SB

EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Ms S Benavides	**AND**	Britannia Services Group Limited

Heard at: London Central **On**: 5-7, 11-14 and 20 September, 21 September & 11 October 2018 (in Chambers)

Before: Employment Judge D A Pearl
Ms C I Ihnatowicz
Mr I McLaughlin

Representation
For the Claimant: Ms A Reindorf, of Counsel
For the Respondent: Mr L Godfrey, of Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that: -

1. The Claimant's claim of automatic unfair dismissal succeeds
2. In the alternative, her claim of unfair dismissal pursuant to section 98(4) ERA 1996 succeeds.
3. The Claimant's claims of detriment succeed as set out in paragraphs 71 to 85 below.

RESERVED REASONS

1. By ET1 received on 22 October 2016 the Claimant claimed automatically unfair dismissal contrary to Section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992, as well as detriment contrary to Section 146 of that Act. She was employed as a cleaner by the Respondent (and its predecessors as transferors) from 29 June 2009 to 15 October 2016. The Claimant was dismissed on purported grounds of gross misconduct which are specified in the ET3 as "the Claimant's activities on social media".

2. This case has been linked to the case of Ms Caceres, 2208251/2016, which at an early case management hearing was ordered to be heard sequentially with Ms Benavides's case. We heard the case of this Claimant for almost 6 days and, just before the case of Ms Caceres was due to be taken, and before we had seen any of the documents in that case, Mr Godfrey on behalf of the Respondent conceded ordinary unfair dismissal as well as automatic unfair dismissal for trade union activities, in that second case. On the next day, 14 September 2018, which was the seventh day of the hearing, the parties reached a settlement through ACAS in the case of Ms Caceres.

3. It is agreed by both parties that the pleadings in the case of Ms Caceres are available to the Tribunal when adjudicating upon the case of Ms Benavides. There is a further point of agreement which relates to an unsuccessful application by the Respondent during the hearing for additional witnesses to be called in the case of Ms Benavides. Having regard to the timing of this application and also the contents of the witness statements, we refused that application. However, it is also a matter of agreement between the parties that those statements (Ms Jordan, Mrs Shaw and Mr Roberts) are written material that the Tribunal is entitled to consult when reaching its conclusions in the instant case.

4. In resolving the issues, we have heard evidence from the Claimant and Mr Elia; and Mr Shaw and Ms Youngblood for the Respondent. We studied a bundle of 271 pages together with some further exhibits that were handed up during the course of the case. Substantial extracts from the tape recording of a disciplinary hearing with the Claimant were also played to us.

Facts

5. Although some of the facts in this case are a little intricate, there is no necessity for the Tribunal to deal with each and every disputed matter between the parties. Many of the essential points in the chronology are agreed and what follow are our necessary factual findings in relation to the issues we have to decide.

6. The Respondent is a contract cleaning company and it specialises in retail clients. Its largest client is, and was for the period we are concerned with, the Arcadia Group which included Top Shop. Mr Shaw is the Owner and Managing Director and his wife is the Company Secretary and HR Manager. The company has about 1200 employees and the majority are cleaners. Head Office has about

10 staff in total. The Claimant was employed from June 2009 and transferred to this Respondent a little over a year later. At all times she has worked at Top Shop's main store in Oxford Street, W1. This is their largest store.

7. United Voices of the World ("UVW") is a relatively new union and has a certificate of independence. It predominantly represents low paid migrant workers, many of whom are from Latin America and are cleaners. There is no question that Mr Elia, who is the driving force in the union, is an energetic campaigner in the cause of improving terms, conditions and pay for this work force. Mr Elia met the Claimant in 2014 when she brought certain grievances to him and at some stage thereafter she became the shop steward of the UVW at the Oxford Street store. There is no dispute that she recruited and organised members and Mr Elia says, as we accept, that she helped some of them submit grievances and took an active part in representing the union at the work place. Back in 2014 Mr Elia represented the Claimant in the grievance hearing and we understand that, then and subsequently, he has frequently interpreted for her and others and translated documents.

8. The Claimant in her witness statement gives a fair degree of background evidence concerning the events of 2011-2014 and, in particular, a problem concerning her hours of work which culminated in a grievance that she made in 2012. In the Autumn of 2014 she was involved with the reconvened grievance that the Respondent was hearing in this regard. There is only some background relevance in the evidence about these years, but from the contents of paragraph 15 of her witness statement the Tribunal is prepared to find that Mr Shaw was not wholly comfortable with the involvement of the UVW at the Top Shop work place. The Claimant gives evidence in this paragraph of a conversation in which he invited her to speak to him directly and said that the union was a problem. Although this evidence involves the Claimant translating from the Spanish that Mr Shaw was using when speaking to her, and therefore there is always the possibility of some confusion or misunderstanding, we take the view that she has in matters of detail satisfied us that she is an accurate witness of fact. The detail that was explored in evidence by the Claimant was inherently plausible, in our view, and the attitude she reports Mr Shaw as exhibiting at this time is consistent with our later findings of fact.

9. In September 2015 the Claimant organised a collective grievance and, although the evidence is relatively short, paragraph 17 of her witness statement is in our view plausible and likely to be accurate. She describes how fellow employees brought to her specific problems and that in some cases they gave her notes. She, along with three others, then collated the information and it was the Claimant who sent the letter at pages 67-69. The letter is headed ("Grievance – Britannia Services Group") and it also states that correspondence should be addressed to UVW at the email address for Mr Elia. The opening paragraph is as follows: -

> "We are writing this letter because we would like to make a joint group grievance against the way we are being treated at your company ... by Mr Ashraf Estefanous, in particular because of the different treatment we

> receive in comparison to other members of staff who in cases receive privileged treatment."

