



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Radzinski-Kalisz  
**Respondent:** Central Window Systems Limited

**Heard at:** Midlands West Employment Tribunal  
In person

**On:** 21<sup>st</sup>, 22<sup>nd</sup> 23<sup>rd</sup> October (in Tribunal)  
24<sup>th</sup> October (Deliberations with Members)  
25<sup>th</sup> October 2024 (Judgment in Tribunal)

**Before:** **Employment Judge Gidney**  
**Mr Nicholas Howard**  
**Ms Janet Jerram (Remote by CVP)**

## Appearances

**For the Claimant:** Mr Christopher Allen (Litigant Friend & Partner)  
**For the Respondent:** Mr Colin Baran (Counsel)

## JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim of automatic unfair dismissal for making a public interest disclosure, pursuant to s103A Employment Rights Act 1996 ('ERA') is upheld.

2. The Claimant's claim of harassment related to her sex and/or of a sexual nature pursuant to s26 Equality Act 2010 ('EqA') is dismissed.

## REASONS

### [1] Introduction

1. The Claimant commenced employed with Central Windows System Ltd, the Respondent, in the role of Quality Health & Safety (QHS) Manager on 21<sup>st</sup> June 2021 [104]. The Claimant was line managed by Matthew Kelly, the Respondent's Operations Director. Mr Kelly reported to the Respondent's Chief Executive Officer, Gary Morton. Mr Kelly was ultimately responsible for Quality and Health & Safety [MK5].
2. At a meeting held on 5<sup>th</sup> September 2022 between the Claimant and Mr Kelly, witnessed by Martyn Elwell, Sales & Marketing Director, Mr Kelly dismissed the Claimant, on notice, to take effect on 30<sup>th</sup> September 2022 [217]<sup>1</sup>. The letter of dismissal identified two reasons for dismissing the Claimant, namely that (i) she had not progressed as expected and (ii) as the role was taking a change in direction it is just not working' [218].
3. At the date of her dismissal on 30<sup>th</sup> September 2022 the Claimant was 42 years old, having been born on 9<sup>th</sup> November 1981. The Claimant had 15 months service. She did not acquire the statutory right not to be unfairly dismissed, pursuant to s98(4) ERA, for which two years' service is a statutory minimum requirement.

---

<sup>1</sup> All page numbers referred to in this Judgment are references to the pages in the hearing bundle.

4. Nearly 4 weeks later, on 25<sup>th</sup> October 2022, the Claimant notified ACAS of a dispute with the Respondent. She received her Early Conciliation Certificate from ACAS on 6<sup>th</sup> December 2022 **[1]**.
5. By a Claim Form dated 22<sup>nd</sup> December 2022 **[2]** the Claimant presented two claims against the Respondent. At trial before us the live Claims were:
  - 5.1. Automatic Unfair Dismissal for making a public interest disclosure (s103A **ERA**);
  - 5.2. Harassment related to sex or conduct of a sexual nature (s26 **EqA**).
6. The 1<sup>st</sup> Respondent's ET3 **[16]** and Grounds of Resistance **[24]** denied all of the Claimant's claims. On 29<sup>th</sup> May 2023 the Claimant responded to that document with additional particulars of her disclosures **[28]**. The matter was case managed by Employment Judge Power on 5<sup>th</sup> June 2023 **[36]** and Employment Judge Clarke on 31<sup>st</sup> October 2023. Judge Clarke set out a List of Issues that we were tasked to resolve **[184]**. The complete **List of Issues** (re-ordered by the Tribunal to reflect the fact the Time issues are only relevant for the Claimant's Harassment Claim, not her Public Interest Disclosure claim) are attached at **Annex 1** to this Judgment, to which the parties are referred.

## **[2] The Evidence**

7. We were provided with the following documents:
  - 7.1. an agreed trial bundle (258 pages);
  - 7.2. A Quality & H&S To-Do List and photographs of the collapsed mezzanine floor (7 pages);
  - 7.3. A single page from the meeting transcript of 16<sup>th</sup> August 2022 with proposed amends from the Claimant (1 page);

- 7.4. email chain from the Claimant raising concerns about the Respondent's conduct of the litigation (16 pages over 2 PDFs);
  - 7.5. The Respondent's written closing submissions (18 pages); and,
  - 7.6. The complete Court file, which was not before the parties, but did contain the Case Management Order of Judge Clarke.
8. We were provided with the following witness statements:
- 8.1. The Claimant's witness statement (34 pages);
  - 8.2. Matthew Kelly's original witness statement (10 pages);
  - 8.3. Matthew Kelly's new witness statement (10 pages);
  - 8.4. Kristie Hughes' witness statement (3 pages);
  - 8.5. Paul Manison's witness statement (2 pages).
9. For reasons of personal tragedy Paul Manison did not attend Tribunal to give his statement, however he did provide a signed version of his witness statement which contained a statement of truth. We offer our condolences to Mr Manison and wish him and his family our best wishes. Every other witness gave evidence under Oath and were subject to cross examination.

### **[3] Witness Credibility**

10. We think it best to set our conclusions on the credibility of the witnesses, which we do as follows:
11. **Paul Manison:** Mr Manison was the Respondent's Operations Director from 23<sup>rd</sup> March 2017 until he stood down for personal reasons in February 2021. He was replaced in that role by Matthew Kelly. We were told that Mr Manison was a very intelligent man and very good at his job. Understandably the Respondent wished to retain his services and it was able to persuade him to stay on in a Consultancy role until October 2023. Mr Manison candidly admits

to not being able to recall the meeting that the Claimant says she had with him on 11<sup>th</sup> August 2022, although he did accept that the Claimant would often come to him with, what he described as ‘moans and groans’ about Mr Kelly ignoring her suggestions and avoiding actioning her suggested improvements. Whilst we consider the expression ‘moans and groans’ as a pejorative description of the Claimant’s concerns, some of which the Respondent now accepts qualified as protected disclosures, as defined in s43B(1)(d) **ERA**, we think that the description he used of ‘*Mr Kelly ignoring her suggestions and avoiding actioning her suggested improvements*’ to be an accurate summary of the complaints that the Claimant says she raised on 11<sup>th</sup> August 2022, which she summed up as Mr Kelly ‘*tying my hands*’.

12. In the circumstances we conclude there is nothing in Mr Manison’s statement which would incline us to disbelieve the Claimant’s account of the meeting on 11<sup>th</sup> August 2022. His evidence could not be tested in Tribunal so we would have looked for other evidence to support his account, in order for that account to gainsay the Claimant’s evidence. Mr Manison told us that he could not recall speaking to Mr Kelly about the Claimant’s concerns **[PM10]**. We take that to mean that he could not recall the conversation, not that it did not happen. We were not persuaded and attached no weight to what he said he ‘*would have done*’ in any particular set of circumstances. Such evidence is self-serving, could not be tested, and was not a recollection of anything that he actually said or did.
13. **Kirstie Hughes:** Ms Hughes is the Respondent’s Finance Director. She is the second most senior officer at the Respondent, after its CEO, Gary Morton. At the time that the Claimant spoke to her on 16<sup>th</sup> and 17<sup>th</sup> August 2022 she was about to go on holiday and was extremely busy completing finance functions for the Respondent prior to going on her annual vacation. She regretted accepting the Claimant’s request to talk about what she also categorised as the Claimant’s ‘*moans and groans*’. Such a description, used twice by two senior witnesses, is, we think, indicative of the status that Respondent attached to health and safety issues, as once again, the Respondent now

accepts that some of the matters the Claimant raised with her did qualify for the protection offered by s43(1)(d) ERA.

14. Ms Hughes did assure the Claimant that she, Paul Manison and Martin Elwell would discuss the Claimant's concerns and that Paul would raise them with Matthew Kelly. She told the Claimant not to raise her concerns with the CEO, Mr Morton, unless the Claimant wanted to formalise her complaints by way of written grievance. She told the Claimant that Paul would raise the Claimant's concerns as if it was coming from him, to protect the Claimant. She did this because she could not be sure that Mr Kelly would remain 'professional' when he found out. This comment, made during Ms Hughes' conversation with the Claimant on 17<sup>th</sup> August [206], apparently expressing her opinion that Mr Kelly would not be unprofessional, we conclude was in fact a tacit acceptance by her that there was a clear acknowledged risk that Mr Kelly may well retaliate against the Claimant if he found out that she had gone above his head with her health and safety concerns. This, we think, is a telling thing to say. Ms Hughes said she could not recall telling Mr Kelly herself and she pointed out that very shortly after the meeting she went on vacation and did not return until after the Claimant's dismissal. We find that she did delegate the task of addressing the Claimant's concerns about having her hands tied by Mr Kelly to Mr Manison. We consider Ms Hughes to have been an honest witness and we were inclined to believe her testimony.
  
