THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Frewer	**v**	**(1) Google UK Limited** **(2) Tim Chatwin** **(3) Richard Turner** **(4) Noah Samuels**

Heard at: London Central

On: 16-20, 23-24 May 2022
25 May 2022 in Chambers

Before: Employment Judge Glennie
Mr P de Chaumont-Rambert
Mr D Shaw

Representation:
Claimant: Mr Harding (Counsel)
Respondent: Mr Stone (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the complaints are all dismissed.

REASONS

1. By his claim to the Tribunal, the Claimant, Mr Frewer, made complaints of unfair dismissal (both "ordinary" unfair dismissal and automatic unfair dismissal by reason of making protected disclosures); detriment for making

protected disclosures; wrongful dismissal (non-payment of notice pay) and disability discrimination. The Respondents all resisted these complaints.

2. The Tribunal is unanimous in the reasons that follow.

The issues

3. The list of issues as agreed by the parties is extensive and appears at pages 115-123 of the agreed bundle. The essential questions to be determined by the Tribunal were as follows:

3.1 What was the reason / were the reasons for the Claimant's dismissal.

3.2 Did the First Respondent act reasonably or unreasonably in dismissing the Claimant.

3.3 Was the Claimant treated less favourably than a hypothetical nondisabled comparator (it being accepted that he was at all material times disabled by reason of depression) in that he was dismissed and his appeal against dismissal was dismissed.

3.4 Was the same treatment because of something arising in consequence of disability.

3.5 Did the Claimant make protected disclosures.

3.6 If so, was the Claimant dismissed because he made protected disclosures.

3.7 Was the Claimant subjected to detriment (i.e. the rejection of his appeal against dismissal) because he made protected disclosures.

3.8 Was the First Respondent contractually entitled to dismiss the Claimant without notice.

3.9 If the Claimant was unfairly dismissed, is there a chance that he would have been dismissed even if any procedural unfairness had been remedied, and if so, what chance and/or when would this have happened.

3.10 If the Claimant was unfairly dismissed, did he contribute to his dismissal by his own conduct.

Evidence and findings of fact

4. The Tribunal heard evidence from the following witnesses:

4.1 Tim Chatwin, the Second Respondent, Vice-President Communications and Public Affairs for Europe, Middle East and Africa (EMEA).

4.2 Richard Turner, the Third Respondent, Vice-President Global Android Platform Partnerships.

4.3 Noah Samuels, the Fourth Respondent, Vice-President Go to Market Operations, EMEA.

4.4 Ian Carrington, at the relevant time Director of Search and Performance Solutions.

4.5 The Claimant, Mr Frewer.

4.6 Stuart Gooden, accredited Trade Union Officer.

5. For ease of reference, the Tribunal will refer to the Claimant and the Second to Fourth Respondents by their names, and to the First Respondent as "Google".

6. The Tribunal also read witness statements produced on the Claimant's behalf from Thomas Ropel, formerly EMEA Travel Vertical Search Lead and Pablo Ruiz, a member of the EMEA Travel GTM Team. These witnesses did not give oral evidence, and the Tribunal read their statements on the basis that they would be given such weight as was appropriate.

7. There was an agreed bundle of documents containing over 2,300 pages. Page numbers in these reasons refer to this bundle unless stated otherwise.

8. Mr Frewer began working for Google in 2007, in the travel sector. He stated that in 2013 there was an attempt to push him out of the business, but that in spite of this he achieved success and became Commercial Director Travel EMEA.

9. One aspect of Mr Frewer's case concerns alleged protected disclosures relating to Google products offering travel items, such as hotel rooms, when a user carries out a search. Mr Frewer contended that Google gave priority to two very large online travel agencies ("OTAs"), namely Booking.com and Expedia, at the expense of smaller OTAs and individual hoteliers. He said that this was undesirable because it was unfair to the smaller concerns; left Google heavily reliant on two organisations; and risked EU fines for anticompetitive behaviour.

10. Mr Frewer's evidence was that he raised his concerns about these matters on many occasions from 2013 onwards. In paragraph 18 of his witness statement, he said that:

> "….the general issues I raised in various meetings over the years were that Google was abusing its dominant position in its search facility, distorting markets, and unfairly positioning particular products on the SERP [search engine results page] directly above normal search results (historically they had been shown on the right of the SERP). This repositioning specifically occurred for products related to the larger OTAs with whom it had a close relationship."

11. Mr Frewer continued in paragraph 19 that he raised the following specific matters:

    11.1 Google was monetising traffic on the SERP at the expense of free traffic and in particular hotel brand owners.

    11.2 The platform enabled a greater share of traffic to go to Expedia and Booking.com at the expense of smaller OTAs.

    11.3 Google was favouring Expedia and Booking.com with regard to paid advertisement slots.

    11.4 There was interference with online connection with alternative metasearch products, in that the "carousel" of products shown under the paid advertisements included Booking.com and Expedia, when these were operating in conjunction with Google.

    11.5 Google was allowing hotel suppliers to be disadvantage as against the larger OTAs.

12. Mr Frewer further said that the global product leaders in Google had a preference for focusing on the two large OTAs as this involved less use of resources than dealing with multiple partners, and brought short term gains. As to when he raised his concerns, Mr Frewer said that he did so:

    12.1 In the third quarter of 2013 and on 27 November 2014 in an email to a Mr Baron.

    12.2 From 2015 onwards at fortnightly Hotel Product Business Review meetings.

    12.3 From 2017 onwards at 6-monthly EMEA Travel Strategy meetings.

    12.4 From 2018 onwards in preparation for and at quarterly Travel Business Forecasting meetings.

12.5 In various other meetings and discussions.

13. In cross-examination Mr Frewer confirmed that he had been talking about over-reliance on the large OTAs since 2015. He stated that Google had been fined for favouring larger customers in the context of online shopping, and that he was arguing that they were doing the same thing in the travel context. Mr Frewer said that he was not claiming that he had raised these concerns every fortnight for years, but he maintained that he was "by far the most vocal person in the business". He stated that Mr Carrington would support him in his views, but they brought him into conflict with the Global Product Leadership Team, and in particular Mr Samuels.

14. Mr Samuels' account, in paragraphs 3 and 7 of his witness statement, was that he would meet Mr Frewer formally around 6-8 times per year, and would communicate with him intermittently on other occasions. He said that Mr Frewer was not the easiest member of his team, but that he did not regard him as a problematic employee and had no issue with him.

15. Mr Carrington was Mr Frewer's line manager between September 2017 and August 2019. In his oral evidence, he said that he "totally agreed with [Mr Frewer] that we needed greater diversity" and that he was "supporting him and saying the same things as him regarding the direction of travel." Mr Carrington agreed with Mr Frewer's estimate that Expedia and Booking.com provided around 70% of the hotel advertisements business and about 31% of Google's travel revenue. He also said that the makeup of the travel business in the US was very different from that in the EMEA. In the former, around 80% of hotel bookings would be made via large organisations, whereas in the latter the figure was around 20%.

16. Mr Frewer relied on his performance ratings, saying in paragraph 61 of his witness statement that his issues with Mr Samuels were reflected in these. Performance ratings were given in Quarters 1 and 3 (Q1 and Q3) each year. The available ratings were Needs Improvement (NI); Consistently Meets Expectations (CME); Exceeds Expectations (EE); Strongly Exceeds Expectations (SEE); and Superb (S). Mr Frewer stated in paragraph 61 of his witness statement that prior to 2018 his ratings had been EE "or more", but that from that date they were not aligned with his contribution to the business. He set out the grades from 2016 onwards.