Seven items of grievance are then set out. The letter ends by saying that if the Respondent wished to discuss any item contained in the letter they should arrange a meeting but "we need enough time to notify our Union Representative regarding the latter". There then follow 18 individual signatures of employees. Ms Caceres is the first on the list and the Claimant is second. The Respondent did not reply to this collective grievance or petition. What Mr Shaw says in his statement is that staff received a pay rise as well as the provision of more uniforms. He also in that paragraph suggests that some of the signatories had not understood what they were signing or had not property consented to their signatures being added. Nevertheless, it seems agreed that there was no response to the grievance in writing or acknowledgment in any written form.

10. One of the complaints in the collective grievance was that holiday pay was being calculated on the basis of contractual hours rather than the actual hours that the employees worked. During the course of the hearing Mr Shaw denied that this was the case. Regardless of the merits of this claim about holiday pay, which we are not able to resolve, the absence of any formal response on the point could only, we find, have added to the suspicions harboured by the employees. The same point can be made about the allegations and the grievance concerning managers' favouritism. Nevertheless, the Respondent chose not to respond.

11. In her witness statement between paragraphs 19 and 21 the Claimant gives a fair deal of additional background information and it is right to observe that this is largely based upon hearsay. It is relevant to note it at this point because it is the view of the Tribunal that what other employees told her at the time is likely to be broadly accurate; and, more important, it may well explain why the company chose not to make any written or formal response to the collective grievance. What the Claimant is here recounting is that after that grievance the manager, Ashraf, and the supervisor, Samuel, convened a meeting with other employees at a time when the Claimant was not on shift and could not attend. Those other employees, says the Claimant, then reported back to her what these managers were saying. The details are set out in these three paragraphs but what it amounts to is (if the Claimant's information is correct) an attempt by the Respondent to detach various employees from the petition that they had signed by making allegations to them that the Claimant had lied to them, for example. It was reported back to the Claimant that it was alleged by the managers that she was dishonest. In the case of an employee called Boris, who seems to have possibility switched sides after these meetings, the Claimant makes the point that Boris had been the person who had translated everything into Spanish before others signed the grievance. We find that it is more likely than not that there is some substance to the reports that the Claimant was given as to what the managers were doing and that this may well explain why the company chose not to respond to the grievance. These allegations surfaced in the Claimant's witness statement and we observe also that the Respondent has called no evidence to dispute what the Claimant has here set out.

12. On 23 February 2016 the UVW sent a detailed letter to the Respondent and the author was Mr Elia. It was headed "re the London Living Wage and disparity of terms and conditions between outsourced and in-house staff". Again, there is no reason to cast any doubt on the short background evidence given by the Claimant in her witness statement. She says, and we accept, that she met with other employees on 14 February 2016 and they spoke about the London Living Wage ("LLW"). They agreed that the union should seek it on their behalf.

13. The letter recorded that the UVW represented the cleaners who were outsourced to the Respondent and also in-house sales assistants at the Oxford Street Top Shop. They were paid the National Minimum Wage which was substantially below the LLW. The letter went on to note that Arcadia Group had seen a recent rise in annual profits. It alleged that many of the Respondent's employees lived in poverty. It referred among other matters to fringe benefits that the cleaners did not receive. In the paragraph dealing with resolution it stated:

> "Whilst we wish to resolve these matters quietly and amicably if no response is forthcoming by Friday 11 March and/or no steps taken to engage with UVW by then we will, regrettably, be left with no choice but to launch a high profile LLW campaign consisting of, but not limited to: balloting our members for industrial action; staging lawful, peaceful, regular and noisy protests; securing mainstream press coverage; coordinating actions with other trade unions and campaigning groups and calling on Members of Parliament both to attend our protest, table Early Day Motions and generally rally public support".

14. The next paragraph asked the Respondent to note "that a large demonstration will take place on 12 March in the event that a resolution has not been reached by 11 March". It then gave a link to the Facebook site for that demonstration. The letter concluded by saying that Mr Elia looked forward to "your response on these matters and to working with you in order to reach a fair and just settlement for both the outsourced cleaners and the in-house sales assistants. Please acknowledge receipt of this email".

15. It is not in dispute that the Respondent did not respond to this letter. Nor did the other addressee, the Arcadia Group, make any response. Mr Shaw characterises the letter in his witness statement as a crude attempt at blackmail because the demonstration would happen "unless their demands were met by 11 March". That is not precisely what the letter says, but as a description of how he viewed it at the time, we have no difficulty in finding that this was his cast of mind.

16. By 29 February there had been no response and the Claimant and some colleagues met with Mr Elia and they had their first discussions about the forthcoming protest. Videos were made calling for support and this is not in dispute. Some part of the video that was placed on Facebook is at page 73. A still photograph can been seen there showing the Claimant and it is evident that the viewers of the page were invited to watch and share widely; and "join us on 12 March at 3pm at Top Shop's flagship store in Oxford Circus to demand a

Living Wage". The other employee who appeared on this video was Roberto who worked at the store.

17. We find that there is no dispute that the Claimant began a petition on change.org on 7 March 2016 although the precise position is that Mr Elia did it in the name of the Claimant and with her consent. As the weeks went by the petition page was updated and we accept the Claimant's evidence that it was Mr Elia who did this. The petition was addressed to Top Shop and Sir Phillip Green and requested that he or they "pay your cleaners the Living Wage". We note the statement that went out in the Claimant's name at page 73b in which she said (or Mr Elia said on her behalf):

> "Although I am not directly employed by Top Shop, they have the power to ensure me and my colleagues are paid a Living Wage".

She said she and colleagues could not get by with what she described as poverty wages.