15. **Joanne Sredzka-Kalish.** We consider that the Claimant's personality was such that she was proud of her job and took it seriously. Following the rules on health and safety was a matter of considerable importance to her. She would not take fools lightly and had the strength of personality to stand up for what she thought was right and to do what was necessary to protect it. In discussion with Ms Hughes on 16<sup>th</sup> August 2022 in the context of discussing how she raised concerns said [183] *'Well, I tried to be very diplomatic, but I can't be. I'm Polish. We can't be diplomatic. It's black or white. Yeah and I tried to, you know, cover Matt's ass, but in the end I said for fucks sake I can't do my job properly'*. Whilst we do not pander to the Claimant's self-

deprecating racial stereotype, we understand what she is trying to say. She does what she thinks is right and she won't back down.

16. On balance we believe the Claimant's account of what happened to her. This is despite, in answer to a question from me, the Claimant accepted that covertly recording meetings with the Respondent's managers, in which she led the conversation into areas which she anticipated will be relevant in a future Tribunal claim, is inherently a dishonest thing to do. The witnesses believe that they are speaking off the record, when they, most definitely, are not. We consider the Claimant did that in the (as things turned out, justifiable) belief that the Respondent could not be trusted to provide an accurate record, or indeed any record, of events. Many of the Claimant's concerns that she asserts were raised with Mr Manison were supported by contemporaneous documents created at the time (for example the Comms meeting of 11<sup>th</sup> May [139] and the draft letter of concern for Emily Hale [162]) and Paul Manison does not deny the meeting of 11<sup>th</sup> August and he concedes that the Claimant did raise concerns of that type with him. For those reasons we accept the evidence of the concerns that she raised with Paul Manison, notwithstanding her methods, which she was advised to do in order protect evidence.
17. **Matthew Kelly.** Mr Kelly is not a witness whose evidence we can rely on. We consider him to be an Operations Director who will take all possible steps to avoid paperwork of any kind and, as the Respondent itself appears to acknowledge, will seek to avoid doing any work if he can. He appears to operate on an '*if can be done tomorrow, do it tomorrow*' basis. His failure to engage with important areas of the business, for which he was ultimately responsible, was the key driver in the Claimant being forced to take her concerns above his head.
18. Mr Kelly attended Tribunal fully intending to give false evidence, to lie to us. In his original witness statement, signed by him on 16<sup>th</sup> September 2024, under a statement of truth (which he acknowledged to me that he understood) he said in paragraph 53, '*Joanna has written .... that due to my boss and the*

*HR Manager's affair ... I am absolutely stunned that she would say that about me. She has no basis to say that whatsoever. Other than a professional relationship working relationship I've never had any sort of relationship with our HM Manager and I've done anything that could possibly make anyone think anything else'. This is about as categorical denial of a workplace relationship that it is possible to give. Even worse, it directly invites us to conclude that the Claimant's assertion in her schedule of loss that he was having an affair is a lie.*

19. The transcripts of the Claimant's meeting with Ms Hughes reveal that Mr Kelly's affair with Liz Culpan was known of in the business. This led Mr Kelly to file a new witness statement, with a new statement of truth. It contained new paragraph 39 which disclosed for the first time a meeting that he had with Emily Hale on 22<sup>nd</sup> August said to be about the Claimant and a new paragraph 42 which disclosed for the first time a meeting he asserts he had with Navigation HR on 30<sup>th</sup> August 2022, again, he asserts, to discuss the Claimant's termination of the Claimant's employment. The new statement heavily amended paragraph the old paragraph 53, now renumbered to paragraph 55. The new version dealt with the allegation that he had had an affair in a different way. He said, *'I always retained a professional working relationship with our HR manager, but I do accept that we had what I would refer to as a short fling at the end of January 2022. This lasted for no more than one week and was strictly outside the working environment. I was also separated from my wife at the time'*.
20. Given the signed statement of truth in Mr Kelly's first witness statement, it is impossible to reach any other conclusion that not only had he been prepared to lie within the workplace, but whilst he thought he could get away with it, he was prepared to lie in sworn testimony to this Court, under Oath.
21. The difficulties with Mr Kelly's honesty to not end there. We noted the following:



- 21.1. In paragraph 20 of his statement, in a discussion about the production of a Quality Do's & Don'ts statement for major new window profile, he told us *'Joanna had been involved in the meeting and was aware of the profile change over five months prior to it happening. I would have expected her to have made some progress by this stage.'* However, in evidence he accepted that the Do's & Don'ts document had not been completed until October 2022, sometime after the Claimant's dismissal.
- 21.2. In paragraph 41 of this new statement (said to be the truthful one) he told us *'The last week of August 2022 finally destroyed what little hope I had left that Joanna was going to work out .... I decided I was going to dismiss Joanna'*. In his oral evidence he told us that he did not decide to dismiss the Claimant until September, after her return from holiday. He accepted that paragraph 41 was therefore incorrect;
- 21.3. In paragraph 43 of the new statement (said to be the truthful one) he told us that not only had he told the Claimant that there would be a change of direction but that he told her what the change was. He asserted that he explained that he would take over the Claimant's role and a H&S Administrator would be taken on to help him. However, when faced with the transcripts of the dismissal meeting [213] he was obliged to accept that he simply referred to the change, he did not explain what it was.
- 21.4. In paragraph 53 of the new statement (said to be the truthful one) he categorically denied saying *'you look nice, no wonder I employed you'*. During his evidence he accepted saying to the Claimant that she looked nice but denied saying *'no wonder I employed you'*. This is in the context of explaining how he treats women in the workplace *'I absolutely have never said anything like that to Joanna or any of my female colleagues or no. It would be highly inappropriate and I simply have never done it'*. His acceptance under oath that he did tell the

Claimant that she looked nice undermines that assertion in his statement. We now know he did engage in a workplace relationship which also undermines the truthfulness of his assertion *'I simply would not do it'*.

22. In the circumstances we concluded that we could not trust Mr Kelly to be truthful with us. We approached every matter where he had given evidence with caution, and where any evidence, from any source, contradicted Mr Kelly's account, we preferred that other evidence.

#### **[4] Findings of Fact**

23. We have not recited every fact in this case or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts. Findings of fact related to a specific issue that we have been tasked to resolve are set out in our Conclusions section below.
24. As we have already stated in our introduction, the Claimant commenced employment with Central Windows System Ltd, the Respondent, in the role of Quality Health & Safety (QHS) Manager on 21<sup>st</sup> June 2021 [103]. Her contract was dated 19<sup>th</sup> May 2021 [103]. At clause 5.1 it contained a 6-month probationary period. The contract referred to the Respondent's Employee Handbook [68]. It contained the following sections:

- 24.1. Whistleblowing. *'Whistle blowing is the term used when an employee passes on information concerning wrongdoing. The wrongdoing will typically, although not necessarily be something they have witnessed at work. To be covered by whistleblowing law, an employee who makes a disclosure must reasonably believe two things. The first is that they are acting in the public interest, this means in particular that personal grievance and complaints are not usually covered by whistleblowing law. The second thing is that an employee must reasonably believe that the disclosure tends to show past, present or likely future wrongdoing, falling into any into one or more of the following categories criminal offences, failure to comply with an obligation set out in law, miscarriage of justice, endangering someone's health and safety and damage to the environment.'* The policy did not contain a hotline or say who a disclosure should be reported to. This meant that any individual wishing to blow the whistle had to make their own choice as to who to raise their concerns with.
- 24.2. Bullying and Harassment. *'We believe that employees have the right to be treated with dignity at work. As such, we will not tolerate employees bullying or harassing fellow employees through word or deeds. Any employee who feels that they have been bullied should contact their line manager in the first instance'*.
- 24.3. Health & Safety at Work. *'It is the responsibility of all employees to make themselves aware of our health and safety policy. All employees have a duty of care in respect of the health and safety of not only themselves, but of other employees, customers and members of the public. You must adhere to the general health and safety rules and procedures'*.
- 24.4. Personal Relationships at Work. *'If you embark on a close personal relationship at work or with the customer whether the relationship is*