17. Mr Stone took the Tribunal to the ratings from 2014 onwards. These were as follows, and given by the following individuals:

17.1 2015 Q1 CME Mr Carrington.
17.2 2015 Q3 CME Mr Carrington.
17.3 2016 Q1 EE Mr Carrington.
17.4 2016 Q3 EE not apparent.

17.5	2017 Q1	EE	Mr Bacuvier.
17.6	2017 Q3	EE	Mr Samuels.
17.7	2018 Q1	EE	Mr Carrington.
17.8	2018 Q3	CME	Mr Carrington.
17.9	2019 Q1	CME	Mr Carrington.
17.10	2019 Q3	CME	Mr Boulte

18. The Tribunal noted a number of matters regarding the performance ratings. Mr Frewer had not in fact achieved EE grades at all times prior to 2018. The ratings had moved up and down one level, from CME to EE and back to CME. At least 4 different managers had been involved. Mr Carrington, who was supportive of Mr Frewer's views about diversity in the travel sector of the business, had rated him at CME 4 times. Mr Samuels, who Mr Frewer identified as having issues with him, gave him an EE rating.

19. Mr Stone took Mr Carrington to various observations made by Mr Frewer's managers in the narrative parts of his performance reviews. The Tribunal noted that there were many positive comments at all times, from both managers and peers. Beyond these, both Mr Carrington in Q3 2015 and Mr Bacuvier in Q1 2017 commented that Mr Frewer should be more "big picture" in his outlook.

20. Mr Frewer referred to observations made by Mr Samuels in the 2017 Q3 review (page 1660), as illustrating his (unfavourable) view of Mr Frewer and his team. When asked about Mr Samuels' comments, Mr Carrington said that they were consistent with his views. The observations in question were as follows:

    "Robin could be more effective internally if he were able to share a more balanced view of what is and isn't working in his business. When he seeks to influence and gain support, he sells hard on what his team has done and the overall performance of the HA business, but isn't effective at stepping back and giving an unbiases assessment. This leads to the people he is trying to influence to doubt that everything is as portrayed as it all sounds too good to be true."

21. Mr Carrington made comments of his own in the 2018 Q1 review at page 1666. He wrote that "areas of development are re working effectively with GPL teams, and clear exec level communications". Later, he wrote "he needs to improve his internal stakeholder management with some teams and he has not fully solved this problem with GPL", and "Needs to flex his comms style to be more collaborative with GPL." On page 1673 Mr Carrington wrote that Mr Frewer had "a challenging relationship with his GPL team".

22. In the 2018 Q3 review Mr Carrington noted that, to some extent, the business was moving towards Mr Frewer's views about diversity within the travel sector. He wrote at page 1676 "It is now understood the true value of getting

more suppliers and IPs [Integration Partners, meaning agencies for hoteliers] integrated." In cross-examination, Mr Frewer agreed that it was the case that his view had been gaining acceptance, and that by October 2019 Google was planning to activate things that he had previously been advocating.

23. Mr Samuels' evidence was that he perceived Mr Frewer's stance as being more about the need for diversification than about anti-competition laws. The Tribunal accepted that this was his perception, in particular because it was in line with what Mr Carrington had recorded in the 2018 Q3 review, and found that Mr Frewer's view was gaining acceptance because it was seen as representing the business's best interests.

24. In 2019 Q3 Mr Boulte again referred to a need to collaborate more effectively with partner teams (page 1689). The final performance review was that of 2020 Q1, but Google took a decision not to apply ratings because of the impact of the pandemic.

25. Mr Frewer set out evidence of his mental health issues in paragraphs 71 to 78 of his witness statement. It is not necessary to record these in detail, or to go into what may have caused them. In summary, there were records of work stress in 2013, and then from 2017 to 2020 more serious problems of low mood, depression and stress, including suicidal vulnerability.

26. In paragraph 17 of his witness statement Mr Samuels said that he became aware in late 2018 or early 2019 that Mr Frewer was having "a rough time" but did not know that he was suffering from depression. When crossexamined about this aspect, Mr Samuels said that he became aware of the full extent of Mr Frewer's mental health issues in around October 2019 and denied the suggestion that he had known about this from earlier in that year. He accepted that he had known that Ms Whitney-Steele of Employee Relations had been having monthly meetings with Mr Frewer about his wellbeing, and that this would indicate that there were issues. He added, "I wish I had understood it better at the time."

27. Mr Carrington stated that he had been aware of Mr Frewer's deteriorating mental health from when he became his manager in 2017. In crossexamination, he agreed that, if Mr Frewer had not had mental health issues, his performance grades would probably have been higher. Mr Carrington said that he would have preferred it if Mr Frewer had taken time off work because of stress, but that the latter did not want to as work was "an anchor" for him.

28. In paragraphs 8 and 9 of his witness statement Mr Carrington said the following:

"8……..His [Mr Frewer's] constant concerns around EU compliance meant he was annoying the Global Product Lead Team looking after Travel who did not share his views around EU compliance.

"9. Due to this and Robin's [Mr Frewer's] deteriorating mental health it was made clear when I was in my role as Robin's manager that it would be better for everyone involved if he left the business which I agreed with if he wanted to go. Robin did not want to go…….I felt it was best if Robin remain in his role because he wanted to……"

29. Mr Carrington continued in paragraph 10 that in late 2018 or early 2019 Mr Samuels asked him to design what the Travel team would look like without Mr Frewer in charge and with a reduced headcount. Mr Carrington said that he felt that he was being asked this because Mr Frewer was no longer considered a "fit" by Google. He stated that he prepared an organogram and submitted it to Mr Samuels with a recommendation that it should not be put into effect because of Mr Frewer's mental health and the lack of a clear benefit to the business.

30. When cross-examined about this aspect, Mr Samuels said that he did not "frame it" in the terms expressed by Mr Carrington in his paragraph 9, and that "he's drawn a conclusion I don't agree with." He agreed that they had spoken about making adjustments to the team which could have left Mr Frewer with no role or a different role. He denied the suggestion that there was a clear plan to remove Mr Frewer from the business. With regard to the re-designed Travel team, Mr Samuels said that Mr Carrington "probably did put a caveat on it and said, here's what it would look like, but here's why we shouldn't do it."

31. On these aspects, the Tribunal concluded that:

    31.1 Mr Carrington had a greater awareness of Mr Frewer's mental health problems than did Mr Samuels (as was likely to be the case given that he was the direct line manager). Mr Samuels knew during 2019 that the issues were sufficiently serious to merit monthly meetings with Ms Whitney-Steele.

    31.2 There had been discussion in late 2018 / early 2019 about how the Travel team might be re-designed, including without Mr Frewer. Mr Carrington recommended that this should not be done, and it was not in fact done.

    31.3 Given the request to re-design the team without Mr Frewer, it was understandable that Mr Carrington might form the view that Mr Samuels thought that the business would be better off without him. The Tribunal found, as a matter of probability, that Mr Samuels was not enthusiastic about Mr Frewer continuing in his role in the long

term, but that he did not have an "agenda" to remove him. There was no suggestion from Mr Carrington that Mr Samuels pressed the point when he recommended that the team should not be redesigned.

32. The Tribunal then turned to the events which led up to Mr Frewer's dismissal and to the disciplinary process itself.

33. On 24 September 2019 Mr Frewer chaired the EMEA Travel Strategy Group meeting in Milan. The meeting involved numerous directors and managers. Mr Frewer had arranged to fly back to London on the evening of 24th, but his flights were cancelled twice and he had to check back into the hotel where he had been staying. He found that the room rate had increased from €250 to €700. Mr Frewer found out where the remaining attendees had gone for dinner, and joined them.

