EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms T Diakoumis	and	Qantas Cabin Crew (UK) Limited

Heard at Reading on: Hearing - 31 October, 1, 5, 6, 7 November 2018
In chambers – 12, 13 December 2018

Tribunal: Employment Judge: Mr SG Vowles
Members: Ms CM Baggs and Ms HT Edwards

Appearances:

For the Claimant: Mr J Arnold, Counsel
For the Respondent: Mr M Pilgerstorfer, Counsel

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Direct Age Discrimination – section 13 Equality Act 2010

2. The Claimant was not subjected to direct age discrimination. This complaint fails.

Protected Disclosure Detriment - section 47B Employment Rights Act 1996

3. The Claimant was not subjected to protected disclosure detriment. This complaint fails.

Automatically Unfair Dismissal - section 103A Employment Rights Act 1996

4. The Claimant was not automatically unfairly dismissed. This complaint fails.

Unfair Dismissal - section 98 Employment Rights Act 1996

5. The Claimant was unfairly dismissed. This complaint succeeds. A remedy hearing will take place on a date to be fixed.

Victimisation - section 27 Equality Act 2010

6. The Claimant was not subjected to victimisation. This complaint fails.

Unauthorised Deduction from Wages - section 13 Employment Rights Act 1996 / Breach of Contract – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

7. The Claimant did not suffer an unauthorised deduction from wages. She received all that was properly payable under her contract of employment.

Reasons

8. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

1. On 17 August 2017 the Claimant presented her claims to the Tribunal.

2. On 26 September 2017 the Respondent presented a response and denied all the claims.

3. A case management preliminary hearing was held on 12 December 2017. The claims were clarified in a case management order as follows:

   Direct Age Discrimination – section 13 Equality Act 2010;

   Protected Disclosure Detriments – section 47B Employment Rights Act 1996;

   Automatically Unfair Dismissal – section 103A Employment Rights Act 1996;

   Unfair Dismissal – section 94 Employment Rights Act 1996;

   Victimisation – section 27 Equality Act 2010;

   Unlawful Deduction from Wages – section 13 Employment Rights Act 1996;

   Breach of Contract – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994.

4. The Claimant was ordered to provide further and better particulars of some of the claims which she did as follows:

Schedule 1 – Protected Disclosures x 6;
Schedule 2 – Protected Disclosure Detriments x 19;
Schedule 3 – Age Discrimination Detriments x 12.
(See Appendix attached to this Judgment)

5. The Respondent then presented an amended grounds of resistance in response the further and better particulars.

EVIDENCE

6. The Tribunal heard evidence on oath from the Claimant, Ms Tessa Diakoumis (Customer Service Manager).

7. The Tribunal also heard evidence on oath on behalf of the Respondent from:

   Mr Richard Hampton (Service & Performance Manager and dismissing officer);
   Ms Dannielle Morgan (Manager and appeal officer);
   Ms Simone Rosslind (Senior HR Consultant).

8. The Tribunal also read a witness statement from Ms Cassie Radford (Customer Experience Delivery Manager) who did not attend the hearing. On her behalf, Mr Hampton, in a second witness statement explained that Ms Radford had now left the Respondent and taken up a new appointment in Germany and, due to the requirements of her new job, she was unable to attend the Tribunal to give evidence on behalf of the Respondent. Mr Hampton also provided them some support for parts of Ms Radford's witness statement where such matters were within his direct knowledge.

9. The Tribunal also read documents provided by the parties running to 1,700 pages contained within 4 lever arch files.

10. From the evidence heard and read, the Tribunal made the following findings of fact and findings.

FINDINGS OF FACT

11. The Claimant was employed as cabin crew by the Respondent for 27 years, initially by Qantas Airways Limited and then for the last 13 years for Qantas Cabin Crew (UK) Limited. Since 2001, the Claimant has been employed as a Customer Service Manager.

12. Airports are broadly divided into landside and airside areas. Landside areas are normally accessible to the public without security checks. Access to airside areas, however, requires stringent security checks for obvious reasons. Until 2014 all cabin crew were required to be in possession of a valid British Airports Authority (BAA) pass which was a security and identity pass. Individuals were required to complete rigorous

background checks before they were granted a BAA pass. In 2014 cabin crew were required to change from a BAA pass to an Aviation Security Identification Card (ASIC) which had a similar effect and purpose as that of a BAA pass. Again, it involved the completion of a rigorous background check.

13. It was a legal requirement that a valid ASIC pass must be displayed by all operational cabin crew who accessed any secure area of an airport into which the Respondent operates an aircraft. An ASIC is valid for two years and must be renewed in advance of its expiry.

14. In June 2014 ASICs were due for renewal but the Claimant failed to comply with the deadline despite a number of emails sent to her by her line manager, Ms Radford, reminding her of the deadline for submission and outstanding requirements. On 14 July 2014 the Claimant eventually submitted all of the required documentation. Although this was 3 weeks after the expiry of the deadline, no formal or informal warning was given to the Claimant as a result of the matter.

15. In May 2015 the Respondent contacted all relevant employees, including the Claimant, to explain that the ASIC renewal process was moving from a paper process to an electronic application process to be completed online. Detailed instructions were provided setting out the requirements and process for ASIC renewals.

16. On 6 January 2016 the Respondent contacted all relevant employees to inform them that they would each be required to complete and submit an online "Disclosure Scotland application form" (a security clearance form) at least 3 months prior to the expiry date of their ASIC and that included a link to the Disclosure Scotland website.

17. On 22 May 2016 the Claimant was sent an electronic link to the ASIC renewal portal because her ASIC was due to expire on 31 July 2016. The Claimant failed to complete the renewal process despite automated reminders sent on 5 June, 19 June, 3 July, 17 July and 11 August 2016.

18. On 25 August 2016 Ms Muller (Learning & Development Manager) wrote to the Claimant as follows:

"Dear Tessa
Thank you so much for calling back today, so glad you have your phone sorted. Below is just a quick summary of our phone call.

- *I confirmed that you have been withheld from service due to your expired ASIC*
- *I advised that it is a regulatory and Group Security requirement that all crew operating in the Qantas group must hold a valid ASIC*

- *I advised that the decision to withhold from service was a Head Office/Security directive that will be mandated closely moving forward and a number of crew have been affected*
- *I advised that it is a condition of your employment contract that you maintain your security clearance*
- *I advised that you will be provide the opportunity to respond to the allegations*
- *You have advised that Clare Pierce has signed your supporting documentation for your ASIC application*
- *You confirmed to me you have already submitted your on-line ASIC renewal application and it was Qantas' processing times that had delayed your renewed ASIC being issued.*

As discussed you will be provided with the allegations in writing and next steps in due course. If I require further information as part of this investigation I will be in contact. I will work to resolve as soon as possible."

19. From that date, the Claimant was stood down from flying duties and, accordingly, while stood down, only received her basic salary and not the additional flying pay because she was grounded.

20. On the same date, 25 August 2016, Ms Radford wrote to her other senior managers (including Mr Hampton) to inform them that 7 cabin crew members, including the Claimant, had expired ASICs and that all 7 had been stood down from flying duties on the direction of the Security Director. It was confirmed that these crew members could not be issued temporary IDs until their clearances had been completed. Ms Radford confirmed that all 7, including the Claimant, would be likely to have disciplinary action taken against them. The Claimant however was the only one who had claimed that her application had been submitted. The entry relating to the Claimant read as follows:

"Tessa Diakoumis (CSM)
Expiry 31 July
Application Not Submitted
Has operated to Australia during the 3 week period of non-compliance
Has claimed the application has been submitted. Has not produced any documentation. Information provided by ID Services advises that she has been sent the link 6 times and has not accessed at all.

Disciplinary Action: At investigation stage, will likely progress to disciplinary.
Removed from service due to expired ASIC: 23 August."