18. The next relevant matter is the demonstration outside the store on 12 March, starting at 2pm after the Claimant had finished a shift. The protest was well attended and there were other employees of the Respondent who cleaned Top Shop stores at other locations than Oxford Street who were present. The evidence we accept is that the Claimant made a banner reading "Britannia respect our contracts" and they also held a banner asking Britannia for permanent contracts. At this point there is no evidence that she was holding any banner criticising Top Shop or saying, "Top Shop shame on you". There is a picture at page 73a which appears to be the 12 March protest and it is clear that the Claimant is holding a banner with the word "Britannia" on it. It is equally clear that somebody standing next to her has the "Top Shop shame on you" placard. The Claimant's banner is written in pen or felt tip and appears to be the homemade one she devised at home, whereas the shame on you placard is printed, presumably by UVW. Other printed placards say "justice for cleaners", "no one should be working poor" and "Real Living Wage". It is evident that this was the campaign that the UVW was supporting and promoting and, as other evidence shows, this was merely the latest set of workers that the UVW was supporting in that regard. Mr Elia says, and we cannot doubt, that there had been previous campaigns that had been successful.

19. There is gross confusion as to the number of meetings that took place with the Claimant in March, their dates and also what was said. There is a high probability that some aspects both of the Claimant's evidence and the Respondent's are factually incorrect. For example, the Claimant maintains that there was a meeting on 10 March 2016 but the Respondent has produced notes of a meeting that were headed with the date 10 March but are said to refer to 16 March. During the course of the Hearing the Claimant agreed that there was a meeting on 16 March while maintaining that there was also one on the 10th. There are notes of a further meeting on 22 March at which Mr and Mrs Shaw were present at various points and there is also the important document at page 89 which is the 23 March email from Mr Shaw to the Arcadia Group. From this mass of confused evidence, a number of clear findings can be made.

20. The first point is that Mr Shaw was thoroughly irked and annoyed by the protest taking place on 12 March outside the store. The evidence for this comes from what he told us when he was cross examined in the Tribunal. He went as far as saying that after the 12 March protest he thought that the Claimant should be dismissed. In our view, this amply explains why the note of 16 March conversation with her at pages 75i-j has the flavour of a disciplinary conversation. It starts by saying that she was invited to an informal meeting "to explain to me why you have taken the actions you have without bothering to have any consultation with your employer ..." Mr Shaw said that he had concerns that the Claimant had not approached the company, and had raised these concerns outside the store on a megaphone. He said that this had contravened her contract of employment because it amounted to abusing not only the Respondent but also its client, Top Shop, on social media "which is potentially gross misconduct". There can be no doubt, as we find, that he thought at this stage that there should be an investigatory meeting and that he considered it would lead to dismissal. There are two references to an investigatory meeting on page 75j. We consider that this accurately documents his state of mind.

21. It does not follow that there was therefore no meeting on 10 March and what is notable about the Claimant's account is that an offer was made to move her to another store and give her potentially increased hours. This is, again, something which must in our view have happened, because we have the further note of the meeting of 22 March at which an offer to move to another store was expressly made.

22. The next day, 23 March, Mrs Shaw the HR Manager wrote to the Claimant referring to this meeting and stated the following. "As discussed with you yesterday Top Shop Oxford Circus have requested that you move to another of their stores nearer to your home which will help you with your travelling and child care arrangements. The store they are suggesting is Top Shop, One New Change, St Pauls ..." It was then said a little further on that another factor in the making of this decision (i.e the offer that was being made) "is due to complaints received from Arcadia to Britannia ... Head Office due to your conduct in the work place on one occasion". This is a reference to her shouting in the staff canteen and also arriving late at a meeting and raising her voice. A third matter that was referred to was work colleagues having complained about her on or about 21 March. It was said that under the circumstances Arcadia felt it would be beneficial to move her to another site. What are we to make of these communications?

23. The finding we have come to based upon a consideration of all of the evidence, and on the balance of probabilities, is that the Respondent was effectively pursuing two tracks. There was a threat of disciplinary action accompanied by an offer to move stores. We further find that no request had ever been made by Top Shop or Arcadia that the Claimant be moved. The way the letter was phrased is disingenuous.

24. The evidence that this is the case is an email dated 23 March at page 89 in which Mr Shaw wrote to Mr Jeal who was the Purchasing Manager of Arcadia. This was copied to Mrs Shaw and also to Mr Grinham, Commercial Director, of

the Respondent to whom we will turn at a later point. The email reads as follows:-

> "Reference to our meeting with Susana yesterday we put the option of a transfer to One New Change for all the reasons we discussed and she said no. We are putting an offer on the table in writing for her to consider lifting her hours slightly to thirty and reducing her days to five Monday – Friday at One New Change again for all the right reasons. We will give her until Tuesday next week to give us a decision should she say no again we have no choice but to take her down the disciplinary route to dismissal. It would make everything so much simpler if Arcadia simply asks to have her removed from their stores which is in effect what is happening now, which is third party pressure and Arcadia and Britannia are both within their legal rights to do so. Considering the comments she has made on social media I think Arcadia would be well within their rights to do so, as she and UVW are not going to go away".

25. This clearly shows that, whatever his initial views about dismissing the Claimant, she was being given the option of moving. But there was still a threat of dismissal in the event that she would not move. This was picked up immediately by Mr Jeal who wrote the next day and asked a number of questions. He wanted to know what grounds Britannia had given to the Claimant for the move. He wanted to know whether the new rate of £7.50 per hour was being paid to all staff at the Oxford Street Top Shop store. The answer from Mr Shaw was that it was. The email further evidences some concern about what Mr Jeal was being told about the Respondent's intentions. He asked who had put complaints in about the Claimant, were they in writing and how many were there and what is the percentage of the staff at the store? He even asked "what are their reasons for the complaints in their words?" He asked whether any Top Shop staff had complained about her, to which the answer was that they had not. He then asked whether lawyers had confirmed that they had agreed with the process of moving the Claimant to another site "and that legally you can dismiss her if she refuses move – please also confirm what grounds you plan to dismiss her on if she refuses to move". The answer to this from Mr Shaw was somewhat opaque, to the effect that an advisor called Louise had recognised the outcome if the Claimant refused to move.