34. The Tribunal will give its findings as to what in fact occurred at the dinner later in these reasons. At this stage, we will set out the matters that were raised following the dinner, and the subsequent disciplinary process.

35. On 30 September 2019 Ms Stringer of Google's employee relations team had a conversation with a female employee, identified in the present hearing as E2, who had raised a concern (known as a "ticket") about events at the dinner. Ms Stringer recorded in an email to Ms Wotherspoon (Employee Relations Partner) dated 2 October 2019 at page 702 what E2 had said to her. This was that there were 8 people at dinner, 2 of whom (E2 and her manager E1) were female. Four other employees were involved in their own conversation and might not have heard what was said. E1 was sitting next to Mr Frewer. E2 said that Mr Frewer had consumed a couple of glasses of wine, and began talking about his divorce and suffering from depression. She then described 5 comments that she said Mr Frewer had made, as follows:

    35.1 He said that he had bought some underwear online which had see through sides and a husky on the front; he said that the husky had a wet nose; and did some hand actions to describe what the underwear looked like.

    35.2 He asked E1 whether she would prefer a young guy with stamina or an old guy with experience.

    35.3 There was a conversation about how each person got into the most trouble when growing up. Mr Frewer turned to E1 and asked her to tell it to him nice and slow as he really wanted to think about the naughtiest thing she had ever done.

35.4 There was mention of someone participating in a blind wine tasting: Mr Frewer said to E1 and E2 “why don’t you come back to my room and I can blindfold you.”

35.5 When everyone was leaving the restaurant, E1 was in the bathroom. Mr Frewer said to E2 not to worry as he would make sure she got home ok. E2 waited for E1 and they took a taxi together as they felt uncomfortable.

36. Ms Stringer asked Ms Wotherspoon to investigate. The latter met E2 on 3 October 2019, notes of the meeting being at pages 819-821. E2 repeated the 5 matters set out above. In relation to the underwear, she said that husky picture was in the crotch area and that Mr Frewer demonstrated this by making a V shape with his hands. She said that she understood the reference to a wet nose as meaning a wet penis. E2 said that Pablo Ruiz was sitting next to Mr Frewer and that he looked uncomfortable and unwilling to engage in the conversation. She said that there were 4 others present, who were speaking among themselves and would not have heard what was being said.

37. E2 added that she spoke to E1 on the night about what had happened. They agreed to sleep and think about it as they were uncertain about whether to come forward. The next day they agreed that they would raise the matter as they did not want it to happen to others.

38. Ms Wotherspoon met E1 on 8 October 2019, the notes of this meeting being at pages 827-830. E1 said that Mr Frewer had arrived at the dinner when those already there were eating their main courses. He took a seat at the head of the table, between E1 and Mr Ruiz. E1 said that Mr Frewer made reference to the “husky” underwear and made comments about it including that the underwear provided the husky and he provided the wet nose, which she took to mean that the end of the penis was the wet nose of the husky.

39. E1 then referred to something that E2 had not mentioned. This was that Mr Frewer spoke about his cancelled flight and the hotel room costing €700; he then joked that an escort must be included in that price, and that since he had ended up getting the room for €200, he would need to expense the escort himself. E1 also described the comments about telling the naughtiest thing she had done and to tell it slowly, and about blindfolding, in essentially the same terms as E2 had. In relation to the end of the evening, E1 said that she understood that Mr Frewer had told E2 to go home and that he would wait for E1. They had pretended to be staying in the same hotel and had walked around the corner and waited until Mr Frewer had gone, before taking a cab. E1 said that she and E2 agreed to sleep on it and decide what to so in the morning, at which point they decided to report the matter.

40. On 9 October 2019 Ms Wotherspoon met Mr Ruiz, notes of their meeting being at pages 823-826. Mr Ruiz recalled 9 people at the table, and that Mr Frewer was sitting next to him. He said that the conversation did not make him feel uncomfortable, and that he did not hear a comment about blindfolding. Mr Ruiz said that Mr Frewer might have made a joke about underwear, but he could not recall exactly what it was. He recalled everyone telling about something they had done when young. He did not think that he had heard Mr Frewer make any comments that would have made E1 or E2 feel uncomfortable, and added that he was speaking Spanish with a colleague (Mr Albizuri) and was only involved in the discussion on and off. Mr Ruiz said he did not hear a comment about an old guy with experience. He said that maybe it was not the sort of discussion he would engage in, explaining that he would not speak about his love life. Mr Ruiz said that Mr Frewer had referred to a website that had weird stuff to buy, and that he thought that this was when Mr Frewer mentioned the husky underpants, although he did not remember any comment about a wet nose.

41. Ms Wotherspoon met E2 for a second time on 16 October 2019, notes of this being at pages821-822. Ms Wotherspoon asked E2 whether she heard Mr Frewer make any comments about escorts, to which E2 replied that there was some comment about the price of the hotel room including or not including an escort, but that she could not remember the specifics.

42. On 21 October 2019 Ms Wotherspoon sent an email to Mr Frewer at page 717 asking him to attend a meeting to discuss some comments he might have made at the dinner in Milan. In a subsequent email on the same day, Ms Wotherspoon stated that she was looking into a concern that he had made potentially inappropriate comments, some of which were of a sexual nature.

43. The meeting took place on 22 October 2019, the notes of this being at pages 831-836. Mr Frewer began by saying that he had not been in a good place recently and that if he had done something to offend someone, he wished to apologise. He said that he had been close to taking his own life and had had extensive counselling. Mr Frewer explained about the flights and the hotel room and said that he established where the others were. He said that Mr Ruiz was sitting to his left, with E1 to his right and E2 beyond her.

44. When Ms Wotherspoon said that she would put specific comments to Mr Frewer, he replied that he was unlikely to remember. He said that he showed pictures of underwear with a wolf on it because E1 had told him about a new director who was joining from the website on which they were advertised. He stated may have spoken about potentially buying them, and that he would have said words to the effect that he was a member of a very old fashioned golf club and would not want them to be seen in the changing room. Mr Frewer said that he could not remember describing them as transparent or

making any comment about a wet nose. He said that what he said was not sexual, but more humorous.

45. Mr Frewer said that he did not recall any conversation about blind wine tasting or blindfolding: subsequently, when reviewing the meeting notes subsequently, he categorically denied saying anything about blindfolding E1 or E2. Ms Wotherspoon asked whether there were any comments about escorts, or jokes about the price of the room being inflated to include an escort, to which Mr Frewer replied that he sincerely hoped that he did not say that, adding that he would have made a comment about the price of the room but did not recall making comments about escorts. He said that there might have been a conversation about people getting into trouble when they were young, he did not recall. When asked about the "nice and slow" comment, his reply was recorded as "absolutely not, he does not recall it at all."

46. Mr Frewer also said "absolutely not" in response to the alleged comment about an old guy with experience. He said that he did not recall waiting for E1 while she visited the restroom, and categorically denied asking anyone to go back to the hotel with him (although the Tribunal noted that this had not in fact been suggested). Mr Frewer suggested that Ms Wotherspoon should speak to E1, E2, Mr Ruiz and the colleague who was sitting next to Mr Ruiz about what had happened. He said that he had thought that the meeting might have been to discuss comments he might have made about having suicidal thoughts and about his mental wellbeing, and that the comments suggested would be totally out of character for him. He said that he could not think of a reason why anyone would make up these concerns. He said that they were not the sort of comments he would make.