21. On 15 September 2016 the Claimant was sent an invitation to a disciplinary meeting which contained the following allegations:

"RE: DISCIPLINARY HEARING REGARDING ALLEGATIONS OF BREACH OF STANDARDS OF CONDUCT

This is to inform you that on behalf of Qantas Cabin Crew UK ("Company") you are required to attend a disciplinary hearing regarding the following alleged behaviour/conduct

Background information
Your Aviation Security Card (ASIC) expired on 31 July 2016

Having the above, it is alleged that:

1. *You were initially sent an electronic link on 22 May 2016 to commence the ASIC renewal process and whilst you viewed the notification, you did not complete the required application process.*
2. *The Company has been advised by ID Services that follow up links to renew your ASIC were sent on 22 May. 05 June, 19 June, 3 July, 17 July, 11 August 2016 which were also not completed.*
3. *On Thursday the 8th of September you were requested to provide the Company with a current security clearance (Disclosure Scotland). The resolution of the Disclosure you provided on Friday the 9th September was illegible.*
4. *On Monday the 12th September a further request was made for you to provide the Company with a current security clearance (Disclosure Scotland). The Disclosure Scotland you provided on Tuesday the 13th September was dated 2014.*

…..

The alleged behaviour appears to be in breach of the Standards of Conduct Policy (a copy of this policy is enclosed) with particular reference to the following sections.

Standards of Conduct
1.2 Personal Behavioural Standards
(b) Abide by laws and regulations
- *Meet all legislative or regulatory requirements which are applicable for you position*

1.4 Gross Misconduct
Conduct which would constitute Gross misconduct includes but is not limited to:
(d) Deliberately providing incorrect or misleading information, at any time, which is relevant to your employment.

(j) Breach of any laws and regulations relevant to your duties or the performance of them.

Employment Contract

Conditions of Employment
15. Passports and other Security Documents

15.2 Whilst at work in a protected or 'security' area or other similar area, you will be required to comply with all relevant national legislation (including regulations) imposed by the host country in respect of that area. The Company will make arrangements to apply for and secure the necessary permit for you to enter the protected, security or other similar area on the condition that your application is acceptable to the Government or other controlling authority of any such protected, security or other area.
15.3 It is a condition of your employment that you maintain your security clearance in accordance with the requirements of the relevant authorities."

22. On 28 September 2016 the Claimant attended a disciplinary hearing chaired by Mr Hampton and also attended by Ms Rosslind (HR Officer) and Mr Joe McGowan (Claimant's Trade Union representative). It was the Respondent's company policy not to provide minutes of disciplinary meetings but to send a letter confirming the outcome of the meeting. Accordingly, Mr Hampton wrote to the Claimant on 7 October 2016 in a letter headed *'Disciplinary Hearing regarding allegations of breach of standards of conduct and conditions of employment – findings'.* The letter confirmed that the 4 allegations set out in the invitation letter quoted above had been substantiated. Mr Hampton added the following:

"Disappointingly, throughout this investigation your responses have been inconsistent, vague and unreliable.
…
To recap, you initially asserted your Disclosure Scotland application was submitted in June 2016, however you were unable to find your original document or a copy of same, to support your assertion in this regard. You continued with this assertion despite being provided with documentation from our ID Services team, confirming that you did not actually access the link to commence the ID renewal process until 11 August 2016.

On 9 September 2016 you then supplied an illegible copy of a basic disclosure document to the initial investigation. When questioned on the quality of the document you supplied, you cited technical issues with your computer. After several requests for an improved copy of the document, you supplied a basic disclosure document dated 2014. When this was highlighted to you, you advised that you had misplaced the June 2016 copy and were unable to find it. Eventually you supplied a basic disclosure dated September 2016. When the Company queried the date of the document in comparison to your assertions of a June 2016 initial ID renewal application, you asserted that Disclosure Scotland were unable to

provide you with a reprint of your original basic disclosure from June 2016, requiring you to resubmit the application in September 2016.

It was only after the Company highlighted the diversity in your version of events surround the basic disclosure document, that you finally advised that you are under a great deal of stress from personal issues outside of the workplace that are affecting your wellbeing. Following a short break in our meeting to facilitate consultation with your support person, Mr Joe McGowen, you both returned to the meeting where Mr McGowan ultimately confirmed on your behalf that you actually cannot recall the events of the past few months and offered that it could be the case that you hadn't submitted your ID renewal application until sometime in September 2016.

Having regard to all of the above, on the balance of probabilities, you have been found to have been untruthful in your response and approach to this process. The Company has concluded that your responses were deliberately untruthful, misleading and the ineligible documentation submitted with the sole intent to deceive and obstruct the disciplinary process.

…

Further Response prior to determining Outcome

Tessa, these findings are very serious and the Company is considering the termination of your employment. Before making a final determination of the appropriate outcome, I would like to provide you with some time to consider the findings of this investigation and your employment history with Qantas.

I invite you to provide a written response as to why your employment should not be terminated. Please provide your response by COB 13 October 2016."

23. On 17 October 2016 the Claimant provided a written response to Mr Hampton's findings.

24. On 23 December 2016, Mr Hampton wrote to the Claimant with a further allegation. The letter contained the following:

"Dear Tessa

RE: DISCIPLINARY HEARING REGARDING ALLEGATIONS OF BREACH OF STANDARDS OF CONDUCT

This is to inform you that on behalf of Qantas Cabin Crew (UK) Ltd ("Company") you are required to respond to further Allegations regarding your behaviour/conduct. I note that we are due to meet to discuss your response to the disciplinary hearing outcome dated 6 October, however

given the nature of this new information, this meeting will be deferred until I have had sufficient opportunity to consider your response to the below.

Background information
Manager Customer Experience Delivery, Kate Muller sent an email to you on 24th October 2016, requesting to meet with you on 23rd November 2016. A read receipt was sent with this email and confirmation was received as read on 25th October 2016.

Having regard to the above it is alleged that

1. *On 19th November 2016, you made a Staff Travel booking to travel to Sydney departing on 19th November. Your return date was booked to depart Sydney on 23rd November 2016 meaning it would not be possible for you to be present in London for your scheduled meeting with Manager Customer Experience Delivery Kate Muller on 23rd November 2016.*

An investigation procedure was completed by Ana Hemon, Service and Performance Manager, on 20 December 2016.
…
As part of the disciplinary hearing process, you are required to respond to the allegations above in writing by 30 December 2016."

25. On 16 February 2017 the Claimant wrote to Mr Hampton with her response to the allegations. Her response included the following:

"Regarding Email

I was unaware of the email dated 24th October 2016, Kate Muller has sent inviting me to attend the Grievance Outcome meeting.

It appears that it was Kate's intention to confirm my attendance prior to the commencement of Annual Leave. Clearly, I did not reply to that email and therefore, if Kate had not heard back from me, I question as to why there was not a follow up especially being aware of previous email problems which I have detailed below. It is concerning that Qantas is seeking to rely on a "read receipt" to try and pin yet another allegation on me.

Furthermore, I query why my personal email was not included, as has been the case, due to previous problems – detailed below.

I cannot explain why the read receipt was created. I can only confirm that I did not read the email and that it is has been accepted that I have had issues with the Qantas email system. I also suspect that my emails are potentially being accessed and/or monitored without my knowledge.

With the enormous concerns and anxiety that I was experiencing at this time, my priority was to check on my health symptoms, so I was not able to focus on emails at the time due to my state of mind and health issues."

26. On 24 February 2017 a second disciplinary hearing was held, again chaired by Mr Hampton and attended by Mr Ian Catlin (Aviation Safety Co-ordinator) and the Claimant was again accompanied by Mr Joe McGowan.

27. In an outcome letter dated 2 March 2017, Mr Hampton confirmed to the Claimant that he found the allegation substantiated and, as before, invited the Claimant to provide a written response to his outcome letter.

28. On 11 March 2017 the Claimant provided a written response which included the following:

"Re: Disciplinary Hearing Regarding Allegations of Breach of Standards of Conduct and Condition of Employment – Findings

I do not accept any of the allegations which you uphold in your letter dated 2nd March 17.

It is clear from the tone of the hearing and your letter that Qantas had predetermined my termination and is now simply going through the motions of a procedure."

29. On 20 March 2017 the Claimant attended a "show cause" meeting chaired by Mr Hampton and attended by Ms Rosslind (HR Consultant) and the Claimant was again accompanied by Mr Joe McGowan.