26. One of these answers, in relation to whether Top Shop staff had complained, suggests to the Tribunal that Mr Shaw has not answered honestly to Mr Jeal, or alternatively has given inaccurate evidence to us. This is because Mr Shaw has maintained at various points in the proceedings that Top Shop staff had complained about the Claimant. These points aside, the correspondence in these two emails shows with clarity that there had been no formal request to move the Claimant from Arcadia or Top Shop. Further, Mr Jeal's email appears to show considerable reservation, or even nervousness, about a dismissal of the Claimant, hence his enquiry as to the reason for dismissal and whether or not the Respondent had received legal advice. It is evident to the Tribunal that Mr Shaw had been fishing for a written request from Arcadia to remove the Claimant and that Arcadia were not prepared to make that formal request.

27. In his witness statement in paragraph 20 Mr Shaw states that when he wrote to Mr Jeal he contemplated starting disciplinary action against the Claimant in the event that she would not move to the other store. He then says that this would be disciplinary action based upon taking part in activities that went well beyond legitimate trade union activities. We have had no answer to the question that has been posed of him: If this was a reason for dismissal, why should the Claimant remain in employment simply because she might agree to move store? Indeed, in oral evidence he told the Tribunal that the Claimant had every right to protest about pay. To many of the questions posed by Miss Reindorf, Mr Shaw had difficulty giving any convincing response. When speaking of page 89 he tried to minimise what he had written by saying they were merely personal thoughts. He was constrained to agree that his witness statement and the terms of the page 89 email did not match. As we have recorded immediately above, the evidence about the offer and her right to protest seemed to contradict the witness statement. Then again, he said that he would have dismissed the Claimant if he had been charged with that decision because of what she was putting on social media and she was even at this point running the company down. Then, he followed up by saying that he had stood back from the situation and that he was well aware of the legal situation. Nevertheless, in an answer almost immediately thereafter, he said that by 23 March he felt that she should be dismissed because of her participation in the activities such as the protest and also the posts on social media. These have been difficult answers to reconcile and our view of his evidence was that he was prone when questioned to give the answer that most immediately came to mind and that seemed to provide a rational answer. He was seemingly unconcerned that, sometimes only a few questions on, he would move to a contradictory answer to the same question.

28. Further, a surprising piece of evidence, which at this point we merely note, is his view that if the remarks made on social media or on the petition site (change.org) had been made in response to a journalist in an interview, the Claimant would never have been dismissed and no Tribunal would ever had taken place. His suggestion is that he was tolerant of such remarks being made in a journalistic setting but unable to ignore them if they were put on social media by the employee concerned. We find the distinction hard to grasp. An equally fine distinction was made by Mr Shaw when he told us that holding up a placard saying “Top Shop shame on you” was not an issue for him, but putting that on social media, presumably by posting a photo of the same, was a problem.

29. The next event to record is that on 28 March 2016 Mr Elia as General Secretary of UVW sent to the Respondent a detailed grievance of over 5 pages on behalf of Ms Eneida and the Claimant. It was copied to Top Shop and Arcadia. The matter numbered 1 was an allegation that both employees had been in the canteen on 10 March when their supervisor, Samuel, asked them what they were doing. The Claimant showed him Ms Luz’s trade union membership form that she was filling out and Samuel allegedly wagged his finger and said “be careful, this will bring you problems”.

30. Second, is a complaint about the hours that Ms Luz worked. Third, it was said that on 16 March, Samuel approached the Claimant in the canteen and shouted at her about a work related matter. This was said also to deter her from

being a member of a trade union and penalise her for taking part in the activities of that union. Fourth, the Claimant had been told she could not talk to or even look at anyone at work and her colleagues had been told not to talk to her because she is a trouble maker. These complaints are contained in the Claimant's witness statement. In addition, the grievance stated that colleagues of the Claimant had been pressurised into signing documents to the effect that they had no grievances; and there had been a false accusation made by the Shaws against the Claimant that she had been shouting. It was expressly alleged that a case was being concocted against her "with the intention of deterring her from being a member of a trade union and penalising her for taking part in the activities of an independent trade union ..."

31. The grievance then went on (it was the tenth matter of the complaint) to refer to the 22 March meeting and the comments that the Claimant was alleging, just six days later, were made at that meeting. These were that Top Shop was watching her and also that Top Shop wanted her to work in another store. It was expressly said that colleagues had been pressurised into making false accusations against the Claimant that she was a trouble maker. This was a reference to the Claimant being told at the 22 March meeting that others were complaining about her and that nobody was happy with her, that she did not represent the people in the store or within the company and that she should be careful and not spoil things for herself. The union was alleging on her behalf that she was being victimised.

32. The letter went on politely to decline the invitation to move to another store. Further, it was alleged that "... the only reason to request her relocation is to remove 'the face' of the living wage campaign from Top Shop's flagship store and to deter not only her, but her colleagues from being or seeking to become a member of an independent trade union ..."

33. Various outcomes were detailed and some of them may not have been particularly realistic, such as the request for a formal written apology to both the employees, or a suitable independent third party being hired to investigate the grievances. (Mr Shaw was not asked during the hearing whether he would have agreed at any time to send a memo to all employees reminding them of their rights to freedom of expression and association, which was another demand.) Among these various requests was the following. "Top Shop to immediately terminate its contract with Britannia. We feel that there is more than sufficient evidence to reasonably and lawfully do so. It would also send a strong and much needed message that the Arcadia Group respects and fiercely defends both human rights and trade union rights and will not tolerate contractors that violate these rights".

34. We find that the belief on the part of the Claimant and Mr Elia that the Respondent was enthusiastically gathering evidence against the Claimant has foundation in fact. On 30 March 2016 Mr Eshun (Samuel) put in a formal complaint against the Claimant: pages 107-108. One of the matters of complaint was that the Claimant had been coercing "any staff members she can to join her cause. Should you refuse you become an enemy to her." This was described as bullying. He said she was a very cunning person. An allegation was also made here that she was a racist. It might be thought that this was the first complaint

that Mr Shaw knew about, but page 91 is written evidence that on 24 March he was telling Mr Jeal that, even at that date, he had 11 written complaints against the Claimant with others also prepared to add further complaints. The Claimant's submission is that these had been orchestrated by the Respondent.