*with a fellow worker, customer or supplier, you're bound by the following provisions: You must not allow your relationship to influence your conduct at work. Intimate behaviour during normal working hours on our premises is prohibited. This includes, but is not limited to, holding hands, other close physical contact, discussions of a sexual nature, or kissing.'*

25. In August 2021 the Respondent conducted a Noise Assessment and then implemented a Hearing Protection Policy [121].
26. On 13<sup>th</sup> October 2021, within 4 months of starting work, the Claimant completed an appraisal conducted by her recruiters (rather than the Respondent) which was essentially designed to get the Claimant's feedback on how things were going [224]. The Claimant described her role and what it involved. In providing feedback to Matthew Kelly on the Claimant's recruitment, the recruiter concluded by saying [120] '*Finally, Joanna said that she feels fully supported from you Matt, and that she was very happy in her role.*'
27. On 18<sup>th</sup> November 2021 Lisa Sage from the HSE emailed the Claimant to raise concerns that the Respondent was storing finished window units over the factory floor making pedestrian movement difficult and that ear protection was not being worn by staff using machinery [122]. The Claimant responded on 22<sup>nd</sup> November 2021, addressing the concerns of the HSE [121].
28. On 25<sup>th</sup> November 2021 a Fire Door Exit - Corrective Action report was completed by the Claimant [123]. It identified a number of doors that, for various reasons, were blocked and could not be used as fire doors. The Claimant was attempting to ensure that the risks exposed by the report were being addressed. This involved doing what she could to arrange for the fire exit doors to be available for use. The Claimant could not physically address the problems herself and by August 2022 no or inadequate action had been taken to make the fire doors safe and useable.

29. On 12<sup>th</sup> December 2021 the Claimant attended her first appraisal at which she was to receive feedback on her performance from Mr Kelly. She prepared for it by completing an appraisal document setting out what she considered she had achieved [226]. In cross examination Mr Kelly accepted that the Claimant's list of her health and safety achievements [227] was accurate. In his witness statement Mr Kelly suggests that he completed a Manager's Appraisal section. He says [MK22], *'Unfortunately, we have been unable to locate a copy of the version that included the appraisers comments. My assessments of Joanna at that time that was that she was committed and had a good work ethic, but there wasn't as much progress as I had expected in terms of improving quality and implementing health and safety procedures'*. Mr Kelly leaves it open as to whether he gave that feedback at the time, or whether, in his statement he is telling us what he could or would have said. The Claimant told us in evidence, and we accept, that Mr Kelly did not provide any feedback to her, no *'manager's appraisal section'* was ever sent to her and no indication was given that she may not be performing fully. Mr Kelly invites us to conclude that the Manager's section has been lost, but we consider more likely that he never completed it. This is the first of a number of meetings that we would have expected an Operations Director to record, but in each case, Mr Kelly did not do so.
30. Mr Kelly tells us in his witness statement [MK25] that during the course of January 2022 he first began to have concerns about the Claimant after informal grumblings had been made about her by production staff. He also accepted that he took no record of those concerns and did not raise them with the Claimant [MK29].
31. In late January 2022 the Respondent held its staff Christmas party. In evidence Mr Kelly told us that his affair or 'short fling' as he described it with Liz Culpan began on that night. Ms Hughes told the Claimant that Mr Kelly split from his wife at the end of January [179]. The Claimant told us in her

statement [JSK25/5]<sup>2</sup> that at one point she went to the toilet, leaving her partner, Mr Allen, talking to Mr Kelly. Upon her return the Claimant told us that Mr Kelly 'came to my partner and started showing him other stunning girls [in the pub]. My partner said he is not interested because he's got me and he is happy with me, but Mr. Kelly wanted to get my partner to look. Then Mr. Kelly said Joanna's in the toilet, she won't find out. Christopher didn't look and I came back from the toilet. We had a drink. And we left.'

32. Mr Kelly denies making the statement. The Claimant's account was hearsay (her partner Mr Allen was in Court and thus could have given us direct evidence on this point). Notwithstanding this point (noting that the Claimant and Mr Allen are not experienced Tribunal Advocates) for the reasons stated, we accept the Claimant's account that the words were said by Mr Kelly to Mr Allen.
33. Also in January 2022 (we were told the beginning of January) the Claimant completed a Quality Training Book. The Claimant had led on this, and it was her creation, but she had had input on it from production experts within the Respondent. We accept the Claimant's evidence (on this point uncontested by Mr Kelly) that he prevented the Claimant from presenting and delivering that Quality Book and quality training to the production staff. Mr Kelly said he did this because the Claimant was too formal and would not be able to deliver it in a way that engaged the staff, and that he would do it. When Mr Kelly told the Claimant that he was firm in his beliefs on how to deliver the training in a way that would engage the staff, the Claimant backed down and said '*what is next, Playboy magazines on the table*'. No doubt said out of frustration we believe that the comment was made and it gave an indication of a reputation that Mr Kelly had regarding women.
34. Having taken the training and the Quality Book off the Claimant, we find that Mr Kelly never got round to providing the Quality Training and distributing the

---

<sup>2</sup> The Claimant restarted paragraph numbering at the start of each section of her statement. As such references refer to the page number/paragraph number.

Claimant's quality book. This was one of the matters that lead the Claimant to complain to both Mr Manison and Ms Hughes that Mr Kelly was '*tying her hands*' ie preventing her from doing her quality and health & safety job.

35. On 22<sup>nd</sup> February the mezzanine floor in the Respondent's Aluminium department collapsed. It was not repaired for some time. It remained an action point at a H&S Comms meeting on 11<sup>th</sup> May 2022. It had been actioned to Mr Kelly, who actioned it to Lloyd Franklin, the Respondent's Facilities Co-Ordinator **[139]**.
36. Mr Kelly tells us that from May 2022 there was an escalation of the concerns surrounding the Claimant **[MK31]**. He told us that she called the factory workers '*incompetent and stupid*'.
37. On 16<sup>th</sup> May 2022 Mr Kelly was told by a supplier that the Respondent's Design Licence had expired **[145]**. He queried this with the Claimant who, upon investigation, said that the duration of the certificates had recently changed. Mr Kelly subsequently relied on this in his witness statement as an example of a performance concern that he had.
38. On the same day, 16<sup>th</sup> May 2022, Mr Kelly arranged for the Claimant, Lloyd Franklin and Martyn Elwell to travel with him to a client in Knutsford. The meet point was the office as Mr Lloyd only had a scooter as a means of transport. During the day Mr Lloyd pulled out of the trip. Mr Kelly changed the met point to his own home, as it was further north and closer to Knutsford, and easier for him. The Claimant asked by text what time to arrive and was told 6.45am, then told that was a joke and that she should attend at his home at 8.10 to 8.15am with coffee **[146]**. At that point she believed Martyn was also making the trip. Mr Kelly told us that Martyn decided to travel to the client directly, leaving the Claimant as the only individual meeting at Mr Kelly's home. He did not advise the Claimant of this change.
39. On 17<sup>th</sup> May 2022, the day of the trip, at 7.46am, and about 25 minutes before the agreed met time, Mr Kelly sent an update on the arrangements to the

Claimant by way of a further text message [147]. He said '*just going to nip to the shop. If you get here early, just go in, the door is unlocked*'. The Claimant relies on this comment, sent by text, as an example of sexual harassment. The Claimant told us that she arrived as Mr Kelly was getting back, and that they both went into his house. No one else was present. The Claimant confirmed that nothing inappropriate was said or took place in the house.