30. On 28 March 2017 the Claimant wrote to Mr Hampton regarding the show cause meeting. In the letter she claimed that the decision to dismiss her had been predetermined, she questioned who had the authority to terminate her employment, denied any breach of trust and integrity, referred to her own employment history and confirmed that she wished to appeal.

31. On 6 April 2017 in a lengthy and detailed letter, Mr Hampton confirmed that the Claimant's employment was summarily terminated by reason of gross misconduct. The letter included the following:

"Outcome – Termination of Employment

QCCUK has taken all relevant matters into account, including your written responses to the Allegations, the findings of the disciplinary hearing, other relevant information obtained during the process and your employment history with the Qantas Group. Consideration has also been given to your position as a Manager, your leadership responsibilities and role within the broader QCCUK leadership team.

In reviewing all of the information available, it is clear that you are willing to actively mislead QCCUK for reasons that are known only to you, whilst at the same time you appear equally prepared to level unfounded and unsupported accusations towards members of the QCCUK leadership team in an effort to deflect attention away from the core issue of your behaviour. When viewed in its entirety, your conduct throughout this process, which has amounted to, and we are treating as, gross misconduct, which has damaged our trust and confidence in you to the extent that I believe we have well beyond the point where the continuation of your employment is a viable option.

In the circumstances, given the serious nature of the substantiated allegations contained in the Findings Letter, Qantas Cabin Crew (UK) has determined that your employment will be terminated, effective 6 April 2017. You will be paid four weeks pay in lieu of notice and the balance of any unused annual leave entitlements up to and including 6 April 2017."

32. The Claimant appealed against the dismissal and an appeal meeting was held on 24 April 2017 chaired by Ms Morgan. Also attending were Ms Louise Evans (Regional Operations Manager) and the Claimant was again accompanied by Mr McGowan.

33. On 12 May 2017 Ms Morgan provided a written outcome to the appeal which was refused. Ms Morgan summarised her reasons for her decision as follows:

"Reasons for my decision
My review of the documentation supplied to the investigation, disciplinary hearing, grievance and Appeal Letter (the Documentation) has confirmed the core issue in this case is that of your dishonesty and your willingness to deliberately mislead QCCUK, which has resulted in an irrevocable breakdown in the trust and confidence required in an employment relationship. I have found this on the basis of your following substantiated conduct in relation to acts of dishonesty and your willingness to mislead QCCUK throughout the disciplinary hearing process."

DECISION

Direct Age Discrimination

34. Equality Act 2010

Section 13 – Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

35. Under section 39 an employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment.

36. These 12 claims were clarified in schedule 3 of the further and better particulars of claims.

Schedule 3 – Age Discrimination Detriments - See Appendix

37. The Tribunal considered whether it had jurisdiction to consider these claims in view of the time limit contained in section 123 Equality Act 2010.

38. Equality Act 2010

Section 123 – Time limits

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) *such other period as the employment Tribunal thinks just and equitable.* …

(2) For the purpose of this section -
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

39. It was agreed by the parties that, for the purposes of consideration of time limitation, Day A was 6 April 2017 and Day B was 20 May 2017 (six weeks). The claim was presented on 17 August 2017. Any allegation before 6 April 2017 is therefore prima facie out of time.

40. It follows that, so far as the direct age discrimination claims are concerned, all the complaints were presented out of time except for Detriment 31 which relates to the allegation of unfair dismissal and is dealt with below. So far as all the other remaining complaints of direct age discrimination are concerned, the Tribunal found as follows taking account of the 3 month time limit and the case law authorities referred to above.

41. The Tribunal considered whether the allegations of direct age discrimination amounted to conduct extending over a period.

42. In Barclays Bank v Kapur [1991] the court drew a distinction between a one-off decision and a continuing state of affairs. In the case of Hendricks v Commissioner of Police for the Metropolis [2002] it was said that the context of policy, rule, practice, scheme or regime in the authorities were

given as examples when an act extends over a period, this should not be treated as a complete and constricting statement of the indicia of an act extending over a period. Instead, the focus should be on the substance of the complaints that the commissioner was responsible for, an ongoing situation, or a continuing state of affairs in which female ethnic minority officers were treated less favourably. The question is whether that was an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

43. That case was approved by the Court of Appeal in the case of Lyfar v Brighton and Sussex University Hospitals Trust [2006] where it was said that the test to be applied was to consider whether the Claimant had established a prima facie case. In that case, the court accepted the counsel's submission that the Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period.

44. Another way of formulating the test to be applied is to consider whether the Claimant has a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.

45. The Tribunal found that there was no reasonably arguable basis for the contention that the complaints of age discrimination amounted to conduct extending over a period. Detriments 20 to 30 may have amounted to unwelcome or unfair treatment in the view of the Claimant, but there was no evidence that the alleged treatment was because of, or in any way related to, age.

46. Only detriment 28 included a mention of age and the Tribunal did not find that it amounted to direct discrimination. It was simply a statement of fact without any indication of animosity, detriment or less favourable treatment.

47. Additionally, the various complaints involved alleged treatment by different people (Cassie Radford, Julianne Rogers and Kate Muller) and there were significant gaps in time between the alleged detriments. They were all plainly individual events which could not be connected together and regarded as a course of conduct or a continuous act.

48. The Tribunal also considered whether there were just and equitable grounds to extend the time limit. In Robertson v Bexley Community Centre t/a Leisurelink [2003] IRLR 434 the Court of Appeal stated that when employment tribunals consider exercising the discretion to extend the time limit there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

49. In British Coal Corporation v Keeble [1997] it was said that the factors that a Tribunal may have recourse to when making such a decision are the length and reasons for the delay, the cogency of the evidence and whether it is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the Claimant acted once he knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action.

50. The Claimant provided no evidence regarding the reason for the delay in presenting these claims to the Tribunal nor did she provide any grounds for the Tribunal to extend time under the just and equitable principle. The burden is upon the Claimant to make a case for extending time.

51. There was nothing in her witness statement regarding time limits. During the course of her evidence, she said that although she was taking advice from a solicitor since August 2016 regarding her suspension from flying duties, she did not wish to upset management or inflame the situation by making a claim to the Tribunal. It was only when her employment was terminated that she decided to do so. She also asserted that she had been in personal crisis for a long while and this had affected her ability to present a claim. During cross-examination, she was asked for the reason for the delay in presenting her claims and she said that she had received legal advice that if she made a claim she would be labelled “difficult”.

52. Taking account of the factors suggested in Keeble, the Tribunal found as follows:

53. The delay in presenting the claims was lengthy. The dates of the alleged acts of discrimination ranged from March 2014 to November 2016. The claim was presented on 17 August 2017. The Claimant provided no good reason for this level of delay.

54. The cogency of the evidence was affected. At the Tribunal hearing, witnesses were required to recall events going back over 4 years. Additionally, in the intervening period, 4 witnesses the Respondent wished to call, and who would have been able to give relevant evidence to the Tribunal, had left their employment with the Respondent, namely Julianne Rogers, Kate Muller, Ana Hernon and Cassie Radford. Ironically, the Claimant criticised the Respondent for not calling these witnesses. In particular, Cassie Radford was the subject of many of the claims and she had initially agreed to give evidence and had provided a witness statement but she had recently accepted a job offer in Germany and that prevented her from attending the Tribunal hearing. Ms Rogers had retired to Australia.

55. Even though the Claimant was receiving legal advice from, at the latest, April 2016, she did not present her claim to the Tribunal until some 16

months later. Although the Claimant was absent on sick leave at various points, this did not prevent her from engaging with the Respondent's processes and producing detailed and lengthy documents and she did not go so far as to say that any medical condition prevented her from presenting the claim any earlier.

56. In the above circumstances, the Tribunal could find no arguable grounds for an extension of time based upon the just and equitable principle.

57. Accordingly, the Tribunal found that the complaints of age discrimination were presented out of time and there were no grounds to extend time. The Tribunal therefore has no jurisdiction to consider these complaints.