35. On 4 April, at page 115, Mr Shaw responded to Mr Elia and said that a grievance hearing had been tentatively booked for the 8th at a hotel near Oxford Circus. "We have a solicitor who will be chairing the meeting". He does not say who the decision-maker will be in terms of the grievance. A reader might think that the solicitor would be the decision-maker, but we know from what occurred in the subsequent disciplinary process that a solicitor chairing the disciplinary meeting in due course purported not to be making the decision. There is no mention in this letter of the purpose of the meeting or whether anyone from the management side will be present. However, it is questionable whether Mr Shaw could ever have genuinely believed this meeting would take place on 8 April. By this point it is likely that he knew that counter-grievances were being compiled against the Claimant.

36. On 5 April the Claimant put a further statement on her petition web site at change.org alleging that she was being bullied and victimised by the Respondent and treated like a criminal. She also said that "it looks like Top Shop are trying to get rid of me too. Britannia have told me that Top Shop don't want me to work in their flagship store anymore ... and I should be careful". She said that she thought that the Respondent would try and concoct a malicious case to suspend or dismiss her. She invited expressions of support on line and she asked people to write to the two companies and ask them to leave her alone, let her work in peace and to pay her a living wage.

37. The same day, 5 April, she was suspended and the letter at pages 119-120 started by informing her that allegations had been brought to the employer's attention regarding her conduct in the work place. No details were given at that point. The next day the Claimant updated her petition site by informing readers that she and Ms Caceres had both been suspended. She alleged here that Top Shop knew what was happening and could easily intervene to stop it; and that both entities were encouraging trade union victimisation.

38. On 14 April Mrs Shaw wrote to the Claimant and summoned her to a disciplinary hearing on the 19th. The letter is headed in bold, underlined capitals "Legally privileged – Not for Disclosure or Wider Dissemination." There has been no explanation for this, but it is clear from all the circumstances that the Respondent was seeking to prevent the Claimant telling anybody about the contents of the letter. The letter alleged gross misconduct on her part in that: "1 You have taken part in activities which result in adverse publicity to ourselves and loss of reputation and/or which cause us to lose faith in your integrity; 2 You have abused the personal harassment policy; 3 You have engaged in rudeness, objectionable and/or insulting behaviour, racial harassment and bullying of other employees." The basis of the allegations was said, inter alia, to be complaints made by employees that the Claimant had bullied them to join the union; and the Claimant making comments on social media which contravened the social media policy and had brought the Respondent into disrepute.

39. A petition from some of the other employees was enclosed. The Claimant was also told that, on advice, the Respondent was not sending her the witness statements because of a fear of reprisals from the Claimant. She would be able to read them at the hearing.

40. The letter stated that the hearing would be conducted by an independent solicitor and also that Mr Grinham would be present. There is nothing to suggest that the solicitor would not be the decision-maker and that is the only natural understanding that could emerge from the text.

41. The Claimant was signed off sick on the 18th and on the same day Mr Shaw in an email to Mr Elia referred to the latter's "libellous campaign of harassment played out on social media and we are taking advice on the same." He described it as "vitriolic and malicious activity" carried out on the authority and instruction of "our employees".

42. There was a noisy and relatively well attended demonstration outside the Oxford Street store on 14 May and the Claimant attended. The demonstration moved on to other stores in Oxford Street.

43. The disciplinary hearing eventually took place on 4 October. The invitation letter for this hearing again said that a solicitor (Mr Roberts) would chair it and that Ms Youngblood, Northern Area Regional Manager, would take notes and then decide the outcome. By this point the charges had been reformulated, at an earlier date in July. The letter from Mrs Shaw of 12 September shows that the social media campaign was a particular concern. The material which is said to constitute gross misconduct on the Claimant's part includes the emails and so forth in the bundle between pages 124 and 175. Many of these are emails from members of the public to either the Respondent or Topshop supporting the union's campaign.

44. Ms Youngblood's witness statement says nothing about the hearing and relies on a detailed letter that dismissed the Claimant. She confirmed to us that Mr Roberts had complete control over the conduct of the hearing and she did not ask any questions. She had, however, dealt with the earlier appeal of Ms Caceres, which she dismissed. (Ms Caceres had been dismissed for alleged gross misconduct which also included allegations that she had racially abused and harassed other employees.) Ms Youngblood has no HR background and she accepted in evidence that Mr Roberts wrote the dismissal letter after she met with him. She accepts that some of the words in the letter are not those she would use. She also said that she wishes now that she had written her own letter. She agreed that she had also spoken to Mr Shaw after the hearing but before the letter was written. Some of what he told her appears in the letter. For example, on page 233 the concern recorded between Mr Shaw and Arcadia on 21 April was never referred to at the hearing. Other points in the letter were seemingly inserted by Mr Roberts alone, e.g. the penultimate paragraph on page 233. Ms Youngblood said that she did not ask for this to be put into the letter.

45. A point was made in the letter that Mr Elia had been obstructing the hearing of the Claimant's grievance (page 234) but Ms Youngblood was unable to say where this came from. As the questioning of Ms Youngblood proceeded, it

became clear to the tribunal that other paragraphs in the letter must have derived from information provided by Mr Shaw. It became ever more difficult for the tribunal to determine which paragraphs had emanated from Ms Youngblood, if any, and which from Mr Roberts.

46. When asked about dismissal procedures, Ms Youngblood defined gross misconduct as conduct for which an employee gets dismissed. She contrasted it with misconduct, which cannot lead to dismissal. When questioned specifically as to whether attending and promoting the two demonstrations was a reason for dismissal, she gave contradictory answers. She said that participation was not misconduct but the disruption caused to the client apparently was. "She was dismissed because it or part of it was very disruptive and caused the customer to close the shop." Part of the reason, she said, was that the Claimant had asked people on Facebook to attend and to help her. Using a megaphone was also part of the reason for dismissal, she told us. Some of these points were never made as allegations against the Claimant at the time and are also similar to criticisms of the Claimant that Mr Shaw has voiced.

