EMPLOYMENT TRIBUNALS

Claimant: Miss J. Gale

Respondent: Gatehouse Bank Plc

Heard at Watford by CVP **On:** **12 and 13 January 2023**

Before: **Employment Judge S. Matthews**

Representation
Claimant: In person
Respondent: Mr. Clement (Counsel)

JUDGMENT

1. The claimant's claim of unfair dismissal under section 100 (1) (c) of the Employment Rights Act 1996 fails and is dismissed.

2. The claimant's claims of detriment under section 44 (1) (c) of the Employment Rights Act 1996 fails and is dismissed.

3. The claim for breach of contract is not well founded and it is dismissed.

REASONS

Introduction

4. The claimant was employed by the respondent, a bank offering Shariah compliant financial products, as a Direct Adviser from 8 September 2020 to 17 May 2022. She issued a claim on 23 June 2022 alleging detriment and automatic unfair dismissal for raising health and safety concerns. The respondent's defence is that the reason for the alleged detriment and the dismissal was capability.

5. The claimant represented herself and the respondent was represented by Mr. Clement of Counsel.

6. I heard sworn evidence from the claimant and from her witness, James Evans (Direct Adviser at the respondent from 20 September 2021 to 4 July 2022) and on behalf of the respondent from Alina Rauta (Compliance

Assistant). There was a bundle of documents consisting of 268 pages. References to paragraphs in witness statements are in the form (AB/X). References in the form (X) are to the pages in the hearing bundle.

7. The case was listed to be heard before a Judge only. Section 4(1) of the Employment Tribunals Act 1996 establishes the general rule that proceedings before an employment tribunal should be heard by a tribunal composed of the chair (i.e. the employment judge) and two lay members unless the claim is of a type that falls within a list set out in s. 4(3) or the parties give their consent in writing to the claim being heard by a Judge sitting alone under s. 4(3)(e). A claim for automatic unfair dismissal falls within s. 4(3) but a claim alleging detriment and unfair dismissal does not. At the beginning of day two of the hearing I explained the issue to the claimant and respondent's Counsel and I gave the parties the option of adjourning and re-listing the case to be heard by a full panel. Both parties confirmed in writing at the beginning of the second day that they were content to proceed with Judge sitting alone.

Issues

8. At the outset of the hearing I was referred to a draft list of issues by the respondent to which the claimant had made additions in red print.

9. I considered the issues carefully, taking into account the content of the ET1 form and the claimant's oral submissions about her claim. The claimant submitted that her complaint was that she had raised health and safety concerns and was subsequently subjected to detriments and dismissal. In addition, she had not been paid a bonus that would have been paid to her if she had remained in employment.

10. Although the respondent had listed a complaint of detriment in the list of issues Counsel for the respondent argued that this was not claimed in the ET1.I decided that it was set out in the ET1 as the claimant stated that the removal of her Competent Adviser status before termination meant that she could not apply for a similar role (8).

11. The claimant had also included in the list of issues a complaint that she had been subjected to detriment and dismissal for making protected disclosures under section 43A of the Employment Rights Act 1996. The protected disclosures she wished to rely on were the same instances as she relied on for the raising of health and safety concerns. This complaint was not set out in the ET1 and the claimant decided that she did not intend to pursue it.

12. The claimant raised other matters in the list of issues which were not reflected in the content of the ET1. These matters are considered only to the extent that they are relevant to the key issues I need to decide. They are not issues of fact or law on which I am required to make a decision. They were; whether the respondent met regulatory training and competency requirements and trained the claimant to a competent (capable) standard at the outset, whether the respondent was obliged to remove the claimant's Competent Adviser Status, whether the respondent should have ensured that the claimant remained competent in her role and whether the respondent was in breach of contract for failing to provide a job description, adequate training, a health and safety policy, not acting appropriately in

response to health and safety concerns raised, deciding to start a capability process and failing to meet legal obligations under The Management of Health and Safety at Work Regulations 1999.