47. Ms Wotherspoon's final meeting was with Mr Albizuri on 25 October 2019, with notes at pages 735-736. Mr Albizuri recalled 8 people at the table. He did not recall anything that would have made people uncomfortable. When asked whether there was a joke about escorts, Mr Albizuri said that he did not know what the term meant. When Ms Wotherspoon explained it, he said he did not really remember and that he might not have understood something that was said. He did not recall any of the other alleged comments, and said that he was speaking to someone else and may have missed some conversations.

48. Ms Wotherspoon produced a report dated 12 November 2019 at pages 809-817. The notes of the various meetings were attached as an appendix. Ms Wotherspoon summarised the evidence on each of the matters of concern (although under the heading "findings" in each case). She concluded that there was a case to answer under concerns 1, 3, 4, 5 and 6 (being numbers 1, 3, 4 and 5 listed above and the "escort" comment), based on breach of Google's policy on harassment. Ms Wotherspoon concluded that in relation to concern 2 (the "old guy with experience" comment) there was insufficient information to conclude that there was a case to answer.

49. There followed a period, commencing on 13 November 2019, during which Mr Frewer was absent on sick leave. In February 2020 Mr Samuels was asked by Google's HR department to conduct the disciplinary hearing. Mr Frewer made a phased return to work on 24 February 2020, returning to full time work on 3 March 2020. At that point, Ms Wotherspoon contacted him to say that there would be a disciplinary meeting with an independent manager, and in early April Ms Berkery informed Mr Frewer that Mr Samuels would be conducting that meeting.

50. Mr Frewer objected to this on the grounds that Mr Samuels would be biased against him. Following this, on 22 April 2020, Ms Berkery wrote to Mr Frewer at page 1084 as follows:

> "…..We do not feel that Noah in any way would be biased or not impartial in terms of acting as the Hearing Manager in the disciplinary process. Nonetheless, in the light of your concerns I am in the process of identifying a new hearing manager……"

51. Ms Berkery had in fact contacted Mr Chatwin on 17 April 2020 with a view to his conducting the hearing (which he subsequently agreed to do). Mr Chatwin stated in paragraph 15 of his witness statement that, although he was told that someone else had been chosen and then stood down, he did not discover that this was Mr Samuels until after the present claim had been brought. He said that he knew Mr Samuels and that their desks were close together: they would have general discussions in the office about work and sometimes personal matters. In paragraph 16 of his witness statement Mr Chatwin said this:

> "I did not inform Noah that I had been appointed to hear a disciplinary for an employee who was in his reporting line. Further, I did not at any point either during the disciplinary process, during the appeal process or at any time they had both concluded, discuss Robin, his disciplinary or the outcome with Noah. In fact, the first time that Noah and I were involved in any discussion together about Robin, his disciplinary and his dismissal was when we were informed by Google's Legal Team that Robin had brought a claim and we had both been named as Respondents."

52. When cross-examined on this aspect, Mr Chatwin denied that he was part of a plan to drive Mr Frewer from the business, or that he was reaching a conclusion in the disciplinary process that he had to reach. He denied that the organisation wanted Mr Frewer out because of his mental health, or because of the disclosures he had made.

53. The Tribunal will give its findings on this aspect after dealing with all of the evidence about the disciplinary process, including the appeal heard by Mr Turner.

54. Mr Frewer was sent an invitation to the disciplinary hearing, at page 1090, on 28 April 2020. The letter set out the 5 allegations and had attached a copy of Google's policy on harassment, discrimination, misconduct, retaliation and workplace concerns (which we will refer to as "the harassment policy"), as updated in February 2020 (at pages 142 onwards). The Tribunal noted that the policy defined sexual harassment as "unwelcome conduct (physical, verbal or non-verbal) of a sexual nature…" and that this was said to include making unwanted sexual advances, displaying or sharing offensive images, and derogatory or insensitive jokes, pranks or comments. (The version in existence in September 2019 contained similar wording, although the last of these, concerning comments, was listed under "other types of harassment"). Both versions contained words to the effect that breach of the policy could lead to disciplinary measures up to and including termination.

55. The letter included the words: "If you believe there are any people we should talk to before the disciplinary meeting please let us have their names as soon as possible." In his oral evidence, Mr Frewer said that he did not pick up this point, as he did not read the letter properly. The letter referred to the right to be accompanied and said that a possible outcome could be disciplinary action up to and including dismissal.

56. The meeting took place by video on 14 May 2020, the notes of this being at pages 1125, chaired by Mr Chatwin, with Ms Berkery of Employee Relations also present. Mr Frewer attended alone: Mr Chatwin asked him whether he was happy to proceed without a companion, and he said that he was. Mr Frewer said that he wanted to give some background information from his perspective. Mr Chatwin replied that he should talk through the allegations and ask his questions of Mr Frewer before that.

57. Mr Frewer stated that he was sincerely apologetic for any offence he might have caused. He said that his sense of humour might differ from everyone else's: he was a bit older than some people and understood that some areas could be misinterpreted. He said that he had been at Google for over 13 years, and that his record had been exemplary. Mr Frewer stated that he understood that concerns had been raised about his comments, which could be perceived as verbal harassment, and that if he had fallen foul of Google's misconduct guidelines, so had others at the dinner. He referred to his personal situation and described his mindset as "very suicidal". He said that he was under huge financial pressure.

58. In relation to the dinner on 24 September 2019, Mr Frewer said that the restaurant had been fairly noisy and that the acoustics had not been good. He said that it appeared that E1 and E2 had discussed events in the taxi and that he believed that they had consumed more alcohol than him and could have "misrepresented the perceptions of the conversation."

59. Mr Chatwin then asked Mr Frewer about the alleged comments concerning the underwear. Mr Frewer said that E1 had been talking about a new director joining from a particular organisation, and that he had said that he and his daughter had been targeted by that organisation with a stream about the husky underpants. He said that he had shown a picture of these, and so would not have tried to describe them with his hands. Mr Frewer continued that the image had not shown transparent sides, that the underwear was sold on Google Shopping, that he had not demonstrated a V-shape and had not referred to a wet nose or a penis.

60. Mr Frewer then continued that he did not make a comment about a golf club. Mr Chatwin asked him whether he remembered describing the underwear as transparent or making the wet nose comment. Mr Frewer replied that he did not recall making those comments and that "he could not say that he did not make these comments as he could not recall the conversation". He said that he did not know why E1 and E2 had said that they had heard these comments, and said that E1 and E2's views were inconsistent with the image, which brought into question the veracity of what they were saying. Mr Frewer pointed out that Mr Ruiz and Mr Albizuri did not recall him referring to a wet nose or a penis. He then said that it was possible that he had an old-fashioned sense of humour and that his comments had been humorous rather than sexual.

61. Mr Chatwin then asked about the second allegation, which concerned the "naughtiest thing" and to tell it "nice and slow". Mr Frewer said that he did not recall this comment. He said that the evidence suggested that there had been a conversation, but did not say that he had instigated it. When Mr Chatwin pressed Mr Frewer as to whether he was saying that he did not recall making the comment, or that he did not make it, he replied that it was difficult to say: as he did not recall the comment, he did not believe that he would have said it. He said that he did not know why E1 and E2 would have stated that he made the comment, that they had clearly discussed it in the taxi and there were some inconsistencies in their accounts. Mr Frewer again said that it was possible that they had misrepresented what had occurred.