40. During the drive to Knutsford Mr Kelly told the Claimant that he had split up from his wife. He told us that his motivation for so doing was because the Claimant would have seen that his accommodation was less than what she might have thought an Operations Director would have, and that he was paying for two houses as his wife did not work. The Claimant told us that he added that he had not had sex for three months. The Claimant suggested he seek out Liz Culpan as a rumour was circulating that she had sent naked pictures of herself to the production floor operatives. The Claimant, at that point, did not know of Mr Kelly's prior affair with Ms Culpan. She said that Mr Kelly's response was that '*he would not be touching a broken woman*' [JSK 27/4]. On the balance of probabilities for the reasons stated we prefer the Claimant's account of that conversation.
41. At some point in June 2022 (the Claimant cannot be more specific than that) the Claimant told us that she had had her hair done, and on seeing the new style Mr Kelly had commented '*you look nice, no wonder I employed you*'. The Claimant relies on this comment as the second incidence of sexual harassment. The Claimant was unable to provide any details as to when, where, and in what circumstances the comment was said.
42. On 1<sup>st</sup> July 2022 the Claimant asked the Respondent's window profile supplier, Epwin, to do an inspection of its window profiles which had dirt marks on them [152]. The supplier responded to say that the marks had been caused by storage issues and proposed a solution [149]. Mr Kelly, in his witness statement relies on this as another performance concern that he had with the Claimant.



43. By 27<sup>th</sup> July 2022 repair work had been completed to the collapsed mezzanine floor. Mr Franklin had measured and purchased a steel lintel to support a roof joist in the floor, but only measured the gap, he failed to add in the extra distance to enable the lintel to be built into the blockwork. Upon the Lintel's delivery, Lloyd's solution was not to order a correctly measured Lintel, but to place two wooden posts next to the block work onto which the Lintel would then rest [154]. The Claimant brought this to the attention of Mr Kelly stating her belief that the repair work remained unsafe and that access to the area under the floor should be restricted. Mr Kelly refused the suggestion stating that he considered Mr Lloyd's solution to be fine.
44. Mr Kelly told us in his statement that the Respondent was at fault for incorrectly fitted hinges on 39 windows intended for Frimley Hospital, and that the Claimant had accepted responsibility for the fault. He stated that this caused him to be really annoyed with the Claimant [MK37]. On 2<sup>nd</sup> August 2022 George Marshall of All Glass Systems emailed Mark McHale about a window order stating '*Further to our conversations regarding the window issues at Frimley Hospital and your acceptance that the hinges had not being fitted correctly ....*' [159]. That day Mr Kelly emailed the Claimant, Mark McHale and Gemma Turner in strident terms, saying '*What is going on here??? A service call request for 39 windows in a hospital on the back of one expect inspection of one window ..... Nope! Who authorised this?? Who made the decision that the product is faulty???*' [158]. This exchange suggests that it was Mr McHale who had accepted responsibility for the fault or that the 'you' used in Mr Marshall's email referred to the Respondent generally. There is nothing in the email exchange relied on by Mr Kelly to suggest support his assertion that the Claimant was at fault.
45. On 3<sup>rd</sup> August 2022 Martin Harris of Qualitere Windows emailed Mr Kelly, Mr Mchale, Mr Elwell and the Claimant to complain that '*the welds on all the windows and doors are terrible. Some we are managing to tidy but one needs either tidying by you or remaking*' [161]. Mr Kelly emailed the Claimant and Mr

Mchale stating '*we are better than this!!! Disappointing! No way this goes through so many hands without being picked up on.*' [161]. In his statement Mr Kelly blames the Claimant for this mistake, however the email exchange goes further to include Mr McHale.

46. On 9<sup>th</sup> August 2022 the Claimant wanted to discipline, or at the very least send a letter of concern to Emily Hale, about her wearing high heel shoes in the production area, when the PPE policy required all employees to wear steel toe-capped safety shoes. The Claimant drafted a letter of concern to that effect [162]. Mr Kelly overrode the Claimant's wishes and refused to allow her to send the letter. He told us in evidence that Ms Hale had a back problem that made the wearing of steel toe capped shoes difficult. He did not give the Claimant that explanation. We consider that this was, in terms of her dealings with Mr Kelly, a further example of him tying her hands and preventing her doing her job. This led her, just a couple of days later, when Paul Manison came to see her on 11<sup>th</sup> August 2022 to tell Mr Manison of all of concerns about Mr Kelly and how he was stopping her from doing her job.
47. On 11<sup>th</sup> August 2022 the Claimant took the opportunity to raise her concerns about Mr Kelly tying her hands to Paul Manison when he came to see her. We accept her evidence of the matters she raised, which we conclude are the matters relied on by her in the list of complaints recited in the List of Issues [54].
48. The Claimant discussed her situation with her partner, Mr Allen. On his advice she decided to covertly record all future meetings that she had with the Respondent.
49. On 16<sup>th</sup> August 2022 the Claimant approached Ms Hughes, having set her recording device. She did not tell Ms Hughes that was being recorded. We have read the (now agreed) transcript of that meeting [163]. We note the following entries:

- 49.1. **[KH]** *'it was only Paul came to me on Thursday and said how upset you were. ... Lots haven't been done so I did briefly speak to Martyn about it ... its going to be a case of sitting down with Matt and just finding out why. Because from what Paul was saying as well, there are also other things that have happened with health and safety that he is asked you not to share'. [176];*
- 49.2. **[JSK]** *'I just said to Paul that I think it's time to resign' [178];*
- 49.3. **[KH]** *'I suppose there is always going to be a fight between health and safety and quality and production, isn't there? But he's not Production. He's Operational he is operational and he shouldn't be stopping it, because I suppose in a way what you do will slow things down for a while but it will make it better in the long run.' [180]*
- 49.4. **[KH]** *'so via Paul ... I was just going to say I think we've got a problem. I think we need to look at it. .... Yeah, I know and I tried, it's like we keep saying to Matt, you know, come on, why hasn't this been completed? Why aren't you doing this? Why aren't we doing that? He's just very noncommittal. He doesn't answer he'll sort of divert the conversation'. [184-185];*
- 49.5. **[KH]** *'So as the responsible person you know, you don't want to see something not being completed because you're being stopped by a director' [186].*
- 49.6. **[JSK]** *'it will be difficult for me to work with him' [190].*
50. The Claimant had a further conversation with Mr Manison also on 16<sup>th</sup> August 2022 **[233-235]**. The transcript records Paul Manison telling the Claimant 'Alright, I've just spoken to Martin and Gary and Kristie. Just had a chat with them I've said about, you know. that there have been some quality issues and what we're doing. So you know. .... OK, fair enough. So see you Thursday will carry on with this.
51. The Claimant spoke with Ms Hughes again on 17<sup>th</sup> August 2022. The transcript reveals:

- 51.1. **[KH]** 'it with us. We're going to tackle it, so it hasn't come from you. That is probably going to make it really difficult for the two of you to work together moving forward' **[204]**;
- 51.2. **[KH]** 'see how it goes 'cause I don't, I don't think Matt would, but I don't think that Matt would be unprofessional. [206];
- 51.3. **[JSK]** 'If you're going to load problems for me, I would just put my notice in so you know' **[206]**.
- 51.4. **[KH]** 'We'll will speak with Matt anyway. I don't know. I don't know if it's already out there' **[208]**.
52. On 20th August the claimant went on holiday.
53. On 22<sup>nd</sup> August 2022 Mr Kelly met with Emily Hale to discuss the Claimant. Her notes are short **[238]**. *'JK. Problem with not fulfilling role. Health and safety poor. Poor risk assessments. Needing lots of support with quality. Doesn't seem to be progressing in role. MK asking how we handle this speak. With Matt and Sally from Navigation. Navigation to come in on the 30th of August.'*
54. On 24<sup>th</sup> August 2022 a complaint was received on the County Noton job **[211]**. Wayne McHale said the Claimant had approved the job to go out.
55. In paragraph 55 of Mr Kelly's statement he sets out what for him was the incident that made him decide that the Claimant was not going to work out.
56. Mr Kelly said that Wayne McHale had told him that the Claimant had berated an experienced staff member, Barry Humphries, that the quality on doors that he had made for her was unacceptable. Mr Kelly said *'When I found out about that, I decided I was going to dismiss Joanna.'* **[MK55]**.

57. The Claimant returned on Thursday 1st September to find that her e-mail logins were not working. On Friday 2nd she worked from home. On Monday 5th September 2022 she was called into a meeting with Mr Kelly who dismissed her [JSK21/1-3].