Protected Disclosures

58. Employment Rights Act 1996

Section 43A - Meaning of protected disclosure

In this Act a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Section 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-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

59. The Court of Appeal in Chesterton Global Ltd v Nurmohamed [2017] IRLR 837 held that to be in the public interest, a disclosure had to serve more than a private or personal interest of the worker making the disclosure. As Underhill LJ put it:

"I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest.

…

The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

…

Against the background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

…

The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para 34 above may be a useful tool...

The factors referred to as a useful tool were:

(a) *The numbers in the group whose interests the disclosure served - see above;*
(b) *The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed - a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of a trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
(c) *The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
(d) *The identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."*

60. The alleged 6 protected disclosures were set out in schedule 1 of the further and better particulars.

Schedule 1 – Protected Disclosures – See Appendix

61. The Respondent submitted that none of these matters amounted to a protected disclosure within section 43B because they did not have the requirement of public interest element but were concerned solely with the private and personal interests of the Claimant.

62. The Tribunal found that the "cigarette information" disclosures did amount to protected disclosures within the meaning of section 43B(1)(a)(b) and (f). It was disclosure repeated in a similar format on five occasions and although it may have been, as submitted by the Respondent, in the personal interest of the Claimant to disclose these matters, it was also clearly in the public interest. It would be rare if the disclosure of a criminal offence being committed was not in the public interest.

63. The Tribunal did not find that any of the other matters amounted to protected disclosures.

64. The reference to ASIC envelopes was raised by the Claimant to counter the allegation against her of failing to apply for an ASIC card in 2014 and again in 2016. It was a disclosure of information solely concerned with the Claimant's own predicament on those occasions. There was no public interest element involved.

65. Similarly, the reference to alleged age discrimination referred to her own personal circumstances and her own career progression. There was no public interest element involved.

66. It follows that of the alleged protected disclosures, the Tribunal found that only those relating to the "cigarette information" qualified as a protected disclosure.

Protected Disclosure Detriments

67. Employment Rights Act 1996

Section 47B - Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (W) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

Section 48 - Complaints to employment tribunals

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1), (1ZA), (1A), or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

68. In Ministry of Defence v Jeremiah [1980] ICR 13, the Court of Appeal said that "detriment" meant simply "putting under a disadvantage" and that a detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. What matters is that, compared with other workers (hypothetical or real) the complainant is shown to have suffered a disadvantage of some kind. Someone who is treated no differently than other workers, even if the reason for an employer's treatment is perceived to arise from, or be connected to, the act of making a protected disclosure, will find it difficult to show that he or she has suffered a detriment.

69. The alleged 19 protected disclosure detriments were set out in Schedule 2 of the further and better particulars. The Respondent's response to each one is also included.

Schedule 2 – Protected Disclosure Detriments – See Appendix

70. In order to succeed with such claims, the Tribunal must be satisfied that the Claimant was subjected to a detriment and that the detriment was on the ground that the Claimant had made a protected disclosure in that it at least materially influenced the treatment - Fecitt v NHS Manchester [2012] ICR 372.

71. Section 48(2) of the Act requires the Respondent to show the ground on which any act or deliberate failure to act was done. The Respondent therefore provided, in its submissions, an account of the grounds for the alleged treatment. These grounds are included in respect of each one of the alleged detriments in bold in schedule 2 in the Apendix. The Tribunal found that each one of these explanations for the treatment was supported by evidence adduced during the course of the hearing and the Tribunal accepted the explanations in each case.

72. Additionally, the Tribunal found it wholly implausible that the only matters which amounted to protected disclosures, namely the "cigarette information" which was first raised by the Claimant in 2014 and repeated on four occasions since then to March 2017, would have given rise to the alleged detrimental treatment. There was no evidence of any hostility or animosity towards the Claimant for having properly raised these matters

with her managers. The Respondent provided plausible, non-discriminatory reasons for the treatment in each case.

73. Additionally, and importantly, the Claimant produced no evidence whatsoever, despite being pressed in cross-examination, to support her allegation that the protected disclosures influenced any of the alleged detriments. When asked why she was claiming that the alleged detrimental treatment was because of a protected disclosure, she said on one occasion that she could not answer but believed they were linked and on another occasion, she said they could be linked but she was not sure and she will never know why she was treated unfairly.

74. The Tribunal also noted that several alleged detriments were not put to the Respondent's witnesses in cross-examination where the witness was alleged to have committed that detriment.

75. Evidence of a causal link between protected disclosures and detriments simply did not exist.

76. In the absence of any evidence of a causal link and the Respondent's witnesses having satisfied the burden of proof under section 48(2) of the Act, the Tribunal was satisfied that there was no evidence to support the claims of protected disclosure detriment.

Automatically Unfair Dismissal

77. Employment Rights Act 1996 - *Section 103A*

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

78. As set out below under the section dealing with Unfair Dismissal, the Tribunal found that the true and sole reason for dismissal was misconduct.

79. There was no evidence that the disclosures found to be protected disclosures above, influenced in any way the disciplinary process or the decision to dismiss.

80. It was not put to Mr Hampton in cross-examination that the reason for his decision to dismiss was influenced by any of the alleged protected disclosures. There was simply nothing in any of the evidence heard and read by the Tribunal to indicate that it did so. Additionally, as found above regarding the allegations of detriments, it was implausible that disclosures regarding unlawful importation of cigarettes by others would have influenced the disciplinary process or the dismissal. The Tribunal found they were wholly unconnected with those disclosures.

81. The Claimant has not shown that there is a real issue as to whether protected disclosures were a reason or principal reason for the dismissal. On the contrary, the Respondent's witnesses discharged the burden of showing that the true reason for the dismissal was misconduct.

82. In the absence of any supporting evidence, reliable or otherwise, the Tribunal found that the claim for automatically unfair dismissal was not well founded.

Unfair Dismissal

83. *Employment Rights Act 1996*
Section 98

(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

… (b) relates to the conduct of the employee, …

(3) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

84. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by her employer.

85. The Respondent claimed that the Claimant was dismissed by reason of misconduct.

86. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including

British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.

87. Firstly, whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.

88. Secondly, whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4). In particular, did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.

89. Thirdly, the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses test. That test applies to all stages in the procedure followed by the employer, including the investigation, the dismissal and the appeal.

90. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.

91. The Claimant summarised this claim in written closing submissions as follows:

Disciplinary Matter (1)

8_For Disciplinary Matter (1), the Disciplinary Officer found an additional 15 or so additional breaches of the Respondent's policies, without notifying the Claimant of those alleged breaches of policy and without giving her an opportunity to answer them. …

9_The only possible viable charge with which the Claimant was originally charged for Disciplinary Matter (1) was deliberately providing incorrect or misleading information. The other charge, breach of legislative or regulatory requirements was not made out – Mr Hampton was unable to point to any law or regulation that the Claimant had breached.

10_As to the charge of deliberately providing incorrect misleading information, Mr Hampton:

10.1_failed to give proper weight to:

10.1.1_the Claimant's preparatory steps to renew her ASIC pass…

10.1.2_the Claimant's maintained position and belief throughout the process until the middle of Disciplinary Heating (1), that she had renewed her ASIC when she could have simply admitted that she had not done it. This was in light of 27 years' near unblemished service; and

10.1.3_the fact that the Claimant had no motive for lying;

10.2_failed to consider the (better and more plausible) possibility that the Claimant was in crisis for a number of personal reasons, and adjourn the hearing to seek medical opinion to determine this matter one way or another;

Disciplinary Matter (2)

11_In finding that Disciplinary Matter (2) was substantiated, Mr Hampton:

11.1_Misconstrued the Claimant's written response and found it to be inconsistent with her oral response. …

11.2_failed to adjourn the hearing and establish whether a read receipt could be generated by someone else at the Respondent, …

11.3_failed to take into the Claimant's actions in booking her leave, which were consistent with not having read the e-mail;

11.4_had already formed a prejudicial and/or pre-decided view:

11.4.1_of the Claimant's behaviour in not attending a previous meeting (it was disappointing and "immature"), but failed to recuse himself from hearing Disciplinary Matter (2); and

11.4.2_that Disciplinary Matter (2) was a "fairly open and shut case" when it clearly was not;

11.5_had failed to progress the matter of the Claimant's ASIC application directly with her despite informing Sarah Whiteside that he would do. …

Overall fairness

12_The Claimant was not interviewed:

12.1_about the fresh allegations (Allegations 3 and 4) before Disciplinary Hearing (1); and

12.2_at all about Disciplinary Matter (2), despite stating in her response she was unclear about the allegations.