62. Mr Frewer denied allegation 3 (the "blindfold" comment). He said that he would have been embarrassed to make the comment, and that he did not recall it: he would not invite a colleague back to his room and that it was not in his nature to do anything like that.

63. Mr Chatwin then asked about allegation 4 (the "escort" comment). He asked Mr Frewer what he had meant when he said in the investigation interview that he sincerely hoped that he had not said this. Mr Frewer replied that he did not recall saying this: it was possible that he had made a "witty remark" about an escort. He pointed out that this had not been referred to in E2's original complaint and that neither Mr Ruiz nor Mr Alburiz had confirmed it. Mr Frewer again said that he did not know why E1 and E2 would make this allegation,

although he added that the first few months he had found E2 to be highly ineffectual, and that this might have got back to her.

64. With regard to allegation 5 (waiting for E1), Mr Frewer said that it was likely that he would have waited for E1 out of courtesy, although he did not recall the incident. There was no malintent and he was offended by the allegation, which he considered might have arisen because E2 had drunk a lot of alcohol. Mr Frewer then asked why there would have been anything wrong with him suggesting that E2 should go home and that he would wait for E1, and said that he might have suggested this.

65. More generally, Mr Frewer said that he did not believe that alcohol had played a part in his inability to remember certain events. He said that he had drunk more than usual, although less than everyone else, but that due to stress and medication it was likely that the alcohol had had more of an impact on him. Mr Chatwin asked what had made him want to apologise. Mr Frewer replied that someone had felt uncomfortable about his behaviour. Mr Chatwin asked whether Mr Frewer thought that E1 and E2 had an agenda: he replied that any concerns had been raised with good intent and that he had no issue with E1 and E2. Ms Berkery asked whether there was anyone else they should consider speaking to: Mr Frewer suggested Mr Samuels and Mr Boulte.

66. On 14 May 2020 Mr Frewer sent some notes relating to the allegations, in which he gave further details about his mental health, his divorce, ad his financial situation. He repeated that he was sincerely apologetic for any offence that he might have caused, and repeated his observations about seating at the dinner, the acoustics in the restaurant, the generally jovial ambience at the dinner, and that E1 and E2 had discussed issues in the taxi and after consumption of alcohol. He said that he was only made aware of the concerns a month after the dinner and was interviewed about it on 13 November. He then largely reiterated his responses to the individual allegations, including observations about inconsistent or inconclusive evidence.

67. Mr Chatwin spoke to Mr Boulte on 29 May 2020, notes of this conversation being at pages 1244-1247. Mr Boulte said that Mr Frewer was in an "extremely bad place", that he had spoken of suicidal ideation, had cried at work in October 2019, and was showing physical signs of distress. He said that all of these concerns had arisen in October and that he had not had cause for concern about Mr Frewer's mental health before that.

68. Mr Chatwin was asked in cross-examination about the possibility of speaking to other witnesses of the events at the dinner. He agreed that there was evidence from 5 of the 8 (if that is the correct number) people at the dinner. When Mr Harding asked Mr Chatwin, what if the other 3 had said none of the comments were made, he replied that it had come up repeatedly that there was noise in the restaurant, and that he took a judgement that people further

away would not have much to add. Mr Chatwin did not agree that it was "blindingly obvious" that the other 3 should have provided evidence, but accepted that it was possible that they could have given evidence that would have changed his mind. The Tribunal understood this to mean that Mr Chatwin could not say that this was positively impossible in some way, rather than that he had in mind something specific that they could have said.

69. Mr Chatwin further stated that speaking to E1 and E2 did cross his mind, but that he decided that he did not need to. He said that they "had already taken a risk in coming forward" and that he did not think that speaking to them would add anything. Mr Chatwin said that he was aware that E2 had also raised the allegation about the "older guy" comment, and that he had accepted Ms Wotherspoon's judgement that there was insufficient evidence to take it further. He said that he did not consider whether that cast light on E2's reliability. Mr Chatwin was also asked about the fact that E1 and the Claimant had shared some cheese and wine at the end of the meal. He said that he did not consider whether that might shed light on whether E1 was uncomfortable, and added that a junior person might not confront a senior one in public.

70. On 8 June 2020 Mr Chatwin sent a letter at pages 1280-1281 to Mr Frewer stating that the outcome of the disciplinary process was that he would be dismissed with immediate effect. He set out his findings in a separate document at pages 1270-1279. In summary, these were as follows, in respect of the numbered allegations:

    70.1 Mr Chatwin found, on balance, that Mr Frewer had made a comment about a wet nose, and that given the image of the underwear which had been produced, it was reasonable for E1 and E2 to believe that he was referring to a penis. He found the statements of Mr Ruiz and Mr Albariz of little value given their distance from the conversation and the noise in the restaurant.

    70.2 E1, E2 and Mr Ruiz had all confirmed the conversation about the "naughtiest thing". Mr Chatwin continued that, whether or not Mr Frewer had been driving the conversation, it was more likely than not that he had made the comment alleged. He said that he could not find a reasonable explanation why E1 and E2 would fabricate this.

    70.3 Mr Chatwin found that it was more likely than not that Mr Frewer made the "blindfolding" comment to E1 and E2, and that it was reasonable that Mr Ruiz and Mr Alburiz did not hear this given the noise in the restaurant and that the comment was addressed to E1 and E2. Mr Chatwin said that the comment was inappropriate and could reasonably be perceived as being sexual in nature.

70.4 Mr Chatwin found that it was likely that Mr Frewer had made the joke about an escort: he himself had accepted that it was possible that he had. Mr Chatwin stated that the comments were "sexual in nature and inappropriate."

70.5 He said that it was clear that Mr Frewer had said that he would wait for E1 and added: "While the comment in isolation may not appear overtly offensive or harassing, it would be remiss of me to look at this comment in isolation and not to consider the entire context and sexual nature of the comments raised as concerns on that evening and upheld by me. It is the impact of this comment which is of utmost concern to me. Based on all of the evidence I uphold this allegation."

71. Mr Chatwin then made some general observations in the document. He said that Mr Ruiz and Mr Alburiz might have missed conversations that took place. With regard to E1 and E2, Mr Chatwin said that he found no evidence to suggest collusion and that they had given consistent accounts. (In cross-examination, Mr Chatwin confirmed that consistency was an important factor in his mind). He referred to Mr Frewer's mental health and personal situation. He said that Mr Frewer's leadership position within the team made the upheld allegations even more troubling.

72. In his oral evidence Mr Chatwin said that he did not believe that it was unfair not to ask E1, E2, Mr Ruiz and Mr Alburiz to attend the disciplinary meeting to give evidence. He asserted that there was no reason for E1 and E2 to have colluded. He accepted that it was theoretically possible for there to be some other explanation apart from fabrication, but thought it unlikely, for example, that one of E1 and E2 could not really remember and was backing up the other.

73. In answer to Mr de Chaumont-Rambert, Mr Frewer said that the next sanction down from dismissal would have been a final written warning, which would not have been sufficient given his findings.

74. Mr Frewer appealed against this outcome by way of a letter at pages 13451352. He made various assertions about the events of 24 September 2019 and some more general points. He said that there were conflicting reports of the dinner, and that no one had challenged the accounts given by E1 and E2, which were accepted without question. Mr Frewer further stated that E1 and E2 had not said that they felt harassed, but that they felt uncomfortable. He repeated his argument about collusion.