58. Mr Kelly's notes of that meeting [217] state (quoted in full):

*'Explained the reason for dismissal: just not working. Joanna: 'what is the real reason???' Lack of progress. Poor relationship with the managers and staff. Moving health and safety and quality in a different direction. Leave equipment with Emily when leaving.*

59. The Claimant's transcript, unsurprisingly, contains more detail [213-215]:

*'I'm going to take a different direction when it comes to quality and health and safety. I'm sorry it won't involve you. I'm going to finish you today and your contract today. I'll pay you to the end of the month. For the time you've been here, I'm sorry it hasn't worked out. I know that you've been down about it for the last couple of months and quite vocal about that too. ... I'm trying not to blame. Like I said, there's no real point going through the ends up outs of where we're at right now. What I would say is that going forward in the future for you, come to the source of where your frustration is. Don't go to everybody else apart from where that frustration is.'*

60. The dismissal letter, also dated 5<sup>th</sup> September 2022 was similarly lacking in detail [218]. It said *'We feel that you have not progressed as expected in this role and the role is taking a change in direction. It is not just working. We've therefore decided that we have no other option but to terminate your contract of employment'*. The Claimant did not appeal against her dismissal.

61. We now turn to the relevant law.

[6] **The Relevant Law**

**Public Interest Disclosures**

62. Whistleblowers are protected from suffering any detriment or dismissal from their employer as a consequence of making a public interest disclosure of alleged wrongdoing. The Act defines a public interest disclosure in the following way: Section 43B of the **ERA** states:

**43B Disclosures qualifying for protection**

- (1) *In this Part a “qualifying disclosure” means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and, tends to show one or more of the following:*
- (b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

**43C Disclosure to employer or other responsible person**

- (1) *A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith (a) to his employer.*

63. In **Babula v Waltham Forest College** [2007] 346 the Court of Appeal held that ‘An Employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in ERA 1996, section 43B(1)(a)-(f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith’. The ‘reasonable belief’ statutory test is a *subjective* one.

64. The **ERA** states that there must be a reasonable belief of the worker making the disclosure (**Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, EAT). In **Korashi** the Court of Appeal stated ‘as to any of the alleged failures, the burden of proof is upon the Claimant to

*establish upon the balance of probabilities, any of the following, (a) there was in fact, and as a matter of law, a legal obligation or other relevant obligation on the employer in each of the circumstances relied on; (b) the information disclosed tends to show that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject.'* The Court continued, *'Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold.'*

65. In **Simpson v Cantor Fitzgerald Europe** [2021] IRLR 238 an individual presented whistle blowing claims based on the assertion that he had made protected disclosures in respect of traders engaging an illegal practise is known as 'front running'. The Tribunal rejected the allegation that there was any causal link between these matters and the treatment of the Claimant. It did so on the basis that the communications contained ambiguity and the Claimant had not reported his concerns to Compliance. The Court of Appeal, Bean LJ stated *'obviously it was open to the Tribunal to find that his failure to make any explicit report to Compliance indicated that he did not genuinely, unconsciously, conscientiously believe that there had been any such breaches'*.
66. Qualifying disclosures must involve a disclosure of information, ie must convey facts, rather than merely raise an allegation. There must be the disclosure of *information*. In **Williams v Michelle Brown AM** [2019] UKEAT/0044/19 the EAT stated *'If the Tribunal properly concludes that the factual content of the claim disclosure cannot reasonably be construed as tending to show a criminal offence [or other relevant breach of section 43B(1)] then that conclusion will by itself be fatal to the proposition that there was a qualifying disclosure relying on section 43B(1). That will be so regardless of what the Claimant subjectively believed, and regardless of whether or the other elements are shown'*.
67. The distinction between information and comment or assertion was illustrated by Slade LJ in **Cavendish** as follows:

*'the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information.'*

68. The question is whether there is sufficient by way of information to satisfy s43B. This will be very much a matter of fact for the Tribunal. The more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide (**Kilraine v London Borough of Wandsworth** [2018] ICR 1850). For a statement to be a qualifying disclosure, there must be sufficient factual content and specificity to show that one of the listed matters in section 43B(1) is engaged. *'If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure that he makes has a sufficient factual content and specificity such that it is capable of tending to show that matter listed, it is likely that his belief will be a reasonable belief.'*
69. It is then necessary to determine that the worker has a *reasonable belief* that the disclosure *is in the public interest* and *tends to show* one of the six statutory categories of 'failure'. The definition of a qualifying disclosure is *'disclosure of information which, in the reasonable belief of the worker, is made in the public interest'*. Disputes that are essentially personal contractual disputes are unlikely to qualify (**Millbank Financial Services Ltd v Crawford** [2014] IRLR 18, EAT). It is not sufficient that the Claimant has simply made *allegations* about the wrongdoer especially where the claimed whistleblowing occurs within the Claimant's own employment, as part of a dispute with his or her employer (**Cavendish Munro Professional Risks Management v Geduld** [2010] IRLR 38).
70. There must be an actual or likely breach of a legal obligation. Under



paragraph (1)(b) there must be an actual or likely breach of the relevant obligation by the employer (**Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540, EAT). The word 'legal' must be given its natural meaning. The fact that the individual making the disclosure thought that the employer's actions were morally wrong, professionally wrong or contrary to its own internal rules may not be sufficient (**Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT). The source of the obligation should be identified and capable of certification by reference for example to statute or regulation. 'Likely' means probable or more probable than not. It is not sufficient that the Claimant reasonably believed that the relevant disclosure of information tended to show that a person 'could' fail to comply with a legal obligation, or that there was a possibility or risk of non-compliance (**Kraus v Penna Plc** [2004] IRLR 260).

71. In **Norbrook** Slade J said '*... an earlier communication can be read together with a later one as embedded in it, rendering the later communication of protected disclosure, even if taken on their own, they would not fall within section 43B(1). Accordingly, two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact*'.
72. An employee wanting to rely on the whistleblowing protection before a tribunal bears the burden of proof on establishing the relevant failure (**Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, EAT). As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following: (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on; and (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.
73. In the event that a qualifying protected disclosure was not made in good faith, at the remedy stage 'the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%'.

74. It is for the Claimant to show that he was subjected to a detriment by an act or a deliberate failure to act by his employer or co-worker. The claim would only be made out if the Claimant was subjected to the detriment on the ground that he had made the protected disclosure. The relevant test is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence, the treatment of the Claimant (**Fecit & Others v NHS Manchester** [2011] IRLR 111). Section 48(2) of the Act states that the onus is on the employer to show the ground on which the act or deliberate failure to act is done. The 'on the ground that' test focuses on the relevant decision-makers mental processes. The test is not satisfied merely because there was some relationship between the protected disclosure and the detriment complained of, or because the detriment would not have been imposed but for the disclosure (**London Borough of Harrow v Knight** [2003] IRLR 140).
75. The Court of Appeal decision in **Jesudason v Alder Hay Childrens NHS Foundation Trust** [2020] IRLR 374 stated *'It is now well established that the concept of a detriment is very broad and must be judged from the viewpoint of the worker. There was a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment'*.
76. The decision to dismiss can itself be a detriment imposed by the dismissing officer. If established as a detriment the employer will be vicariously liable for that.
77. In **Timis v Osipov** [2019] IRLR 52 the court said: 'It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, ie for being a party to the decision to dismiss and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). ... All that section 47B(2) excludes is a claim against the employer in respect of its own active dismissal.'

## Harassment (s26 EqA)

78. Section 26(1) of the **EqA** provides that:

- (1) *A person (A) harasses another (B) if—*
  - (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
  - (b) *the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
  
- (4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
  - (a) *the perception of B;*
  - (b) *the other circumstances of the case;*
  - (c) *whether it is reasonable for the conduct to have that effect.*

79. The test for conduct "related to" a protected characteristic is wider than the test for direct discrimination, which requires treatment "because of" a protected characteristic. Where the words used are not inherently discriminatory, context will be important.

80. To succeed in a harassment claim a claimant either needs to prove that the conduct had the purpose of violating his dignity/creating a hostile environment and/or that it reasonably had that effect on her.

81. It is not enough for the victim simply to claim that the unwanted conduct violated their dignity or created an environment that was intimidating, hostile, degrading, humiliating or offensive to them. The Tribunal must also decide that it is reasonable for that to be the effect. In reaching their view on this, the Tribunal must take the victim's perception into account (s.26(4)(c)).