13_Further, with a lack of presentation of the management case by the Investigating Officer (or someone else), Mr Hampton assumed that role at Disciplinary hearing (1). He was given a list of questions by Cassie Radford to ask the Claimant, he titled his preparatory notes 'Investigation meeting' and there was no investigator/presented present. …

Lack of minutes

14_The Claimant was never provided with notes of any meetings to which she was subject. …

92. The Tribunal found that the true and sole reason for the Claimant's dismissal was misconduct.

93. The Claimant's claims that the dismissal was not for misconduct but was on the grounds that she had made a protected disclosure and/or an act of age discrimination and/or was an act of victimisation because the Claimant had made a complaint of age discrimination were without any evidential foundation.

94. The mere fact that the Claimant had made protected disclosures and made an allegation of age discrimination were not, by themselves, any basis for the Claimant's claims. There was no evidence of any causal link between these matters and the dismissal. On the contrary, the Tribunal found positive evidence of the Respondent's belief in the Claimant's misconduct in respect of both the first and the second allegation. The misconduct investigation and procedure and the dismissal itself were all well documented, despite the absence of meeting minutes. The documentation available to the investigators and the dismissal officer were put before the Tribunal to consider.

95. The Tribunal found however that the dismissal was unfair for the following reasons.

96. Mr Hampton, the dismissing officer, was appointed to conduct the disciplinary hearings on 28 September 2016 and 24 February 2017 because Ms Radford was not available. However, it is clear that Mr Hampton had previously had extensive knowledge of, and dealings with, the disciplinary process in August and September 2016. For example, on 12 August 2016, Mr Hampton wrote to two colleagues (Sarah Whiteside and Simon Rosslind):

"Hi Sarah
Thank you for your assistance with regard to LHR CSM, Tessa Diakoumis who is currently operating a pattern to AUS on a temporary ASIC card. It has come to our attention that CSM Diakoumis has not yet lodged an ASIC application meaning that we are not in receipt of a current background

check. Are you able to advise if there is an regulatory/legal risk in allowing CSM Diakoumis to continue operating her rostered pattern in light of this?"

97. He was appointed on 22 September 2016 to deal with the disciplinary hearings having been involved in part in the investigation of the first allegation and was clearly involved in instigating the investigation into the Claimant's failure to apply for the ASIC pass.

98. Shortly before the first disciplinary hearing, the Claimant wrote to Mr Hampton on 26 September 2016 with her response to the allegations against her and in part of that response she said:

"I have a grievance as to Cassie Radford's treatment of me over the course of several months which I intend to forward to Qantas shortly. In the circumstances, I believe it would be unfair and inappropriate for Cassie to be a decision-maker in relation to the outcome."

99. Despite this, on 28 September 2016, shortly before the disciplinary hearing, Ms Radford wrote to Mr Hampton providing a list of questions which he should ask the Claimant as follows:

"Here's a quick list of questions I think could assist in today's meeting. I don't know if there is much more she would like to add as it's quite a straightforward meeting with her disclosure still not submitted. She may however bring new information in.

Can you also probe with her at the end any concerns regarding the process and to draw distinction between the disciplinary process and grievance. She can submit a grievance at this stage if she has concerns however it is my understanding both processes happen in isolation to one another.

Above all – if you can also remind Tessa that we have applied the disciplinary process to all crew who were non compliant with ASICs – it's unfortunate though that due to Tessa's participation, we have been unable to resolve this as quickly as the others.

I know you'll have it covered however can you please probe any last opportunity for Tessa to provide reasons why her behaviour has not been cooperative? In addition – if there is anything else that she would like to disclose as we are nearing the pointy end of this process and we obviously want to take into consideration all and any information prior to determining any outcomes.

Let me know if you have any questions – out of wifi for the next few hours however if you send a direct text I'll receive."

100. Mr Hampton confirmed in his witness statement that he received these questions from Ms Radford and although no minutes of the meeting were produced, there is nothing to suggest that he did not put these questions to

the Claimant or that he told the Claimant that he had received questions from Ms Radford.

101. In an organisation as large as the Respondent, it would have been a simple task, in accordance with paragraph 6 of the ACAS Code of Practice, for different people to carry out the investigation and the disciplinary hearing. Mr Hampton was clearly involved at early stages investigating the first allegation against the Claimant. The intervening list of questions from Ms Radford was clearly an attempt to influence the conduct of the disciplinary hearing. In these circumstances, Mr Hampton should have stood aside and allowed a completely independent manager to conduct the disciplinary hearing. The Tribunal found that his failure to do so was sufficient to make the dismissal, which was based in part upon the disciplinary hearing on 28 September 2016, unfair.

102. Additionally, his reliance upon the Claimant's failure to comply with an updated policy, produced on 4 October 2016, that is after the first disciplinary hearing, also made the dismissal unfair.

103. So far as the second allegation was concerned, at the second disciplinary meeting on 24 February 2017, Mr Hampton was challenged by Mr McGowan, the Claimant's trade union representative, that the Claimant had not been interviewed about the matter before the disciplinary hearing. The exchange included the following:

"JM Okay, well let me, let me tell you Richard, er, since you, you're not aware Ana Hemon did not speak to Tessa before she, er, concluded her investigation.

RH That's not abnormal, um, if it's a fairly open-shut kind of case.

JM Would it not be normal to ask somebody's version of events before…

RH Well, that's what this is for

JM Well, no, before you decide whether to take it to a disciplinary hearing. That would be normal, wouldn't it?

RH Not necessarily
[over speaking]"

"RH And the nature of the case. Again, this is a fairly open-shut um er I guess case based on you know a ticket and an email, um, so in, in that situation, um, we wouldn't necessarily, um, alert, um, Tessa perhaps, at that stage.

JM But it would have been, it would have been more through to have spoken to Tessa, wouldn't it?

RH It would have, but it would also would have I guess doubled up on a lot of things. Um again, if there was a, er, I guess a question as to facts, um, Ana may choose to speak to Tessa but we don't always um, we don't always invite the employee in during the investigation phase if it's a fairly um matter of fact.

JM But you, you would, you would often ask for their, for their comments wouldn't you, asking them to give you a …?

RH Again, it depends on the circumstances.

JM Yes, I mean I just… What would the justification be for not doing it under these circumstances?

RH Because, again, it's a fairly open and shut er case based on a booking and an email and a read-receipt."

104. The Tribunal found that Mr Hampton had clearly made up his mind about the second allegation before the disciplinary hearing, without any proper investigation, that the Claimant was guilty of the misconduct alleged. There was a failure to interview the Claimant before the disciplinary hearing and he referred on three occasions to the matter being "open and shut".

105. Additionally, later in the disciplinary hearing, the Claimant claimed that she did not see the email before she went on leave and claimed that her emails were being monitored and that was where the "read receipt" message came from, not because she had read the email. The relevant exchange was as follows:

"TD … I did not see that email before I went on leave.

RH Okay. Where do you think the read-receipt came from then?

TD Richard, you know my emails are being monitored and they've been monitored for quite a long time. And you're aware of that."
…

"TD Okay. I would suspect that because I've been suspended that you, whoever, the Qantas management team, would request from IT that you would monitor my emails. I mean, it's not unreasonable.

RH Do you have any evidence of this, Tessa?

TD How would I have any evidence?

RH Well, you're, you're making a fairly outlandish assertion. What, what makes you think that and what evidence do you have that we would…"
…

TD Corporate IT policy states that they can access the emails at any time. If you've got someone under investigation and someone that's been suspended, I would imagine that the first port of call would be to monitor their, all their electronic movements including emails.