75. Mr Frewer also referred to his mental health issues, and continued that he had on numerous occasions raised concerns about the organisation's strategic approach, with regard to compliance with European competition concerns. He wrote:

"Overall the state of my mental health and my challenger mentality may have led me to be perceived as an awkward individual to work with, and I am concerned that this perception, and my more recent mental health issues, my be the real reason why these allegations, such as they are, have been seized upon to remove me from the business."

76. The appeal hearing, conducted by Mr Turner, took place on 8 July 2020, the notes being at pages 1408-1419. Mr Turner began the meeting by saying that this would not be a re-hearing, but a review of the grounds of the appeal to determine whether the disciplinary decision was unfair or inappropriate. Mr Frewer attended with Mr Gooden. Much of what Mr Frewer said at the appeal was similar to what he had said at the original hearing and in his appeal letter. He referred to his mental health and said that the allegations had been blown out of proportion.

77. Mr Frewer also said that what E1 and E2 had said had not been challenged or put to the others present at the dinner. He repeated his point about E1 and E2 apparently having communicated in order to create a consistent story. He then referred to his raising of concerns about competition issues, and to his mental health, in essentially the same terms as his appeal letter. Towards the end of the meeting, Mr Frewer said that E1 and E2 had not been re-interviewed in the light of his account of events.

78. On 21 July 2020 Mr Turner met Mr Chatwin, notes of this being at pages 1445-1449. Mr Chatwin said that he had found E1 and E2's accounts to be very consistent and credible, whereas Mr Frewer's position had largely been that he did not remember anything. He confirmed that he had not interviewed E1 and E2 directly, saying that he did not think that there was any more that they could have added; he might have spoken to them had there been specific questions raised as to their motives, but there had not been.

79. Mr Chatwin further stated that Mr Ruiz and Mr Alburiz could not be expected to have heard the whole conversation. He and Mr Turner then discussed the individual allegations. In relation to the comment about an escort, Mr Chatwin told Mr Turner that he did not believe that joking about escorts was witty, and that this underlined that Mr Frewer had not taken the matter seriously, having apologised to Mr Chatwin for his having to waste his time on it.

80. Mr Turner pointed out that Mr Frewer had a very strong view that "biases of the business" had affected the outcome. Mr Chatwin said that he had not been seeking an outcome, but had been guided by the policies, the expectations of conduct, and the expectations of directors. He commented that each of the allegations had been serious enough to merit a final written warning, and that the cumulative impact had made it impossible for him to reach any conclusion other than termination.

81. On 4 August 2020 Mr Turner held a further meeting at which he gave the outcome of the appeal to Mr Frewer and Mr Gooden. He read through his findings, which were attached to a letter of the same date, and are at pages 1484-1493. Mr Turner upheld Mr Chatwin's findings and his conclusion that the appropriate sanction was dismissal.

82. Mr Turner stated in paragraph 5 of his witness statement that, prior to being appointed to hear the appeal, he did not know any of Mr Frewer, Mr Chatwin or Mr Samuels. He said that he had apparently attended one meeting at which Mr Chatwin was present, but did not remember him, and that while Mr Samuels had stated that they spoke once or twice a year, he had no clear memory of this. Mr Harding put to Mr Turner in crossexamination that the appeal was a whitewash, or a rubber-stamping exercise, which he denied. Mr Turner denied that it was his job to get rid of Mr Frewer.

Applicable law and conclusions

83. The Tribunal first considered the reason or reasons for Mr Frewer's dismissal and for the rejection of his appeal.

84. Section 98 of the Employment Rights Act 1996 includes the following provision:

> *(1) In determining…..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.*

85. Section 48(2) of the Employment Rights Act provides that on a complaint of detriment or dismissal for making protected disclosures (which we will describe by the shorthand term "whistleblowing"),

> *…….it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

86. The burden of proof provisions in the Equality Act 2010 are also relevant to the reason for the dismissal and the rejection of the appeal as these are relied on as acts of discrimination. Section 136 of the Equality Act provides that:

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) above does not apply if A shows that A did not contravene the provision.

87. In **Efobi v Royal Mail Group Limited [2021] ICR** 263 the Supreme Court confirmed that the two-stage test previously identified under the earlier legislation remained applicable under the Equality Act. At the first stage, the burden is on the claimant to prove facts from which the Tribunal could conclude or infer, in the absence of an adequate explanation, that discrimination had occurred. Earlier authorities identified the need for "something more" beyond a simple difference of protected characteristic and a difference in treatment for such a finding to be one that could properly be made. If such facts are proved, the burden is on the employer at the second stage to explain the reasons for the allegedly discriminatory treatment and satisfy the tribunal that the protected characteristic had played no part in those reasons.

88. In **Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust UKEAT/0047/19** HHJ Auerbach reviewed the authorities and confirmed that the position under section 48(2) of the Employment Rights Act is similar, although not identical to, that under section 136 of the Equality Act. Both involve a two-stage test, under which the tribunal will consider whether there is a sufficient prima facie case, such that the conduct calls for an explanation. If there is, it is for the employer to advance an explanation: the difference in the case of section 48(2) is that a failure to prove the explanation does not automatically lead to a finding that causation has been made out.

89. The Tribunal first addressed the question in accordance with the two-stage test for discrimination and whistleblowing. At the first stage Mr Harding, for Mr Frewer, relied on Mr Carrington's evidence that it was thought that it would be better for everyone if Mr Frewer left the business, and the reasons why this was; and that Mr Samuels had asked Mr Carrington to design what the travel team would look like without Mr Frewer in charge.

90. The Tribunal found that, in the absence of an explanation from the Respondents, these facts were sufficient to amount to the something more that could amount to the something more which could be the basis of a finding that Mr Frewer's disability and/or his raising of the competition issues were a substantial reason for his dismissal.

91. The Tribunal then considered whether the Respondents had discharged the burden of proving that this was not the case. We found that they had. As Mr Harding fairly conceded, Mr Frewer's case in this regard depended on the Tribunal finding that Mr Samuels, Mr Chatwin and (probably) Mr Turner had given untruthful evidence. In other words, the Tribunal would have to find that Mr Samuels had influenced Mr Chatwin in favour of dismissing Mr Frewer, presumably having explained why he wanted to achieve this; that both had lied in their evidence when they said that there was no contact

between them about Mr Frewer; and that Mr Chatwin had lied about the reason for the dismissal.

92. Mr Harding urged the point a little less strongly in relation to Mr Turner, suggesting in more general terms that the appeal was "a whitewash", but again it seemed to follow that for Mr Frewer to succeed, Mr Turner would also have to have given untrue evidence about having considered the appeal on its merits.

93. The alternative suggestion on Mr Frewer's behalf, which the Tribunal found inherently unlikely, and for which there was no evidential basis at all, was that an unidentified third party (not Mr Samuels) was behind the dismissal and had influenced Mr Chatwin (and, presumably, Mr Turner).

94. The Tribunal found that the Respondents had discharged the burden of proof for the following reasons:

94.1 As Mr Frewer accepted, the allegations raised by E1 and E2 were genuine. There was no suggestion that they were any part of a conspiracy.

94.2 Mr Frewer himself accepted some aspects of the allegations. His accounts in the course of Ms Wotherspoon's interview and the disciplinary hearing were not entirely consistent. At the interview, however, he said that he made a humorous, not sexual, comment about the underpants, and that he made a comment about the price of the room. At the disciplinary meeting, he accepted that there was a conversation about being naughty when young, and about tasting wine blindfolded, and that he possibly made a "witty remark" about an escort.