13. The issues to be decided were finalised as follows:

13.1 Dismissal – s100(1)(c) Employment Rights Act 1996 Did the Claimant bring to the Respondent's attention by reasonable means circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety. The Claimant relies on the following concerns.

a. On 13 September 2021, concerns about her workload to her Line Manager Ms Alina Rauta;

b. In September 2021 – concerns about her workload and stress at work in the Advisor 1;1 Summary to Alina Rauta.

c. On 29 October 2021, at the Team Talks meeting to S Harvey about the stress caused and affect to their wellbeing due to the increase in workloads.

d. In the grievance dated 25 February 2022 about the lack of support and bullying and harassment by Ms Alina Rauta.

e. 16th February 2022 – Doctor note for work related stress

f. 28th February 2022 – Doctor note for work related stress

g. 14th March 2022 – Doctor note for work related stress

h. Before 22nd March 2022- Grievance Outcome Appeal confirming reasons signed off work were due to work related stress

i. On 25th April 2022 – concerns raised about working hours in response to Health and Safety Section of Remote working Policy.

j. On 25th April 2022 – reported Gemma Donnelly for breaching Health and Safety of Remote Working Policy.

k. 13th May 2022 – Doctor note for work related stress

13.2 Was the sole or principal reason for the Claimant's dismissal the fact she raised the above concerns? The Respondent asserts her dismissal was on the grounds of capability/performance.

13.3 Detriment – s44(1)(c) Employment Rights Act 1996 If it is found the Claimant did raise any of the concerns as aforesaid, was the Claimant subject to the following detriments

(i) Faults being found in her work by Ms Alina Rauta;
(ii) Removal of CAS;
(iii) Being placed on a PIP

13.4 Remedy What, if any, compensation would be just and equitable to be awarded to the Claimant for

(i) financial losses;
(ii) injury to feelings;
(iii) personal injury;

13.5 Breach of Contract or Unauthorised deductions

(i) Was the Claimant contractually entitled to a bonus payment during her employment?
(ii) If so, what was the Claimant's entitlement on termination?

The Claimant claims the outstanding balance of the bonus payment of £1498.00. The Respondent asserts this sum was not payable as the Claimant had been dismissed by the Bank at the date the bonus became payable.

Findings of Fact

14. The issues were narrowed down at the outset of the hearing as discussed at paragraphs 8 to 13 above. While I have carefully considered all the points that were argued orally and in writing I have not dealt expressly with every single point but I have dealt with the key points where they are vital to my conclusions. I have referenced **items a) to k)** from the list of issues in bold type when discussing my findings of fact.

15. The respondent is regulated by the Financial Conduct Authority and the Prudential Regulation Authority (AR/2). It differs from the well-known 'High Street' banks in particular respects such as by offering Home Purchase Plans as an alternative to mortgages in order to be compliant with Shariah law and in lending to overseas customers. The claimant is a very experienced mortgage adviser with over 20 years' experience (JG/A10) but, at the time of joining the respondent, she was not familiar with the type of product offered by the respondent (JG/C2).

Training and Induction

16. The claimant worked a three-month probationary period in which she was expected to achieve Competent Adviser Status (CAS) (64). CAS is a regulatory requirement for the role. It requires an adviser to demonstrate competence to give advice without supervision.

17. In order to decide whether to grant CAS the respondent assesses whether the adviser is competent in three consecutive case reviews and all elements of the sales process (AR/11).

18. In the claimant's view her initial training was not adequate (JG/C3). She was sufficiently concerned to request an extension to her probation period (JG/C6-10). She was awarded CAS on 6 January 2021 based on three cases (JG/C11). In evidence the claimant argued that she should not have been assessed as competent on the basis of these three cases alone as they did not enable her to demonstrate competence in all areas, particularly as the financial products offered by the bank were unusual. The cases that

subsequently led to the removal of her CAS status were not representative of the three cases that had led to her achieving CAS.

19. Despite her concerns over the quality of the training the claimant performed very well during 2021 and exceeded her targets (JG/16).

Concerns about workload

20. Both the claimant and James Evans (former Direct Adviser at the respondent) gave evidence that the workload was heavy, frequently requiring them to work a 14- or 15-hour day (JG/D19/D23), (JE/22). James Evans raised his concerns with the respondent (JE/19,20). The claimant brought her concerns about the workload to the attention of the respondent. I deal with each occasion below.

September 2021

21. The claimant raised concerns about the workload on 13 September 2021 in a one to one meeting with her line manager Alina Rauta (AR), who was at that time Home Finance Sales Manager (JG/D17) **(a) list of issues)**. She wrote in 'Advisor 1:1 Summary' **(b) list of issues)** that overworking staff is not sustainable and 'more staff will burn out and leave' (143-145). In the absence of a health and safety policy (JG/B8) AR accepted in evidence that health and safety issues were to be raised to her or with Human Resources.

October 2021

22. A 'Teams Talk' meeting was held on 29 October 2021 (145) (JG/D31-38). The meeting was arranged by Sharron Harvey (SH), Head of Human Resources, to enable attendees to raise concerns. 'Chatham house rules' applied (111). Attendees included the claimant and James Evans who gave evidence on behalf of the claimant. The claimant spoke out about the long days they were expected to work, describing the work as 'relentless' (**c) list of issues**).