47. Ms Youngblood was pressed about the addition to the charges at page 229 and she said that she had not seen this. She had also to accept that some of the criticisms of the Claimant for which she was dismissed were never raised with her as charges or communicated to her before dismissal. She also accepted that some of the paragraphs in the letter came from Mr Roberts and that, left to her own devices, she could not have written them because some of the contents conflicted with what she knew.

48. Ms Youngblood candidly told us that when she met with Mr Roberts she had no notes or anything written down. "It was just general impressions." She said that she did not consider any alternatives to dismissal and she was unable, when asked, to think of any alternative options. It was clear to the tribunal that a warning or a final warning or disciplinary transfer were matters that had never crossed her mind.

49. Overall, we find that Ms Youngblood was ill-equipped to be the decision-maker. We have some sympathy for the predicament created for her. We find that she was placed in the role, even though she lacked the experience to deal with a relatively complex matter, because Mr Roberts would, in effect, ensure that the correct decision from the Respondent's point of view emerged. It is not credible or possible that the managers were unaware of Mr Shaw's trenchant views. Ms Youngblood had been involved in the case of Ms Caceres. The attempt by the Respondent to portray the disciplinary process against this Claimant as being one for which Ms Youngblood is mainly responsible, in our view, is a sham. Mr Roberts's witness statement to which we have briefly referred (a) says nothing about his role in writing the dismissal letter and (b) suggests in terms that the decision was Ms Youngblood's and that the letter is hers: see paragraph 9. This is not the reality, although there is also nothing to suggest Ms Youngblood disagreed with the dismissal. On the contrary, she believed it to be the correct course to take once the Claimant had been shown to have committed gross misconduct, because there was no alternative.

50. In the decision letter, which we consider reflects Mr Roberts's reasoning and not Ms Youngblood's, the first eight items of alleged gross misconduct were dismissed on the basis that they were not gross misconduct. The Claimant's dismissal was based on number 9 alone. This is the promotion and attendance at demonstrations, holding the placard and making derogatory statements about Topshop on change.org. Mr Elia on behalf of the Claimant appealed and this letter is at pages 236 to 249. The appeal grounds dealt with this ninth allegation gross misconduct in detail.

51. Mrs Shaw was to hear the appeal and the Claimant, perhaps understandably, objected to this. There never was an appeal meeting. Nevertheless, Mrs Shaw dismissed the appeal on 7 November 2016 - pages 250 to 253. One of the many points she made was that use of a megaphone outside the store was not a breach of contract; but saying through the megaphone that the Respondent was not paying the London Living Wage was a breach of contract.

The Law

52. Section 152 (1) of the 1992 Act reads (so far as material):

> "For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee —
> (a) …
> (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time
> (ba)-(c) … ."
>
> Section 146(1) of the Act provides that "a worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of - (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so, (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, (ba) preventing or deterring him from making use of trade union services at an appropriate time or penalising him for doing so …"

Submissions

53. We are grateful for the extensive submissions of counsel, oral and written.

Conclusions

Automatic unfair dismissal

54. It is convenient to start with this claim. Both counsel cite Morris v Metrolink [2018] IRLR 853, CA, the most recent authority.

55. In our view, when the statute is applied to the facts of this case, it is clear beyond any argument that the Claimant was dismissed for the reason that she had taken part in the activities of the independent trade union.

56. The Respondent's defence seeks to characterise its dismissal of the Claimant for gross misconduct, either because she had breached the social media policy; or had committed other serious breaches of contract. The attempt has, therefore, been made to remove the reason for dismissal from that set out in section 152. The ET3 in paragraph 30 says that it is denied that the Claimant was dismissed due to her trade union membership or any *legitimate* trade union acts." (Emphasis in original.) Paragraph 31 states that the dismissal was "on grounds of gross misconduct, namely the Claimant's activities on social media." It then cites the social media policy.

57. This may have been either (a) what the Respondent believed it was doing at the time or (b) what it said at the time it was doing. However, on any proper analysis, we conclude that its arguments all fail.

58. Our first point is that it is a thankless and probably impossible task to establish precisely what was in the mind of the employer when it dismissed. The reason for this is that the Respondent's evidence has been contradictory and unsatisfactory. Indeed, the person who best answers the question, Mr Roberts, was never intended to be called. The Respondent's case was presented on the basis that Ms Youngblood took the decision and wrote the dismissal letter. Both propositions we have found to be false.

59. The social media policy provides, of the use of social networking sites, as follows. "Any work related issue or material that could identify an individual who is a customer/client or work colleague, which could adversely affect the company a customer/client or our relationship with any customer/client must not be placed on a social networking site. This means that work related matters must not be placed on any such site at any time either during or outside of working hours and includes access by any computer equipment, mobile phone or PDA."

60. This policy means that, arguably, no employee can place any material on a social media platform or site that criticises the Respondent or Topshop, or even identifies Topshop. The Respondent further relies on the posts on social media that invite people to email the Respondent and Topshop and which request Topshop to terminate its contract with the Respondent. The change.org update of 5 April 2016, page 116, said: that the Respondent was bullying her and victimising the Claimant; and Topshop seemed to want to get rid of her. They were, the Claimant said, trying to concoct a malicious case to suspend or dismiss her. She therefore asked that people write to both companies or leave posts on Topshop's Facebook page. They could email Topshop. She ended by saying that updates could be accessed on the Union's Facebook page.

61. The Respondent's argument is that its social media policy means that the Claimant was in fundamental breach of contract and therefore committing gross misconduct. This is set out, in essence, in paragraph 45(e) of Mr Godfrey's closing submission.

62. At paragraph 121 Mr Godfrey contends that the Claimant encouraged her supporters to boycott Topshop stores. This can only be a reference to page 216, an update on the petition site: "Please remember to Tweet using the hashtag#topshopstyle and #boycotttopshop."