82. Case law indicates that an individual's dignity is not necessarily violated "*by things said or done which are trivial or transitory, particularly where it should have been clear that any offence was unintended*" (**Richmond Pharmacology Ltd v Dhaliwal** [2009] I.C.R. 724 (2009) at §22).

83. Harassment claims require 3 elements (**Dhaliwal**), namely (i) unwanted conduct; (ii) having the purpose or effect of either (a) violating the claimant's dignity; or (b) creating an adverse environment; (iii) which are related to the Claimant's protected characteristic.
84. In order to decide whether the conduct has either of the proscribed effects under sub-paragraph (1)(b) a Tribunal must consider *both* whether the putative victim perceives themselves to have suffered the effect in question *and* whether it was reasonable for the conduct to be regarded as having that effect **Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham** [2018] IRLR 542, CA.
85. The statutory words 'intimidating, hostile, degrading, humiliating or offensive' are important. Elias J stated in **Land Registry v Grant** [2011] IRLR, 748, CA '*Tribunals must not cheapen the significance these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*'.

## Time

86. In considering whether to extend time on the just and equitable basis, a Tribunal must consider the balance of prejudice as between the Claimant and Respondent. These include:
- 86.1. The length of and reasons for the delay;
- 86.2. The extent to which the cogency of the evidence is likely to be affected by the delay;
- 86.3. The promptness with which the Claimant acted once she knew of the facts giving rise to the claim;

- 86.4. The steps taken by the Claimant to obtain appropriate professional advice once she knew that a claim could be brought; and,
- 86.5. The promptness with which the Claimant acted once she know of the facts giving rise to the claim.
87. The relative hardship prejudice to the parties in allowing or disallowing the extension is a relevant factor in determining a just and equitable extension.

## [6] Our Conclusions

88. We turn now to our conclusions on each of the Issues that exist between the parties.
89. Turning first to the claim of automatic unfair dismissal for making a public interest disclosure.
90. We find that the Claimant was passionate about health and safety and that she felt constrained by Mr Kelly. We accept the Claimant's evidence that on 11 August 2022 in a conversation with Paul Manison, Technical Director, the Claimant raised the following concerns about Mr Kelly tying her hands when it came to health and safety:
- 90.1. *"The company is breaching the covid reporting"*. We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.
- 90.2. *"The Mezzanine floor was collapsed creating a risk and no action has been taken for a long time and then once repaired it was substandard and structurally unsafe, but Matthew Kelly tried to convince everyone*

*at a board meeting that the job is done correctly. Also, the job has been carried out by one of Central Window Systems employee without any qualification and without structural engineering report /calculations".* The Respondent accepts that this disclosure was a qualifying disclosure for the purposes of s43B **ERA**. We agree. It clearly disclosed information tending to show, in the Claimant's reasonable belief that the health of safety of an individual has been, is being or is likely to be endangered. This disclosure qualifies.

- 90.3. "Health & Safety training hasn't been provided, like safety inductions, Risk Assessments and Safe Systems of Work have not been provided for our employees. The skills training matrix has not been conducted". The Respondent accepts that this disclosure was a qualifying disclosure for the purposes of s43B **ERA**. We agree. It clearly disclosed information tending to show, in the Claimant's reasonable belief that the health of safety of an individual has been, is being or is likely to be endangered. This disclosure qualifies.
- 90.4. "PPE was being worn by some and not others" (safety shoes, ear protection). The Respondent denied that this disclosure qualifies, however we conclude that it did contain sufficient information regarding the health and safety risk, namely the specific types of PPE that was not being worn. This disclosure qualifies.
- 90.5. "*The E stop button has not been placed properly - located in easy accessible reach*", namely a button that stops a machine from running. The Respondent accepts that this disclosure was a qualifying disclosure for the purposes of s43B **ERA**. We agree. It clearly disclosed information tending to show, in the Claimant's reasonable belief that the health of safety of an individual has been, is being or is likely to be endangered. This disclosure qualifies.

- 90.6. “We do not have engineering staff in place. One of our employees was asked to carry out tasks without the required qualifications and knowledge to do it, for example electrician jobs or building structure jobs”. The Respondent accepts that this disclosure was a qualifying disclosure for the purposes of s43B **ERA**. We agree. It clearly disclosed information tending to show, in the Claimant’s reasonable belief that the health of safety of an individual has been, is being or is likely to be endangered. This disclosure qualifies.
- 90.7. “My report from November 2021 has not been implemented, it was a great risk in case of fire. Some of the fire exit doors had a punch code lock and some of the doors were opened inwards instead of outwards.” The Respondent accepts that this disclosure was a qualifying disclosure for the purposes of s43B **ERA**. We agree. It clearly disclosed information tending to show, in the Claimant’s reasonable belief that the health of safety of an individual has been, is being or is likely to be endangered. This disclosure qualifies.
- 90.8. “I couldn’t conduct any disciplinary actions as Matthew Kelly wouldn’t allow it.” We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.
- 90.9. “I created the letter of concern to give to Emily Hale, but it was stopped by Matthew Kelly.” The Respondent denied that this disclosure qualifies, however we conclude that it did contain sufficient information regarding the health and safety risk, namely that Mr Hale had prevent disciplinary action for a health and safety breach to be instigated against Ms Hale. This disclosure qualifies.

- 90.10. “The KPIs had not been analysed as it should to improve the quality and Health & Safety issues. We probably had 4 meetings and then has been stopped by Matthew Kelly.” The Respondent denied that this disclosure qualifies, however we conclude that it did contain sufficient information regarding the health and safety risk, namely that Mr Hale had prevented 4 meetings to improve health and safety issues. This disclosure qualifies.
- 90.11. “This is the same case that we had with Christina Walker. She was dismissed by doing her job properly, the same as me and we discovered many wrongdoings in the factory”. We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.
91. We accept the Claimant’s evidence that on 16 August 2022 in a conversation with with Kristie Hughes, Finance Director, the Claimant raised the following concerns about Mr Kelly tying her hands when it came to health and safety:
- 91.1. “I spoke to Paul Manison about the situation and wrongdoings. I want to speak to Gary Morton about Matthew Kelly and all wrongdoings because I stuck with my work”. We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.
- 91.2. “Matthew Kelly is tying my hands with H&S and quality”. We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.



- 91.3. "PPE: safety shoes, ear protection have not been worn". The Respondent denied that this disclosure qualifies, however we conclude that it did contain sufficient information regarding the health and safety risk, namely the specific types of PPE that was not being worn. This disclosure qualifies.
- 91.4. "Letter of concerns regarding PPE I prepared have been stopped by Matthew Kelly". We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.
- 91.5. "No disciplinary actions had been taken as people had already been given", [i.e. they had already been subject to disciplinary action]. We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.
- 91.6. "Roof/mezzanine floor collapse in Aluminium and Matthew Kelly tried to convince me that everything is ok". The Respondent accepts that this disclosure was a qualifying disclosure for the purposes of s43B **ERA**. We agree. It clearly disclosed information tending to show, in the Claimant's reasonable belief that the health of safety of an individual has been, is being or is likely to be endangered. This disclosure qualifies.
- 91.7. "Safe System of Work (SSoFW) training - people haven't been trained and we could prevent one of the near misses". The Respondent denied that this disclosure qualifies, however we conclude that it did contain sufficient information regarding the health and safety risk, namely that staff had not been provided with the Safe System of Work training. This disclosure qualifies.