RH Okay. Are you suggesting that someone then from the management team accessed your emails and generate this read-receipt? Is that what you're suggesting?

TD I'm not suggesting. I don't know who. What I'm suggesting is that there was a, well you've got evidence that there was a read-receipt. I understand that when you click on an email, or you delete an email or open and you do something with it, the next one pops up automatically. So, there's, that's an, that's an option. Or…"

106. Mr Hampton dismissed the Claimant's suggestion as "outlandish" but made no efforts to investigate the matter. Later, the Claimant discovered that the Respondent's IT department did have the ability to monitor emails. She also discovered from an email provider that if an email was opened remotely it would generate a read receipt message without the recipient having read the email. This lack of investigation by Mr Hampton also made the dismissal unfair.

107. The Tribunal found that, so far as the second investigation was concerned, Mr Hampton failed to ensure that a proper and reasonable investigation had taken place and had pre-determined the Claimant's guilt.

108. A further matter which the Tribunal found made the dismissal unfair was that the decision was based not only upon the first and the second allegation but also relied upon allegations regarding assertions and allegations made by the Claimant towards senior members of the Respondent's management team which were not previously put to the Claimant and which she had no opportunity to respond to.

109. In addition, despite assertions that the disciplinary process and the grievance process would be dealt with separately, in the dismissal letter Mr Hampton referred extensively to the Claimant's grievance in which it was said the Claimant alleged "predetermination, misconduct, untruthful and misleading behaviour from numerous members of the QCC UK management team, including but not limited to allegations of Qantas *IT being involved in Ms Muller's receiving a read receipt confirmation from her email to you dated 24 October 2014*." Adding this matter to the list of allegations against the Claimant and finding them proved without giving the Claimant an opportunity to address them, made the dismissal overall unfair.

110. The Claimant's appeal against dismissal was heard on 24 April 2017 by Ms Danielle Morgan. The appeal outcome letter was dated 12 May 2017. It is clear from the case of Taylor v OCS Group Limited [2006] ICR 1602 that procedural unfairness can be corrected on appeal. In this case however,

Ms Morgan accepted all that Mr Hampton had done in finding the allegations of misconduct proved. It was an uncritical approach which simply endorsed his decisions. There was no further enquiry or investigation conducted. Ms Morgan concluded:

"Based on my inquiries and review, I have not found any unfairness or error that might constitute grounds for changing the Decision as provided for in the Appeals section of the Qantas Standards of Conduct Policy. Accordingly, your Appeal is dismissed. There will be no change to the decision to terminate your employment effective 6 April 2017.
I am satisfied that the investigation and disciplinary hearing were conducted in a fair and objective manner in the first instance. I am further satisfied that it was open to Mr Richard Hampton to consider the termination of your employment was the appropriate outcome of the disciplinary hearing."

111. In short, Mr Hampton's decision was uncritically approved.

112. No reasonable employer would have conducted the disciplinary process in this manner.

113. The Tribunal found that the disciplinary process undertaken including the dismissal and the appeal, considered as a whole, for the reasons set out above, were outside the range of reasonable responses of a reasonable employer.

Victimisation – section 27 Equality Act 2010

114. Equality Act 2010

Section 27

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

115. The Claimant claimed that the Claimant's raising of a grievance on 5 October 2016 tainted the dismissal with age discrimination. She raised a complaint of age discriminatory treatment in her grievance of 5 October 2016 and sent it to Mr Hampton. It was claimed that having seen the grievance on 5 October 2016, Mr Hampton then produced his outcome letter on 7 October 2016 and therefore the allegation of a discriminatory dismissal is based upon the proximity of those dates. However, it is based on nothing more than that. The Claimant raised this as a "possibility" and said that the proximity of dates was "suspicious".

116. As found above under the hearing of 'Automatic Unfair Dismissal' and 'Unfair Dismissal', the Tribunal found the true and sole reason for dismissal was misconduct. There was no evidential foundation for the allegation that a complaint of age discrimination (or the protected disclosures) played any part in the decision to dismiss.

117. In any event, the disciplinary process was already under way before the 5 October 2016 grievance was lodged and the allegations of age discrimination were not made against Mr Hampton personally.

118. Additionally, it was not put to Mr Hampton in cross-examination that he had dismissed the Claimant because of the reference to discrimination in the grievance.

119. It follows that this claim fails.

Unlawful Deduction from Wages/Breach of Contract

120. Employment Rights Act 1996

Section 13

> *(1) An employer shall not make a deduction from wages of a worker employed by him unless –*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of a worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction …*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion."*

121. The Claimant submitted that insofar as the Tribunal may find that the treatment of the Claimant was heavy-handed, and that she should not have been suspended in the first place, but rather encouraged to complete her ASIC application, then the Claimant should have been paid her full salary and not just her base salary.

122. Insofar as the Claimant's contract of employment was concerned, paragraph 15 read as follows:

"15. Passport and other Security Documents

15.1 It is a condition of your employment with the Company that you obtain, and keep operative and current at all times, a passport and any visa or entry permits which are prescribed by countries in which QANTAS operates, and which the Company requires you to obtain.

15.2 Whilst at work in a 'protected' or 'security' area or other similar area, you will be required to comply with all relevant national legislation (including regulations) imposed by the host country in respect of that area. The Company will make arrangements to apply for and secure the necessary permit for you to enter the protected, security or other similar area on the condition that your application is acceptable to the Government or other controlling authority of any such protected, security or other area.

15.3 It is a condition of your employment with the Company that you maintain your security clearance in accordance with the requirements of the relevant authorities."

123. Paragraph 3.1 of the contract permitted the Respondent to assign duties *"as the Company may from time to time require"* and the employee manual allowed the Respondent to stand the Claimant down from operations, standing down being separate from suspension.

124. While stood down from flying the Claimant received full basic pay and the fixed allowance but additional pay related to flying duties was not payable when the Claimant was stood down from flying duties.

125. The Tribunal did not find that standing down the Claimant from her flying duties was heavy-handed or a breach of her contract of employment.

126. There was no unlawful deduction from wages because she was paid what was properly payable under her contract of employment.

Remedy - Polkey and Contributory Conduct

127. The case will now be listed for a one day remedy hearing before the same Tribunal.

128. Although the Tribunal has found the dismissal to be unfair, there appear to be grounds for reduction in compensation by reason of the Claimant's acceptance that her assertions to the Respondent regarding having made an application for ASIC were untrue.

129. That may give grounds for a reduction under the Polkey principle and by reason of contributory conduct.

130. At the remedy hearing, the Tribunal will not hear any further evidence on these matters as there was sufficient evidence adduced at the full merits hearing. However, the Tribunal would be assisted by submissions on these matters. The parties are therefore to provide written submissions to each other and to the Tribunal no later than two weeks before the remedy hearing which is yet to be listed.

_____
Employment Judge Vowles

Date: …24 January 2019…….

Sent to the parties on:

…….....

.....
For the Tribunal Office

Public Access to Employment Tribunal Judgments

The parties are informed that all judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the Claimant and the Respondent.