94.3 The proposed "conspiracy" was not, therefore, one which involved invented allegations. It was along the lines of a plan to use genuine allegations which were partly accepted by Mr Frewer as an opportunity to dismiss him.

94.4 Mr Samuels would therefore have to have discovered what the allegations were; formed the belief that they might not, in the event, prove to be sufficient to cause Mr Frewer's dismissal; and then approached Mr Chatwin with a view to securing the dismissal. The Tribunal found all of this improbable. Mr Samuels would not know in advance what Mr Chatwin's reaction would be to an attempt to interfere with the disciplinary process. He might have reported it as a disciplinary matter against Mr Samuels. It might have made him suspicious about the allegations against Mr Frewer, and so have been counter-productive to Mr Samuels' supposed wishes.

94.5 The allegations were not such that the Tribunal felt concern at their being the stated reason for the dismissal. They were not the sort of allegations that raised suspicion on the grounds that they seemed too trivial to found a dismissal of someone in Mr Frewer's position.

94.6 Although, as will be explained, the Tribunal did not regard the disciplinary process as perfect, that too was not such as to raise suspicion.

94.7 There was nothing in the evidence given by Mr Samuels, Mr Chatwin or Mr Turner that led the Tribunal to suspect that they were lying.

94.8 Mr Carrington's evidence did not amount to saying that there was a plan, or a campaign, to remove Mr Frewer. It was that there was a belief that it would be better if he left; that he (Mr Carrington) believed that it would better for Mr Frewer to remain in his role; and that when he drew up the design for the team without Mr Frewer, he recommended that this should not be put into practice – and it was not. The "something more" was not, ultimately, at all compelling when viewed in the context of all the other factors listed above.

95. The Tribunal therefore found that the Respondents had proved that the sole reason for the dismissal was that Mr Chatwin believed that Mr Frewer had made the comments alleged; and that the sole reason why the appeal was rejected was that Mr Turner genuinely considered that this was the correct outcome on the merits.

96. These findings mean that the complaints of disability discrimination, automatic unfair dismissal and detriment for making protected disclosures all fail.

97. There is no other issue to determine in relation to the discrimination complaint. With regard to the whistleblowing complaints, the Tribunal is conscious that it has determined the causation issue before deciding the issue as to whether or not Mr Frewer made protected disclosures.

98. Section 43A of the Employment Rights Act provides that a protected disclosure is a qualifying disclosure made in accordance with any of sections 43C to 43H. The relevant parts of section 43B provide as follows:

(1)…….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……"

99. The Tribunal considered how it should approach this issue in the light of its findings on causation, which mean that the whistleblowing complaints fail, regardless of whether or not the issues raised by Mr Frewer had amounted to protected disclosures. Ideally, the Tribunal would nonetheless make findings about each alleged disclosure, including findings of fact about what was said, and determining whether each item satisfied the requirements of section 43B.

100. The Tribunal concluded that this approach would be unrealistic and disproportionate in the present case, for the following reasons:

    100.1 Paragraph 19 of the list of issues identified 22 occasions or categories of occasions when disclosures were made.

    100.2 In reality, this involved many more than 22 instances to be considered. For example, item (a) referred to fortnightly meetings from 2015 onwards and 9 individuals (identified by name or job title) and item (b) to an unspecified number of meetings from early 2019 onwards and to 9 individuals (not the same 9 as above). Item (f) referred to the period "from 2018 onwards" without any specific occasions, and to 5 individuals, only 1 of whom had been named in (a) or (b). Other items referred to specific meetings and those who attended them. (In this context, the Tribunal noted that, in giving judgment on an interlocutory appeal in the case, HHJ Tayler referred to the need for proportionality, and to the "myriad" and "multitudinous" disclosures amounting to nearly 100 in all).

    100.3 The disclosures were described in paragraph 18 of the list of issues, in 5 sections. Paragraph 19 did not differentiate between the individual items, saying only that the above disclosures were made at many meetings and in various contexts, and then setting out the 22 occasions or groups of occasions referred to above.

    100.4 Mr Frewer's evidence about this aspect was similarly put in general terms. In paragraph 19 of his witness statement he set out the 5 items in the same terms as in paragraph 18 of the list of issues. Over paragraphs 21 to 52 he repeatedly referred to raising "these issues" on various occasions, mostly (but not invariably) without stating precisely what was said on each occasion.

101. The Tribunal has not therefore attempted to make the findings that it would usually do in a situation such as this where causation is determinative of the whistleblowing complaints. Beyond this, in general terms the Tribunal found that Mr Frewer's evidence showed, and Mr Carrington and Mr Samuels confirmed, that he was raising competition and/or diversification issues very frequently, but there was not the information available that would enable the

Tribunal to find that the section 43B test had been satisfied. Mr Harding submitted that the Respondents' disclosure had been deficient and that the Tribunal could infer that this was because minutes of meetings and other documents contained details which could be analysed as showing that protected disclosures had been made. While noting that, in cross-examination, Mr Samuels agreed that there would have been documents concerning the various meetings, the Tribunal did not consider that it could realistically infer that all of the elements necessary for a protected disclosure would have been present had the documents been disclosed.

102. The Tribunal then considered the complaint of unfair dismissal under section 98 of the Employment Rights Act. The reason for the dismissal was the potentially fair reason under subsection (2)(b) of a reason related to conduct. Section 98 then continues:

> *(4) 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.*

103. The well-known **Burchell** test for a dismissal for a reason related to conduct requires the following:

103.1 A genuine belief that the employee was guilty of the misconduct.

103.2 Reasonable grounds for that belief.

103.3 Such investigation as was reasonable.

103.4 That dismissal was within the range of reasonable responses.

104. The standard to be applied throughout is that of what is reasonable, and not that of perfection. Another way of putting it is to ask whether the investigation, or the sanction of dismissal, was such that no reasonable employer, acting reasonably, could have adopted in the circumstances. The Tribunal must be careful not to substitute its own decision for that of an employer who was acting reasonably.

105. The Tribunal found that Mr Chatwin had a genuine belief that Mr Frewer had committed the conduct concerned. This largely follows from our finding as to what the reason for the dismissal was. We also found that there were

reasonable grounds for that belief. As has been described above, E1 and E2 both stated that the conduct had occurred, and Mr Frewer accepted at least some elements of it.

106. With regard to the question whether a reasonable investigation was carried out, Mr Harding made a number of criticisms of the disciplinary process. These were against the background submissions, which the Tribunal accepted, that the proceedings were of great significance to Mr Frewer (even if he had not fully appreciated that at the outset) and that there could be no suggestion of lack of resources on Google's part.

107. Mr Harding submitted that there had not been a disciplinary hearing as such, as E1 and E2 did not give evidence to Mr Chatwin. He pointed out that Mr Ruiz was not called and asked what he had heard. Mr Harding submitted that only Mr Frewer's evidence had been challenged, and that the evidence of E1 and E2 had not been challenged in any way. He said that the result was that Mr Chatwin preferred the written statements of E1 and E2 over Mr Frewer's "live" account. He further contended that, in relation to E1 and E2, Mr Chatwin had essentially confined himself to asking why would they lie, when it was not known what they would have said had Mr Frewer's case been put to them. Mr Harding said that all of those present at the table could have been asked what they had heard; and he said that the appeal involved speaking to Mr Chatwin about how he had reached his decision, but had not included speaking to any of the witnesses.

108. The Tribunal acknowledged that these points were largely correct as matters of fact. We also considered that it would not, on the face of the matter, have been difficult for Mr Chatwin or Mr Turner to speak to E1, E2, or any of the others present at the dinner.