- 91.8. “There is a lack of training of team leaders”. We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.
- 91.9. “Epilepsy training been stopped due to lack of HR organisation.” We conclude that whilst this point was raised it did not qualify for the protection offered by s43B **Employment Rights Act 1996** because it did not contain sufficient detail or disclose sufficient information to qualify. It was a broad assertion only.
92. Having established that the disclosures relied on by the Claimant were made, and that the majority of them are ‘qualifying disclosures’ for the purposes of s43B of the **ERA**, our next task is to determine the reason for the Claimant’s dismissal. Section 103A **ERA** states:
- ‘An employee who was dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason or more than one the principal reason for the dismissal is that the employee made a protected disclosure.’*
93. What was the reason for the Claimant’s dismissal by Mr Kelly? Was it, as he asserts, the reason given in his letter of dismissal, ‘*We feel that you have not progressed as expected in this role and as the role is taking a change in direction it is just not working*’. Or was it, as the Claimant asserts that she had gone above his head to raise qualifying disclosures about health and safety that he was blocking or ‘tying her hands’ on?
94. We conclude that the real reason that Mr Kelly dismissed the Claimant was because she had raised the public interest disclosures referred to above. We reject the reason provided by Mr Kelly in his dismissal letter. We do so having considered the following evidence:

- 94.1. Kirstie Hughes' conversation with the Claimant on 16<sup>th</sup> August 2022 [176] in which she told the Claimant that Paul Manison had come to see her (Kirstie) on Thursday and said how upset the Claimant was, and that it was going to be a case of sitting down with Matthew Kelly and just finding out why. This passage states a clear intention to discuss the concerns with Mr Kelly. On the balance of probabilities we conclude that such a conversation did take place.
- 94.2. Kirstie Hughes' conversation with the Claimant on 16<sup>th</sup> August 2022 [180] in which she acknowledged that '*I suppose there is always going to be a fight between health and safety and quality and production isn't there*' which recognised that Matthew Kelly, working in operational production might put operational matters above health & safety.
- 94.3. Kirstie Hughes' conversation with the Claimant on 16<sup>th</sup> August 2022 [183] in which the Claimant said '*I try to, you know, cover Mat's ass but in the end I said fuck sake I can't do my job properly*'.
- 94.4. Kirstie Hughes' conversation with the Claimant on 16<sup>th</sup> August 2022 [184] when Ms Hughes acknowledged that they have to keep asking Mr Kelly why he has not done his job.
- 94.5. Kirstie Hughes' conversation with the Claimant on 16<sup>th</sup> August 2022 [186] when Ms Hughes acknowledged that as a responsible person the Claimant did not want to see something not being completed because she had been stopped by a Director.
- 94.6. Kirstie Hughes' conversation with the Claimant on 16<sup>th</sup> August 2022 [190] when Ms Hughes and the Claimant acknowledged that it would be difficult for her to work with Matthew, so she was glad that she was going on holiday.
- 94.7. Kirstie Hughes' conversation with the Claimant on 17<sup>th</sup> August 2022 [204] confirming that they (Ms Hughes, Gary and Martin) would tackle the issue with Matthew Kelly, so it (the concern) hasn't come from the Claimant and Ms Hughes acknowledgment [204] that it is probably going to make it really difficult for the two of you to work together moving forward.

- 94.8. Kirstie Hughes' conversation with the Claimant on 17<sup>th</sup> August 2022 [205] confirming that Paul will speak to Matthew Kelly.
- 94.9. Kirstie Hughes' conversation with the Claimant on 17<sup>th</sup> August 2022 [206] in which she says 'I don't think Matt would be unprofessional' in circumstances we have found amounted to a tacit admission that he could be unprofessional and retaliate against the Claimant because of her complaint.
- 94.10. Kirstie Hughes' conversation with the Claimant on 17<sup>th</sup> August 2022 [208] that 'we'll speak with Matt' about the Claimant's complaint;
- 94.11. Paul Manison's conversation with the Claimant on 16<sup>th</sup> August 2022 that he had spoken to Kirstie, Martin and Gary about Matt [233] and that 'we'll carry on with this' [235] meaning we'll take the complaint forward with Matthew Kelly.
- 94.12. The inadequacy of Matthew Kelly's own notes of the dismissal meeting [217] which say, '*lack of progress, poor relationship with all the managers and staff. Moving HSQ (Health, Safety & Quality) in a different direction*'. There was no evidence of a change in direction or any attempt to explore capability or conduct issues. This struck us as a sham reason to dismiss, to hide Mr Kelly real reason, which is the Claimant's H&S disclosures.
- 94.13. Mr Kelly's evidence in his witness statement that he explained the different direction that HSQ would move into, which is contradicted by the transcript of that meeting [213] which plainly evidence that he did not.
95. The most compelling evidence of the real motivation for Mr Kelly's dismissal of the Claimant is the exchange that the transcript of the dismissal meeting does record:

*. I know that you've been down about it for the last couple of months and quite vocal about that too. ... I'm trying not to blame. Like I said, there's no real point going through the ends up outs of where we're at right now. What I would say is that going forward in the future for you,*

*come to the source of where your frustration is. Don't go to everybody else apart from where that frustration is.'*

96. In this statement Mr Kelly tells the Claimant that she has been vocal in expressing her concerns, and tells her, in future to go to the source of her frustration (ie him) not everybody else (ie Mr Manison and Ms Hughes). We conclude that Matthew Kelly was told by either Mr Manison and/or Ms Hughes that the Claimant had raised a complaint against him for tying her hands on health and safety and that he decided to retaliate by dismissing her.
97. In the circumstances we uphold the Claimant's claim of automatic unfair dismissal on the grounds that the reason for her dismissal was that the Claimant had made protected interest disclosures.
98. We turn now to the Claimant's claims of sexual harassment. We shall deal with them in turn:
99. The first complaint relates to the incident on 17<sup>th</sup> May 2022 when the Claimant had arranged to meet Mr Kelly at this home as a starting point on a shared journey to visit a client. On the day of the trip, at 7.46am, and about 25 minutes before the agreed met time, Mr Kelly sent an update on the arrangements to the Claimant by way of a further text message [147]. He said '*just going to nip to the shop. If you get here early, just go in, the door is unlocked*'. The Claimant relies on this comment, sent by text, as an example of sexual harassment. The Claimant told us that she arrived as Mr Kelly was getting back, and that they both went into his house. No one else was present. The Claimant confirmed that nothing inappropriate was said or took place in the house.
100. We do not consider the statement, '*just going to nip to the shop. If you get here early, just go in, the door is unlocked*' to be of a sexual nature or related to sex in any way, whatsoever. The Claimant did not suggest that she arrived at the property. She went into the property. If, upon reading the text she felt that it was of a sexual nature or related to her sex, she could have (and we

would have expected her) to stay in her car. The fact that she took up the invitation to go in suggests to us that at the time she did not consider or perceive the suggestion to be of a sexual nature or related to her sex. Mr Kelly had asked the Claimant to meet at his home at a particular time, then realised he might be late, so he warned the Claimant of that fact and said she could wait in his house. As the conduct was not of a sexual nature or related to sex, this claim fails at the first hurdle.

101. If we are wrong on that, and the statement had engaged either s26(1)(a) or s26(2)(a) of the **Equality Act**, we do not consider that the words used can fairly be said to have had the purpose, or (taking into account all of the circumstances) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. As we have observed the Claimant did go into Mr Kelly's house. This act is inconsistent with the words having the effect required for this claim to succeed. In the circumstances we dismiss it.
102. Turning to the second claim of harassment related to sex. At some point in June 2022 (the Claimant cannot be more specific than that) the Claimant told us that she had had her hair done, and on seeing the new style Mr Kelly had commented '*you look nice, no wonder I employed you*'. The Claimant relies on this comment as the second incidence of sexual harassment. The Claimant was unable to provide any details as to when, where, and in what circumstances the comment was said.
103. Notwithstanding the Claimant's lack of recollection regarding the circumstances, in which the comment was made, we accept the Claimant's evidence that this comment was said. She has struck us as an honest witness throughout. Mr Kelly has not been honest with us and we reject his evidence where it conflicts with the Claimant's evidence. On this point Mr Kelly changed his own account in a way that further damages his credibility. His original evidence was to deny the making of the entire comment. He subsequently revised this to admit saying '*you look nice*' but deny saying '*no wonder I*

*employed you*'. He originally denied having an office affair and then was forced to admit that he had. We find that the full comment, *'you look nice, no wonder I employed you'* was said by Mr Kelly. We conclude on the balance of probabilities that he did tell the Claimant that he had not had sex for three months (a comment not relied on as harassment) and that he did try to engage the Claimant's partner's partner in a discussion about other pretty girls at the office party. We also find that he did engage in a work affair. All these behaviours are consistent and we find that the comment *'you look nice, no wonder I employed you'* was said, in or around June 2022.