APPENDIX

Schedule 1 – Protected Disclosures

No.	Date	Para no.	Recipient / method	s.43B(1)(a)-(f)	Information disclosed
Det1	2015 Performance Review	PoC118	Cassie Radford / oral conversation	(a) criminal offence (b) legal obligation (f) deliberate concealment	Cigarettes were being imported by members of staff to be sold, avoiding import duty in doing so (**Cigarette information**)
Det2	10 May 2015	PoC134	Julianne Rogers / written report	(1): (a), (b), (f), and (d) endangerment of health or safety of an individual (2): (a), (b), (f)	(1) Two 'Safe Hand' envelopes containing new ASIC passes went missing (**ASIC information**) (2) Cigarette information
Det3	4 June 2016	PoC120	Group Security / telephone call	(a), (b), (f)	Cigarette information
Det4	5 & 6 October 2016	PoC134	Richard Hampton / e-mail & attachments (**the Grievance**) Bryony Tainton / the Grievance	(1): (b) (2): (i) (a), (b), (f) and (d) (ii) (a), (b), (f) (3) (a), (b), (f) and (d)	(1) Age is a barrier to career progression in Qantas (**Age discrimination information**) (2) By reference to the written report of 10 May 2015: (i) ASIC information (ii) Cigarette information (3) ASIC information

~~**Det5**~~	~~3 March 2017~~	~~PoC134~~	~~Allan Joyce / letter~~	~~N/A~~	~~Withdrawn~~
Det6	21/22 March 2017	PoC128 (and PoC124 & 129)	Whistleblower Hotline / telephone	(a), (b), (f)	Cigarette information

Schedule 2 – Protected Disclosure Detriments

Detriment 1

Date: *On-going until dismissal*
Para No. *PoC14 & 62*
Perpetrator *Cassie Radford*
Material Influence *PD1-6*
Detriment *Cassie Radford 'worked in the background' on the Claimant's dismissal, despite the Claimant raising concerns about Ms. Radford's behaviour*

Respondent's response:
It is not credible to suggest that matters which were raised in 2014 and 2015 (which were known issues) were suddenly the reason why action was taken against C in 2016, when the far more obvious explanation of the failure to apply for an ASIC (a very serious matter indeed) occurred.

Detriment 2

Date: *31 July 2016 onwards*
Para No. *PoC33 / 50 (overleaf)*
Perpetrator *The Respondent*
Material Influence *PD1-3 until 31.7.16*
Detriment *Failure to warn the Claimant that her ASIC pass had not been renewed, other than by sending an identical link to the original renewal link*

Respondent's response:
C was treated in the same way as everyone else. She received the same reminders and general announcements.
When it was appreciated by R that she has not applied for an ASIC, R raised this with her because she had not applied for an ASIC not because of having made protected disclosures. R raised this with others (who did not make protected disclosures) when it became aware that others had not renewed their ASIC on time.

Detriment 3

Date: *6 August 2016 onwards*
Para No. *PoCs 35-38, 49 & 126*
Perpetrator *The Respondent*
Material Influence *PD1-3 until 6.8.16 PD1-6 as they arose*
Detriment *Allowing the Claimant to fly and work on a Temporary ASIC pass without warning her of the consequences of doing so (a charge of possible gross misconduct)*

Respondent's response:
In any event, the reason why such a statement was not made was because C had herself positively asserted she had applied for an ASIC when signing on for her flight.
It was not because she had made statements long previously.

Detriment 4

Date: *August 2016*
Para No. *PoCs 14 / 40 / 100 / 106-109 / 131*
Perpetrator *Kate Muller; Cassie Radford; Julianne Rogers; Ian Jackson*
Material Influence *PD1-3 until 8.16 PD1-6 as they arose*
Detriment *Suspension and/or differential treatment in relation to suspension, 7 of the 9 crew-members in relation to ASIC renewal being suspended for only 1 trip and 1 for slightly longer*

Respondent's response:
However it is categorically not the case that the removal of C from flying was decided upon or maintained in any way due to the alleged protected disclosures.
R's evidence was clear: it came from Mr O'Connor [862] and it was in accordance with the security policy that C could not fly or be issued with a TAC until she had applied for an ASIC. She said she had applied for an ASIC and therefore that needed to be investigated.

The fact of the other crew members (p908) also being removed from flying (even though they had not made protected disclosures) demonstrates that this act was not affected by that factor.
As to the length of removal from flying: once others had applied for an ASIC they were able to be returned to flying whilst awaiting receipt of their ASIC card. None of them asserted (falsely) that they had in fact already applied.

Detriment 5

Date:	*August 2016 onwards*
Para No.	*PoC42 / 44*
Perpetrator	*Kate Muller; Cassie Radford; Simone Rosslind; Julianne Rogers*
Material Influence	*PD1-3 until 8.16; PD1-6 as they arose*
Detriment	*Failure to progress the Claimant's initial disciplinary matter at an informal stage before moving to a formal stage, in breach of policy and/or in any event.*

Respondent's response:
The reason the allegation was pursued as a formal disciplinary matter was because of the seriousness of the issue. It had nothing to do with the alleged protected disclosures.
Further, disciplinary proceedings were advanced against all the others (p908) who did not renew, even after they applied for their ASICs and were returned to flying. There was no differential treatment.

Detriment 6

Date:	*7 Sep 2016 & on-going*
Para No.	*PoC46-47*
Perpetrator	*Kate Muller*
Material Influence	*PD1-3 until 9.16; PD1-6 as they arose*
Detriment	*Failure to respond to the Claimant's request to resolve the issue of her ASIC pass*

Detriment 7

Date: *7 Sep 2016 & on-going*
Para No. *PoC46-47*
Perpetrator *Kate Muller*
Material Influence *PD1-3 until 9.16;*
Detriment *Failure to resolve the matter informally and/or failure to treat the matter as anything save gross misconduct, despite the Claimant's long service and/or her return to flying.*

Respondent's response (to detriments 6 and 7):
Others who failed to renew their ASICS were taken to disciplinary hearings.
In C's case, there was the added dimension of apparently being dishonest, which was a further matter taken to disciplinary hearing because that had been C's conduct.
Nothing here had anything to do with the alleged protected disclosures.

Detriment 8

Date: *7 Sep 2016 & on-going*
Para No. *PoC46-47 & 65*
Perpetrator *Kate Muller; Simone Rosslind; Julianne Rogers; Dannielle Morgan*
Material Influence *PD1-3 until 9.16; PD1-6 as they arose*
Detriment *Failure to pay the Claimant anything save for her base salary and/or return her to flying*

Respondent's response:
In any event, the financial consequences of being removed from flying was the same for everyone, irrespective of whether they made protected disclosures.
The reason C received the pay she did was because she was not flying. The reason she was not flying has been covered above (see Det 4). It was nothing to do with protected disclosures.

Detriment 9

Date: *8 Sep 2016 & on-going*
Para No. *PoC52*
Perpetrator *Simone Rosslind; Kate Muller*
Material Influence *PD1-3 until 9.16; PD1-6 as they arose*
Detriment *Failure to send the Claimant any minutes or notes of the Investigation meeting of 8.9.16 so that she may properly understand what was said and/or in any event, and failure to send any such records of any meeting thereafter*

Respondent's response
C was not sent minutes of meetings because that is R's policy.
As R has explained, it took a decision applicable to all employees – not to supply minutes after each meeting, but rather to confirm the contents of the meeting in writing in a letter.
It applies to all, and not just to C. There is no basis at all to suggest that C did not receive minutes of meetings because of having made protected disclosures.

Detriment 10

Date: *12 Sep 2016*
Para No. *PoC56-58*
Perpetrator *Ana Heron*
Material Influence *PD1-3*
Detriment *Failure to accept the Disclosure Scotland form dated 14.9.16 as evidence, having been sent after 17:00 on 12.9.16 and/or failure to accept the Disclosure Scotland form dated 14.9.16 in order to curtail the disciplinary process*

Respondent's response
In any event, this had nothing to do with protected disclosures.
By this stage. C had asserted (falsely as she now accepts) that she had applied for an ASIC. R was entitled to pursue the disciplinary process on the basis that C had sought to mislead it as to applying for an ASIC.

Detriment 11

Date: *23 Nov 2016*
Para No. *PoC77*
Perpetrator *Kate Muller; Dannielle Morgan*
Material Influence *PD1-3*
Detriment *Failure to hold Grievance Outcome meeting to have findings delivered and explained*

Respondent's response
In any event, the reason why a meeting was not held to go through the outcome letter was because of the delay since the grievance meeting. R had proposed various days for the meeting: 23 Nov, 19 Dec, 23 Dec. Thereafter when C sought a further extension (p1499) it was then at Ms Muller sent the outcome due to delay (p1498, 1474). C accepted this was done due to the passage of time since the grievance meeting (XX).

Detriment 12

Date: *23 Nov 2016*
Para No. *PoC77*
Perpetrator *Kate Muller; Dannielle Morgan*
Material Influence *PD1-3*
Detriment *Failure to address grievance properly (and in particular the Claimant's complaint of discrimination) and/or uphold the Grievance*

Respondent's response
The reason the grievance was not upheld was because it was considered to be without merit.
R's conduct here had nothing to do with alleged protected disclosures.

