondent in this case fell outside the range of responses open to a reasonable employer acting reasonably in these circumstances.

Wrongful Dismissal

99. We were conscious that we needed to apply a different test to this claim which did not involve consideration of the reasonableness of the Respondent's actions, but involved an objective assessment of whether the Claimant had committed an act of gross misconduct, i.e. which was a fundamental breach of her contract, in the form of sending the emails containing confidential material to her email address. We were satisfied that that indeed was the case.

100. The attachments contained sensitive information concerning contracts with customers as well as personal data of customers' employees. With regard to the company accounts, whilst the Claimant asserted that company accounts were available from Companies House, she ultimately had to accept that the information contained in those accounts was not as comprehensive as that set out in the accounts she had sent to her email address and did therefore contain confidential material. Ultimately therefore we were satisfied that there had been a repudiatory breach of contract by the Claimant.

Sexual Harassment

101. We have addressed our factual findings on these matters above. However, in terms of our conclusions with regard to the Claimant's claims, we noted that only the last two of her allegations took place within the required time period, being mindful that the Claimant's claims had, by virtue of contacting ACAS for the purposes of early conciliation, to relate to periods of time after 1 August 2016. In this regard, we were not satisfied that the allegations of "leering" or "looking up and down" in August 2016 had been made out and therefore we considered that the Claimant's claims in this regard had not been brought in time. We also did not consider, due to the range of complaints and individuals involved, that the acts could be said to amount to a collective course of conduct.

102. More fundamentally however, we did not consider that, regardless of that, any of the conduct asserted had the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We noted that, in that regard,

we would be required to take into account the Claimant's perception, the circumstances of the case and whether it was reasonable for the conduct to have had that effect. We noted particularly that the various allegations spanned over two years and, apart from one assertion regarding the viewing of pornography by one of her colleagues, had not been raised by the Claimant at any time throughout her employment. Instead, they were raised for the first time during the grievance process and we considered that they were raised at this stage by the Claimant purely to maintain her complaints against the Respondent. We did not therefore consider in any event that the conduct that we concluded did take place had the effect of violating the Claimant's dignity or creating the inappropriate environment and we certainly found no evidence of any purpose of any such matter.

103. For that reason, we did not consider that there was any benefit in us extending time to allow the Claimant's claims of sexual harassment to be brought in time as, as we have noted, we considered that even if there had been an in time claim of sexual harassment, we did not consider that it had been made out.

Whistleblowing Detriment

104. As we have noted above, we did consider that the Claimant's verbal discussion with Mr Hurcombe on 5 July 2016 did amount to a protected disclosure. However, we were not satisfied that any of the detriments asserted by the Claimant either occurred, or where they occurred, arose as a result of her disclosure.

105. The one assertion which we considered at greatest length was the first, i.e. the failure to pay the Claimant sufficient commission in July 2016. We noted Mr Hurcombe's admission that if the relationship with the Claimant had not been what it was in July 2016, then it could be that the payment of the £700 for the second quarter of 2016 would have been made in the same way that it was made for the first quarter. However, we were satisfied that Mr Hurcombe's decision was driven by the unreasonable absence of the employee following the clarification provided to her by Mr Griffin on 5 July and 7 July and by her unwillingness to accept the reassurances provided by the Respondent, instead looking to "keep the pot boiling" by putting forward further objections. Applying the Panayiotou case, we were satisfied that Mr Hurcombe's decision was separable from the Claimant's disclosure and arose from her subsequent attitude.

106. With regard to the other asserted detriments, we did not consider that it was unreasonable for the Respondent to delay investigating the Claimant's grievances until such time as they were all consolidated and co-ordinated. We noted that the Claimant had raised in excess of 10 separate grievances, some of which raised several individual matters and we did not think it was inappropriate for the Respondent to take that action. We did not therefore consider that there was any detriment to the Claimant in this regard, regardless of whether it may have been connected to her original disclosure.

107. The other aspect of this issue was the Claimant's assertion that the Respondent's failure to let her meet occupational health amounted to a detriment. As we have noted above, as a matter of fact that did occur in that, despite several reminders from the Claimant, no appointment was made with occupational health. However, our conclusion was that that was down to incompetence on the Respondent's part and that of its advisers rather than was driven by the Claimant's protected disclosure.

108. With regard to bonus, as a matter of fact, we concluded that the Claimant had no bonus entitlement in 2016 and therefore the failure to pay the Claimant a bonus could not be considered to amount to a detriment.

109. Similarly, we were satisfied that Mr Hurcombe had provided the Claimant with information to join the stakeholder pension scheme and that it had no obligation to take any proactive steps itself to facilitate that. Consequently, there is no question of there having been any detriment to the Claimant in this regard.

110. Finally, with regard to sections 8.1.5, 8.1.6 and 8.1.7, whilst Mr Griffin did indeed raise his voice to the Claimant on 4 August 2016, we were satisfied that that arose out of frustration in relation to matters as they stood within the workplace on that day and on the preceding few days and were not connected to her disclosure on 5 July. The comments made by Mr Griffin and the emails he sent regarding work matters were not, in our view, untoward such as to cause any detriment although, as we have noted, we did not consider that they would in any way have been connected to the Claimant's disclosure on 5 July in any event.

Direct Discrimination

111. As we have noted above, we do not consider that the Respondent was under any obligation to pay any form of quarterly bonus to the Claimant in 2015 and 2016 and therefore there cannot have been less favourable treatment of her on the grounds of her sex in that regard. We have similarly identified that the Respondent was under no obligation to include the Claimant in its pension scheme and equally that it did not include any male employee in any more favourable manner in any event. Finally, with regard to the allegations of sexual harassment, we have noted our position in relation to that above. Our view was exactly the same in relation to direct sex discrimination.

Victimisation

112. We have noted our conclusions above in relation to the detriment and direct sex discrimination claims. As we have noted, our view was either that the various matters asserted by the Claimant did not amount to any form of detriment or less favourable treatment or, if they did, were not referable to the Claimant's disclosure or her sex. Our view was exactly the same in relation to victimisation in that we did not consider that any less favourable treatment occurred of the Claimant arising from her protected acts.

Unauthorised Deduction of Wages/Breach of Contract

113. As we have noted above in our findings, we did not consider that the Respondent was under any form of contractual obligation to pay the Claimant the commission beyond £65 in respect of the second quarter of 2016. The Claimant did not take issue with the calculation of that amount, her case being that as the Respondent had made a discretionary payment to her in respect of the first quarter, it should do so as well for the second quarter. In the absence of any contractual obligation however, we did not consider that the failure to pay £700 in respect of the second quarter amounted either to an unauthorised deduction of wages or to a breach of contract.

114. With regard to sick pay, our findings above were that the Respondent did not provide any form of contractual company sick pay and therefore any failure to pay above SSP in respect of the period between 5 and 25 July 2016 did not amount to unauthorised deduction of wages or to a breach of contract.

115. Finally, we have noted the position with regard to bonuses above; the Respondent did not operate any form of bonus applicable to the Claimant in 2015 and 2016 and therefore there was no unauthorised deduction of wages or breach of contract with regard to any non-payment.

116. Ultimately, we concluded that none of the Claimant's claims were made out and therefore that they should all be dismissed.

_____
Employment Judge S Jenkins

Date: 31 / 5 / 2018

Sent to the parties on: .....

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For the Tribunals Office