109. In asking itself whether the disciplinary process was such that no reasonable employer, acting reasonably could have adopted it, the Tribunal reached the following conclusions on the specific matters relied upon by Mr Harding:

    109.1 A reasonable employer could proceed with the disciplinary hearing without calling E1 and E2 to give evidence. A disciplinary process should not be judged by the standards of a court hearing. The Tribunal would not go so far as to say that there could never be circumstances in which it would be necessary for a fair hearing to test the evidence by cross-examination or something similar, for example if the employee alleged that the case against him was malicious or wholly fabricated, or if he offered a completely different explanation of what had taken place. In the present case, however, Mr Frewer accepted that the complaints were genuine, accepted some aspects of the comments attributed to him, and denied, queried or did not recall the more serious aspects. He did not advance any positive case or explanation that could have been put to E1 or E2.

109.2 Similar reasoning applies to the suggestion that the evidence of E1 and E2 had not been challenged and that neither Mr Chatwin nor Mr Turner had spoken to them. The Tribunal considered that, while it was arguable that the process might have been improved by Mr Chatwin and/or Mr Turner speaking to them in person so as to have an impression of them as witnesses, it was within what was reasonable not to do so. E1 and E2 had given their accounts of what Mr Frewer had said. Speaking to them in the light of Mr Frewer's account would presumably have involved telling them that he accepted some aspects of their account, and had said that he did not say, or could not remember saying, the more troubling things. In the Tribunal's judgement, it would be open to an employer to take the view that there would be little point in this, it being unlikely that E1 or E2 would say anything different on being told what Mr Frewer's position was.

109.3 A reasonable employer could take the view that speaking to Mr Ruiz again, or speaking to others at the table, was unlikely to take the matter any further. Mr Ruiz had said that he was only involved in the relevant conversation on and off, and that he had heard some things but not others. He was not therefore in a position to make any assertions about what had not been said. A reasonable employer could take the view that others at the table who were not involved in the conversation and were further away from it than Mr Ruiz would have nothing useful to add: at best, if they said they did not hear the alleged comments, that would take matters no further, as they too would not have heard the entire conversation.

109.4 It is not necessarily the case that "live" evidence trumps written evidence: an employer could reasonably prefer the latter in a particular case.

109.5 The appeal took the form of a review of Mr Chatwin's decision rather than a re-hearing. While re-hearing might be preferable from an employee's point of view, that is not in general an unreasonable approach to take. It was not unreasonable in this particular case, where Mr Frewer had not advanced any positive case in relation to the alleged comments, and where Mr Turner asked Mr Chatwin about the suggestion in the appeal that "biases of the business" had influenced the disciplinary outcome.

110. A further point raised by Mr Harding was the suggestion that the decision not to proceed with the "old guy with experience" allegation cast some doubt on E2's reliability as a historian. The Tribunal did not agree. The fact that E1 did not recall this comment of itself means only that she did not recall it, not that E2's account of it should be regarded as suspect.

111. The Tribunal therefore concluded that, while it was possible to suggest ways in which the disciplinary process might have been conducted differently, none of these points took the process outside of the range of that which was reasonable.

112. Reminding itself that it can be possible to come to a different conclusion when looking at a process in the round from that which is produced by looking at its individual components, the Tribunal asked itself whether, viewed overall, the process was outside of the range of reasonable processes. We found that it was not.

113. The Tribunal then considered whether dismissal was within the range of reasonable responses. We concluded that it was. We considered that different employers might take different views about the seriousness of the various comments, and that it was possible that a different employer in the same situation might not have opted for dismissal. There were, however, 4 inappropriate comments made in the course of the evening (the Tribunal considered that, had it been the only event, waiting for E1 would not have given rise to any complaint, but that it was a legitimate concern given what had gone before). The comments were addressed to more junior female colleagues, who were troubled by them. Mr Frewer was the team leader and could reasonably be expected to set an appropriate standard of conduct. Google could not reasonably be expected to tolerate or appear to condone conduct of this sort.

114. The Tribunal therefore found that the dismissal was not unfair.

115. It was then necessary for the Tribunal to make its own findings about what occurred on 24 September 2019, for the purposes both of the wrongful dismissal complaint and the issue of contributory conduct, had we decided that the dismissal was unfair. This is a different exercise from that of assessing the reasonableness or otherwise of the employer's decision: we have to reach our own conclusions on the evidence. The evidential standard to be applied is the balance of probability.

116. The Tribunal has already set out the relevant evidence and will not repeat it here. We found as a matter of probability that Mr Frewer made all 4 of the remarks attributed to him and complained of by E1 and E2. Our reasons for so finding are as follows:

    116.1 While recognising that E1 and E2 have not given evidence in the present hearing, their written accounts are essentially consistent.

    116.2 There is no obvious reason to doubt the credibility of E1 and E2: indeed, Mr Frewer himself accepted that their complaint was genuine.

116.3 In his evidence to the Tribunal Mr Frewer maintained essentially the same stance as in his account in the disciplinary process. He accepted that he showed the picture of the underpants but denied making reference to a penis or a nose. He accepted that he may have made a "witty remark" about an escort. Mr Frewer agreed that there was a conversation about getting into trouble when younger. In relation to the more serious aspects of the alleged comments, he said "I believe I probably did not say those things." He said that the bar bill should have been investigated because "if the others were drunk they would have a poor recollection".

116.4 When asked about the sanction of dismissal, Mr Frewer said that he did not believe that he had done anything that justified being dismissed, and that there should not have been any sanction. He agreed that it was correct that he thought he had not done anything wrong.

116.5 Mr Frewer's partial acceptance of the allegations, his somewhat enigmatic denial of the other aspects, the suggestion that others at the table may have been drunk, and his assertion that he had not done anything wrong, all led the Tribunal to doubt his account of events.

117. Mr Frewer agreed that he had waited for E1, and said that he did so out of genuine motives. As the Tribunal has already observed, had this stood alone there would have been no grounds for complaint about it. We accepted that Mr Frewer had no wrongful intent in waiting for E1 at that point, but found that, given the comments that he had previously made, he should not have waited for her, as he should have realised that E1 and E2 might assume that he intended to make advances towards the former.

118. Having made these findings of fact, the Tribunal had to consider, for the purposes of the wrongful dismissal complaint, whether Mr Frewer had committed a breach of the employment contract that was sufficiently serious as to justify his dismissal without notice. We found that he had. Making comments such as he did to more junior female colleagues was likely to seriously damage Google's confidence in him as a manager. The harassment policy made it clear that a serious view would be taken of such matters and that breach of the policy could lead to dismissal.

119. Had the Tribunal found that the dismissal was unfair on procedural grounds, we would for the same reasons have found that Mr Frewer contributed to his dismissal to the extent of 100%.

120. So far as the principle in **Polkey** is concerned, had this arisen for decision, the Tribunal would have found that it was unlikely that remedying any

procedural defect that (contrary to our findings) might be identified would have led to a different outcome. For the reasons already given, we found it unlikely that further questioning of E1, E2, or Mr Ruiz would have produced any different evidence, and unlikely that approaching the others present at the dinner would have led to any different conclusion. Similarly, it was unlikely that conducting the appeal in any different way would have led to a different outcome. The Tribunal would therefore have found that there was no real prospect of a different result being reached.

121. The effect of all of the above is that all of the complaints in the claim are unsuccessful.

Employment Judge Glennie

Dated: ……. 26 August 2022……..

Judgment sent to the parties on:

27/08/2022

For the Tribunal Office