Detriment 13

Date: *23 Dec 2016*
Para No. *PoC79*
Perpetrator *Richard Hampton; Kate Muller; Simone Rosslind; Julianne Rogers; Dannielle Morgan*
Material Influence *PD1-4*
Detriment *Delivery of the 2nd Disciplinary Allegation letter on Friday 23 December 2016 at 16:21, just before entering the Xmas Break.*

Respondent's response:
In any event, it is plain that the timing was nothing to do with protected disclosures (and notably no alleged PDs were made around that time), but everything to do with the timing of the events in question and C's absence on annual leave and then sickness which prevented action taking place before then.

Detriment 14

Date: *23 Dec 2016*
Para No. *PoC79-81*
Perpetrator *Richard Hampton; Kate Muller; Simone Rosslind; Julianne Rogers; Dannielle Morgan*
Material influence *PD1-4*
Detriment *Prosecution of a 2nd disciplinary process, despite knowing of the issue since October 2016*

Respondent's response:
In any event, this had nothing to do with protected disclosures.

Detriment 15

Date: *24 Feb 2017*
Para No. *PoC83*
Perpetrator *Richard Hampton*
Material Influence *PD1-4*
Detriment *Mr. Hampton's behaviour at the 2nd Disciplinary Hearing on 24.2.17, by rotating his hand in a circular fashion and looking down, turning pages, while the Claimant was explaining a point*

Respondent's response
The reason for Mr Hampton's conduct at the meeting was plainly because of C refusing to answer his question at least 4 times (see transcript p1076ff).

Detriment 16

Date: *24 Feb 2017 & on-going*
Para No. *PoC84*
Perpetrator *Julianne Rogers/the Respondent*
Material influence *PD1-4*
Detriment *The appointment of Julianne Rogers to oversee the Claimant's Grievance Appeal, despite previously making an ageist comment*

Respondent's response
R did not appoint Ms Rogers because C had made protected disclosures.
The appointment of a manager would have taken place after a valid grievance appeal had been lodged.

Detriment 17

Date: *6 April 2017*
Para No. *PoC 27-30/110*
Perpetrator *Richard Hampton; Simone Rosslind; Julianne Rogers; Dannielle Morgan*

Material influence PD1-6
Detriment The Claimant's mitigating circumstances were not taken or not properly taken into account

Respondent's response
Mr Hampton did take the purported mitigation into account to the extent appropriate.
Protected disclosures had nothing to do with his considerations in this regard.

Detriment 18

Date: 6 April 2017
Para No: PoCs131 & 134 / 75 & 103-105 / 100
Perpetrator Richard Hampton; Simone Rosslind; Julianne Rogers; Dannielle Morgan
Material influence PD1-6
Detriment Dismissal and/or pre-determined dismissal and/or differential treatment in relation to dismissal

Respondent's response
The reason C was dismissed was for having lied to R about having applied for an ASIC, when she had not, and for the second disciplinary matter.

Detriment 19

Date: 6 April 2017
Para No: PoCs113
Perpetrator Richard Hampton; Simone Rosslind; Julianne Rogers; Dannielle Morgan
Material influence PD1-6
Detriment Richard Hampton did not have the authority to hear the disciplinary hearing and/or dismiss the Claimant

Respondent's response
The decision to appoint Mr Hampton had nothing to do with C having made alleged protected disclosures.

Schedule 3 – Age Discrimination Detriments

No.	Date	Para no.	Perpetrator	Comparator	Detriment
Det20 [1]	~~January 2014 – 27 Nov 2014~~	~~PoC135~~[2]	~~Cassie Radford~~[3] ~~Josh Rogers~~	~~Hypothetical~~	~~Inappropriate e-mail contact while Claimant was attending her father in Australia after his heart attack and/or allegation that the Claimant had been unresponsive, despite being on annual or unpaid or carer's leave~~ This complaint was withdrawn during the course of the hearing
Det21	March 2014	PoC135[4]	Cassie Radford ~~Josh Rogers~~	Hypothetical	Allegation that the Claimant was not compliant with ASIC when in fact she was This complaint was amended during the course of the hearing
Det22	April 2014	PoC135[5]	Cassie Radford ~~Josh Rogers~~	Hypothetical	Excessive telephone calls by Ms. Radford while the Claimant was on sick-leave and/or the Claimant was asked for a medical certificate by Ms. Radford that she had already provided to the Respondent This complaint was amended during the course of the hearing
Det23	2 Jun 2014	PoC135[6]	Cassie Radford	Hypothetical	Ms. Radford changed the Claimant's sign-on time to an

[1] Detriments 1-19 are alleged detriments relating to Protected Disclosure Detriment, of which see Schedule 2

[2] See also Report 10 May 2015 (**the Report**), p.1 as well as PoC9 / PoC76

[3] Where the Claimant has identified an individual, please note that this is pending completion of disclosure

[4] See also the Report, p.8 as well as PoC11

[5] See also the Report, p.13

[6] See also the Report, p.16

					hour earlier without warning, as a way of inviting her to a meeting and/or the meeting raised alleged serious concerns without the Claimant being forewarned
Det24	9/10 Oct 2014 10/11 Dec 2014 30/31 Jan 2015	PoC135[7]	Cassie Radford Julianne Rogers	Hypothetical	Ms. Radford chose to speak to the Claimant on 3 occasions after the Briefing when the Claimant was due to leave the Base, when she has been given only 20 minutes to pass through Security, speak with Ground Staff at the Gate, exchange documents and make her way to the aircraft.
Det25	Aug 2014	PoC135[8]	Cassie Radford Julianne Rogers	Hypothetical	Ms. Radford scheduled a formal performance meeting in August 2014, when there had been no further meetings after the informal 2 June 2014 meeting and/or those concerns at the informal 2 June 2014 meeting had been completed and/or Ms. Radford failed to particularise what those concerns for the August 2014 performance meeting were.
Det26	27 Nov 2014	Poc135[9]	Cassie Radford	Hypothetical	No further correspondence or discussion regarding the August 2014 performance meeting occurred after 14 August 2014, but was instead raised in the Claimant's scheduled Annual Performance Review
Det27	~~12 Mar 2015~~	~~PoC135[10]~~	~~Cassie Radford Julianne Rogers~~	~~Hypothetical~~	~~E-mail stating that the Claimant had not 'Competency' in the area of 'Business Driver', despite not being mentioned in the Annual Performance Review in~~

[7] See also the Report, p.23

[8] See also the Report, p.26

[9] See also the Report, pp.30 & 31-33

[10] See also the Report, p.34

					~~November 2014 and/or in any event.~~ This complaint was withdrawn during the course of the hearing
Det28	May 2015	PoC136-137	Julianne Rogers	Hypothetical	The Claimant's Report was met by Ms. Rogers with: "*I haven't read it, but what would you like me to do with it? Tessa, at our age, things have changed*"
Det29	~~5 Oct 2016 or thereabouts~~	~~PoC138~~	~~Julianne Rogers Dannielle Morgan~~	~~Hypothetical~~	~~The Claimant's Grievance letter of 5 October 2016 was also met by Ms. Rogers with: "*Tessa, at our age…*" and/or Ms. Rogers refused to take the Grievance seriously due to the Claimant's age~~ This complaint was withdrawn during the course of the hearing
Det30	23 Nov 2016	PoC139	Kate Muller Dannielle Morgan	Hypothetical	The Respondent failed to deal with the Claimant's complaint of discriminatory treatment
Det31	6 April 2017	PoC 138 & 140[11]	Richard Hampton SimoneRosslind Dannielle Morgan Julianne Rogers	The 8 other crew-members who were suspended re. ASIC but not dismissed[12] / hypothetical	Dismissal and/or pre-determined dismissal and/or differential treatment in relation to dismissal

[11] See also PoC131 & 134 / 75 & 103-105 / 100

[12] Insofar as those 8 members do not include a Ground Manager with a conviction, he is also a comparator