104. The comment was plainly related to the Claimant's sex. It is more difficult to determine whether it had the purpose or effect of harassing the Claimant. Our hesitation stems from the fact that the Claimant, who has demonstrated she was not afraid to raise a complaint against Mr Kelly, did not raise a complaint about it at any point between June 2022 and her dismissal, or at any point afterwards. In those circumstances can we conclude that the comment harassed her?
105. This leads into our final consideration regarding this allegation of sexual harassment: time. The relevant chronology is as follows:
  - 105.1. June 2022: the Claimant's best guess as to when the *"you look nice, no wonder I employed you"* occurred;
  - 105.2. 5<sup>th</sup> September 2022: Claimant dismissed by Mr Kelly;
  - 105.3. 25<sup>th</sup> October 2022: the Claimant notified ACAS of a dispute with the Respondent;
  - 105.4. 6<sup>th</sup> December 2022: Claimant received her Early Conciliation Certificate from ACAS;
  - 105.5. 22<sup>nd</sup> December 2022: Claimant's Claim Form.
106. The Claimant's sexual harassment complaint must have occurred on or after 26<sup>th</sup> July 2022 to have been presented in time. This is three months less one day prior to the notification to ACAS, pursuant to s207B(4) **ERA**. The

Claimant's best estimation is June 2022. This puts the comment between 3½ and 7½ weeks out of time, depending on when in June it occurred. We cannot however be sure that it happened in June, as the Claimant cannot be sure about that. It could have happened earlier.

107. Clearly it was a single act of harassment. There is no basis for asserting that it continued past the date that it was said.
108. In determining whether it would be just and equitable to extend the time for the necessary period for the allegation to be in time, we note that the Claimant made no objection to the comment between the date she asserts it was made and her dismissal on 5<sup>th</sup> September 2022. We note that she had no concerns about raising other complaints against Mr Kelly. Following her termination, when the Claimant had nothing to lose, she did not file a grievance about the comment. We are troubled that the Claimant cannot recall when the comment was made with any sort of precision. We note that Mr Kelly's position has changed on what he recalls saying. The lack of any complaint may indicate that it was not harassing, and has only been added as a supplementary allegation to what was always her primary public interest disclosure case. Taking all those matters into account, we concluded that it would not be just and equitable to extend time for that allegation to be included.
109. In the circumstances this second allegation of harassment is also dismissed.

## **[7] Concluding Summary**

110. In drawing all of the above together, it is our Judgment that:

- 110.1. **The Claimant's claim of automatic unfair dismissal for making a public interest disclosure, pursuant to s103A Employment Rights Act 1996 ('ERA') is upheld.**



- 110.2. **The Claimant's claim of harassment related to her sex and/or of a sexual nature pursuant to s26 Equality Act 2010 ('EqA') is dismissed.**
111. A remedy hearing in respect of the public interest disclosure claim has been listed to be heard on 3<sup>rd</sup> February 2025. The directions for its preparation were given at the hearing and are recited here:
- 111.1. The Claimant to provide an up to date schedule of loss and any additional remedy documents / remedy witness statement by 16<sup>th</sup> December 2025;
- 111.2. Any remedy documents that the Respondent wishes to rely on must be provided by 16<sup>th</sup> December 2025;
- 111.3. The Respondent is to prepare a Remedy bundle by 16<sup>th</sup> January 2025.

**Signed by: Employment Judge Jonathan Gidney**

**Signed on: 18 December 2024**

**Annex 1 – List of Issues**

**Automatically Unfair Dismissal - s103A ERA**

- 1) Was the claimant dismissed?
- 2) Was the reason or principal reason for dismissal that the claimant made a protected disclosure?
- 3) If so, the claimant will be regarded as unfairly dismissed.

**Protected disclosure**

- 4) Did the claimant make one or more qualifying disclosures as defined in section 43B **ERA**? The Tribunal will decide:
- 5) What did the Claimant say or write? When? To whom? The Claimant says she made the following statements:
- 6) On 11 August 2022 in a conversation with Paul Manison, Technical Director:
  - a) “The company is breaching the covid reporting”.
  - b) “The Mezzanine floor was collapsed creating a risk and no action has been taken for a long time and then once repaired it was substandard and structurally unsafe, but Matthew Kelly tried to convince everyone at a board meeting that the job is done correctly. Also, the job has been carried out by one of Central Window Systems employee without any qualification and without structural engineering report/calculations”.
  - c) “Health & Safety training hasn’t been provided, like safety inductions, Risk Assessments and Safe Systems of Work have not been provided for our employees. The skills training matrix has not been conducted”.
  - d) “PPE was being worn by some and not others” (safety shoes, ear protection).
  - e) “The E stop button has not been placed properly - located in easy

- accessible reach”, [a button that stops a machine from running]
- f) “We do not have engineering staff in place. One of our employees was asked to carry out tasks without the required qualifications and knowledge to do it, for example electrician jobs or building structure jobs”.
  - g) G. “My report from November 2021 has not been implemented, it was a great risk in case of fire. Some of the fire exit doors had a punch code lock and some of the doors were opened inwards instead of outwards.”
  - h) “I couldn’t conduct any disciplinary actions as Matthew Kelly wouldn’t allow it.”
  - i) “I created the letter of concern to give to Emily Hale, but it was stopped by Matthew Kelly.”
  - j) “The KPIs had not been analysed as it should to improve the quality and Health & Safety issues. We probably had 4 meetings and then has been stopped by Matthew Kelly.”
  - k) “This is the same case that we had with Christina Walker. She was dismissed by doing her job properly, the same as me and we discovered many wrongdoings in the factory”.
- 7) On 16 August 2022, in a conversation with Kristie Hughes, Finance Director:
- a) “I spoke to Paul Manison about the situation and wrongdoings. I want to speak to Gary Morton about Matthew Kelly and all wrongdoings because I stuck with my work”.
  - b) “Matthew Kelly is tying my hands with H&S and quality”.
  - c) “PPE: safety shoes, ear protection have not been worn”.
  - d) “Letter of concerns regarding PPE I prepared have been stopped by Matthew Kelly”.
  - e) “No disciplinary actions had been taken as people had already been given”, [i.e. they had already been subject to disciplinary action]
  - f) “Roof/mezzanine floor collapse in Aluminium and Matthew Kelly tried to

convince me that everything is ok”.

- g) “SSoW - people haven’t been trained and we could prevent one of the near misses”.
- h) “There is a lack of training of team leaders”.
- i) “Epilepsy training been stopped due to lack of HR organisation.”

8) Did the Claimant disclose information?

9) Did she believe the disclosure of information was made in the public interest?

The Claimant says the following:

10) It was in the public interest to comply with the Covid restrictions, to protect other employees in the workplace.

11) It was in the public interest because employees and visitors could be injured or killed.

12) It was in the public interest because employees could be injured.

13) It was in the public interest because visitors could be injured.

14) Was that belief reasonable?

15) Did she believe it tended to show that:

a) A criminal offence had been, was being or was likely to be committed;

b) A person had failed, was failing or was likely to fail to comply with any legal obligation;

c) The health or safety of any individual had been, was being or was likely to be endangered;

16) Was that belief reasonable?

17) If the Claimant made a qualifying disclosure, was it a protected disclosure because it was made to the claimant's employer.

### **Harassment related to sex (s26 EqA)**

18) Did the Respondent do the following things:

- a) In or about June 2022, did the Respondent's Matthew Kelly say "you look nice, no wonder I employed you"
  - b) On 17 May 2022, did the Respondent's Matthew Kelly send a text message to the Claimant reading just got to nip to the shop if you get here early just go in the door is unlocked",
- 19) If so, was that unwanted conduct?
- 20) Was the unwanted conduct of a sexual nature or related to sex?
- 21) Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 22) Did the Respondent treat the Claimant less favourably because the Claimant rejected the conduct?
- 23) Did Matthew Kelly treated the Claimant less favourably by tying the Claimant's hands" with Health and Safety and quality by:
- a) Preventing her from conducting disciplinary actions May to July 2022,
  - b) Not allowing her to proceed with a letter of concern on 9<sup>th</sup> August 2022.
  - c) Not allowing meetings regarding KPIs to proceed May or June 2022.
- 24) Was the harassment claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
- 25) If not, was there conduct extending over a period?
- 26) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 27) If not, were the claims made to the Tribunal within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
- a) Why were the complaints not made to the tribunal in time?
  - b) In any event, is it just and equitable in all of the circumstances to extend time?