63. On this significant aspect of the case we are satisfied that the Claimant was taking part in the activities of a trade union: see also below. The argument, if it is being advanced, that the social media policy alone can remove section 152 protection for employees is one we have no hesitation in rejecting. We accept Ms Reindorf's counter-submission (paragraph 19) that there is nothing unusual or unreasonable about a union seeking to place pressure on an end-user, which is not the formal employer, in order to secure improvements in terms or conditions. She goes on to submit that such activity is not wholly unreasonable or extraneous or malicious, within the terms of the case law, and, if it were so categorised, unions would be seriously limited in their activities. It would create, she submits, a lacuna in the scheme of statutory protection and allow victimisation by contractors. We agree. Even if the Claimant was in breach of the social media policy, that does not remove her conduct from the scope of section 152, for which she has statutory protection.

64. We therefore turn to the issue of whether her conduct was otherwise outwith the section on the remaining grounds relied upon by Mr Godfrey. He expressly submits that the Claimant could not protest outside Topshop without losing the benefit of section 152. He says that she was in breach of contract and breach of fiduciary duties that were owed to the Respondent. Further, attending outside the premises at a demonstration is action short of a strike for which there must be a ballot. The Claimant, in inciting a demonstration that eventually did attract 200 people, and which led to a shop closing for 15 minutes, was acting beyond the scope of trade union activity within the statute. Additionally, the union's request to Topshop on 28 March to breach its contract with the Respondent was a tortious act.

65. In Morris v Metrolink Underhill LJ summarised the case law and stated the following:-

> 18. In *Azam v Ofqual* [2015] UKEAT 0407/14/1903 the claimant employee, who was a trade union representative, was dismissed for disclosing to her members confidential information with which she had been supplied by the employers in the course of negotiations on an expressly confidential basis. The EAT upheld the decision of the employment tribunal that the dismissal was not for taking part in trade union activities. HH Judge Eady QC directed herself by reference to *Bass Taverns* and *Mihaj*.
>
> 19. In my view the principle underlying these cases is – as so often – most clearly stated by Phillips J. If Slade J in *Mihaj* intended to suggest that there was some difference between his approach in *Lyon* and that taken by this Court in *Bass Taverns* I would respectfully disagree. At the risk of simply repeating less succinctly what Phillips J says in the passages which I have quoted, there will be cases where it is right to treat a dismissal for things done or said by an employee in the course of trade union activities as falling outside the terms of section 152 (1), because the things in question can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred; and his reference to acts which are "wholly unreasonable, extraneous or malicious " seems to me to capture the flavour of the distinction. That precise phraseology should not be treated as definitive (any more than Slade J's formulation

> in *Mihaj*); but the point which it encapsulates is that in such a case it can fairly be said that it is not the trade union activities themselves which are the (principal) reason for the dismissal but some feature of them which is genuinely separable. *Azam* is a good illustration of such a case: the employee's deliberate breach of confidence could fairly and sensibly be treated as a reason for dismissal distinct from the fact that it occurred in the context of trade union activities.
>
> 20. However, as Phillips J points out, this distinction should not be allowed to undermine the important protection which the statute is intended to confer. An employee should not lose that protection simply because something which he or she does in the course of trade union activities could be said to be ill-judged or unreasonable (NB that Phillips J, I am sure deliberately, says "*wholly* unreasonable"). *Bass Taverns* is a good illustration of this: the employee was held to fall within the scope of the section even though he had gone "over the top".

66. We note that in paragraphs 64 to 67 Underhill LJ refers to the 'Lyons/Bass issue' and the 'Lyons/Bass threshold.' He also considers the culpability of the employee concerned in these paragraphs and it is clear that this is to determine whether the employee's conduct was such as "to take his conduct outside the scope of 'trade union activities' for the purpose of section 152."

67. The Respondent's argument, in effect, is that there was wholesale unlawfulness on the part of the Claimant and the union and the consequence is that the activities for which she was dismissed fall outside any possible statutory protection. It is a dramatic submission because, if correct, it would mean that the Claimant taking part in the activities of the trade union (as she undoubtedly was) nevertheless loses the constitutional right to protection. On these arguments, she would also render herself liable to a civil claim for damages in a number of respects. It might mean that no attendance at a demonstration would be possible. No invitation to others to attend (assuming the Claimant stayed away) would be possible, as this would be likely to be viewed as 'incitement'. No placard could be held that identified the Respondent or its client. No megaphone could be used. No request could be made to the end-user to cancel its contract with the employer because of low wages. Further, if a consequence of a demonstration was the closure of a store, that would remove the statutory protection. The attendance outside the store is said to amount to secondary picketing.

68. We do not accept any of these arguments and they would amount to an unjustified restraint on an employee's right to undertake lawful protest. Faced with such a battery of potential arguments, an employee wishing to take part in the union's low pay campaign would necessarily have either to decline to do so, or run the high risk of losing the protection of the Act. Mr Godfrey's submission reflects this. In paragraph 17 of the closing submission he states: "Frankly, if Parliament in enacting the TULRCA wish to release an employed unionist from the obligations of their employment contract to exercise freedom to incite a mass protest then those surprising protections would be express; they aren't." He submits that the provisions on picketing are engaged, which rules out more than 4 to 6 people attending. A union's 'typical activities' cannot include "large scale public direct-action protests."

69. In our view, they can. While the Claimant's union activism in support of higher pay may be uncomfortable for her employer, there is no warrant for the

limitations that Mr Godfrey seeks to advance. What has occurred, in this case, is that she was dismissed for activities, all of which amount to taking part in the activities of the union. The Respondent has sought by its various arguments to remove those activities from the proper scope and ambit of section 152. That alone would defeat the claim, and it would also greatly assist it in the concomitant argument that the reason for dismissal was gross misconduct. We have rejected all of these arguments.

'Ordinary' unfair dismissal

70. It is only if we were wrong about this that 'ordinary' unfair dismissal under section 98(4) comes into play. It would be our conclusion that the Claimant was dismissed for a reason relating to conduct. Ms Reindorf's submission that the Respondent has failed to discharge the burden of establishing the statutory reason is not accepted. It is true that the detailed reasons have changed over time, but the reason related to conduct and that has been established. As to fairness, Mr Godfrey, in effect, concedes procedural unfairness, but the tribunal would go further. The procedural unfairness is manifest. Ms Reindorf describes the procedural defects as fundamental and irreparable and we agree. She is correct also to observe that, whereas a reasonable employer would have considered alternatives to dismissal, Ms Youngblood appeared not to appreciate that there could be such alternatives. No reasonable employer would have been acting reasonably in dismissing the Claimant in the circumstances, but it is not merely a procedural criticism to be made of the Respondent. The entire process, we conclude, was designed to ensure that the Claimant was dismissed as a result of the various union activities she had been engaged in. The dismissal was substantively unfair, to use that somewhat dated description.

The detriment claims

71. Each interaction between the Claimant and the Respondent, which the former has experienced as a detriment, has been made the subject of an individual claim. Approximately 24 of these individual acts are said to be detriments for which compensation is sought under s 146(1). Some of these are made out and others are not. We accept the summary of the law given by Ms Reindorf in her written submissions. We adopt the paragraph numbering contained in the list of issues; and that list should be read alongside these summary conclusions.

72. 6.1 and 6.2. There is no prima facie case here, on the evidence. The "personal information" claim remains unclear. The estimate of the number of union members that was given by Mr Shaw on 11 March could have been one that he genuinely held.

73. 6.3. This claim is that Mr Shaw, in telling the Claimant on 22 March 2016 that she was in breach of contract and in breach of company rules, was acting to her detriment for the prohibited reasons. Given that this was, quite possibly, his belief at the time, we conclude that the evidence concerning his main purpose is not clear. We consider therefore that the claim fails because the evidence is inconclusive.

74. 6.4. The words that he spoke that warned the Claimant to be careful and not to spoil things for herself are not actionable detriments for the same reasons. Saying that Topshop was watching her, however, is in our view a claim of detriment that is made out. It was an untrue statement (or at least an exaggerated one) and we conclude that it was designed to deter the Claimant from continuing her campaign for better pay.

75. 6.5. Encouraging the Claimant to move to another store is explicable solely on the ground that moving away from Oxford Street would hinder her union activities. The purpose alleged by the Claimant is established in evidence and this claim succeeds.

76. 6.6. This is too tenuous a claim to succeed. Putting a factual allegation to the Claimant, in the context in which it arose, is not sufficient.

77. 6.7. In our view this received insufficient evidence upon which a claim could be based.

78. 6.8. Based on paragraph 54 of the Claimant's witness statement, this claim is made out. We accept the evidence in paragraphs 54 and 56 of the Claimant's statement.

79. 6.9. The Respondent correctly says that the claim here lacks particularity and we agree that the evidence has been far too unclear for it to succeed. Merely being shouted at is not the basis for a claim.

80. 6.10. This is a more substantial claim of detriment based on the Respondent-inspired (or instructed) campaign of ostracising the Claimant at work. The Claimant asks us to draw inferences to this effect: see paragraph 41 et seq of Ms Reindorf's submission. We first refer to issue 6.8 above. Next, Ms Reindorf contends that after 23 March the Respondent "went about systematically trawling for a basis upon which to concoct a disciplinary case against the Claimant which would enable it to dismiss her for 'all the right reasons', as foreshadowed in David Shaw's email to Brian Jeal in which that phrases is used." We are prepared to infer from all of the evidence that this is what happened. We also refer to our findings at paragraph 11 above. The evidence for the written complaint against the Claimant is, indeed, unsubstantiated and suspicious, not least in relation to Mr Torres's volte face. The Claimant was, we conclude, ostracised by colleagues and the evidence strongly suggests that this was at the encouragement or even instruction of the Respondent. It could only have been to deter her pursuing her trade union activities.

81. We would add that the submissions made by the Claimant, as to the evidence, at paragraphs 41.3 to 41.5 of the submission are, in our view, compelling and accurate. A flimsy case against the Claimant has emerged, so far as it involved allegations that colleagues supposedly made against her. On the other hand, the Claimant's grievance of 28 March 2016 was apparently investigated by the Respondent without any documentary evidence of that investigation.

82. The claims in 6.11 and 6.15 accordingly succeed. This latter is a more substantial complaint than some of the others as it links directly to the Claimant's dismissal.

83. 6.12 is too remote in terms of s146 (a point Mr Godfrey alludes to.) Paragraph 6.13 is not a detriment, in our view. Paragraph 6.14 is part of the fairly acrimonious dispute between the parties but too far removed from the section as to constitute an allowable claim.

83. As to the sub-detriments (6.15.1 to 6.15.7) these are unnecessary and add nothing to the principal allegation in 6.15. The sub-paragraphs merely overload the list of issues. We decline to make separate findings of further individual acts of detriment, indeed a number of them are allegations of unreasonableness that could be viewed as part of the overall allegation in 6.15.

84. The dismissal (6.16) has its own cause of action. The failure to "hire a mutually agreed independent third party to hear and investigate" the grievances is again too remote from the Claimant's trade union activities and that claim does not succeed.

85. The outcome is that six detriment claims succeed: 6.4 (in part), 6.5, 6.8, 6.10, 6.11 and 6.15.

86. The tribunal agreed 15 February 2019 as a remedy hearing. It is appreciated that the promulgation of this decision is somewhat later than had been intended. If, on receipt, the parties or either of them seeks a telephone hearing for directions, EJ Pearl will be happy to oblige at short notice.

_____
Employment Judge Pearl

Dated: 8 January 2019

Judgment and Reasons sent to the parties on:

8 January 2019

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For the Tribunal Office