November 2021

23. On 1 November 2021 SH sent an email outlining the complaints about long working hours and the effect on well-being to various managers including Gemma Donnelly (GD) (Head of Direct Finance and Wellbeing Support Mentor*)* (111) (112). The claimant and other participants in the October meeting were not identified. A further meeting to discuss the issue was held and GD was in attendance ***(***JG/E1***).***

24. The Claimant believes that although she was not named the managers would have known that she made the complaints, and she was subsequently singled out for raising Health and Safety concerns (JG/E2). She alleges that from the beginning of November 2021 onwards there was a sudden change in the way in which she was treated (JG/D38). I deal with these assertions under my Conclusions below.

December 2021

25. In December 2021 and January 2022 two of the claimant's files were marked 'Red' following routine file reviews (AR/23). The

respondent carries out one file review a month and one case review per quarter in order to monitor the performance of CAS rated staff (AR/13). The reviews were usually carried out by the line manager but at that time GD was helping AR with the reviews as AR had new members of staff to train (AR/22).

January 2022

26. On 18 January 2022, as a result of the Red file reviews, AR informed the claimant in a teams meeting that she would be subject to 'enhanced supervision' meaning that more of her files would be checked. She warned the claimant that if any more of her files were assessed as amber or red she would need to consider removing her CAS rating (AR/17). The effect of removing the CAS rating was significant as it would have been a requirement for any mortgage advice role the claimant wished to apply for (JG/E21),

27. The respondent's Training and Competency Scheme (65) provides:

> *An Adviser may be regressed if the Supervisor determines that the Adviser is persistently failing to demonstrate a competent standard in any aspect of the performance of their role.*
> *In such circumstances the Bank's Performance Improvement Process will ensue. A suitable remedial Performance Improvement Plan will be agreed with their Supervisor, incorporating the additional training and coaching support required. The supervisory requirements of 'Attaining Competence' should be adopted by the Supervisor. The adviser must attain competent adviser status within 1 month of being regressed. Failure to reach competent adviser status will lead to a formal performance plan. Increased levels of supervision should be continued until the Supervisor is satisfied that performance has been recovered and ongoing competence can be maintained. The Bank reserves the right to remove an Adviser from the role where competency has not been demonstrated.*

28. On 19 January 2022 and 28 January 2022 AR assessed two more files as amber (AR/24). In January 2022 she found a data breach and incorrect storing of information (AR/ 25).

February 2022

29. On 1 February 2022 AR held a meeting with the claimant to provide feedback on the two amber cases (AR/26). At a subsequent meeting on 3 February 2022 AR informed the claimant that she was removing her CAS rating and placing her on a Performance Improvement Plan (PIP) (AR/27). AR stated in evidence that she did not take the decision lightly. Her concern was that if the claimant was making mistakes when under increased supervision it was not safe to allow her to give advice unsupervised. She denied that she was motivated by the claimant raising health and safety concerns. I found her evidence on her reason for removing the CAS credible and I discuss the reasons for this further under Conclusions below.

30. On 10 February 2022 a meeting was scheduled between the claimant and AR to discuss the PIP. This meeting did not take place owing to the claimant

being off sick (AR/31). The claimant was subsequently signed off sick until 28 March 2022 and this meant that the PIP did not commence until 4 April 2022 (AR/36).

31. On 25 February 2022 the claimant raised a written grievance (121-123). She alleged 'Bullying' and 'Unfair Treatment' by AR (121). The grievance states that AR did not offer help and support and should have done more to reduce her workload (122) (**d) list of issues).**

March 2022

32. A grievance meeting took place with GD on 3 March 2022 and the letter setting out the outcome is dated 15 March 2022 (124-140). GD stated that she was satisfied that the removal of CAS was a reasonable and appropriate course of action(127).

33. The claimant appealed the grievance outcome (151-156) and a meeting took place with Tracey Bailey (TB) on 25 March 2022 (!57-160) **(h) list of issues)**. The matters raised by the grievance were identified as Bullying, Unfair treatment and withdrawal of CAS (157). Although she did not uphold the grievance TB acknowledged that the workload was significant (JG/E46)**.**

April 2022

34. On 4 April 2022 the PIP commenced (AR/36). The claimant had been subject to enhanced supervision between 18 January 2022 and 10 February 2022 and had been signed off sick until 28 March 2022. AR stated in evidence that she proceeded with the PIP because she was 'not comfortable' with the claimant giving advice unsupervised. I find her evidence on her reasons for placing the claimant on a PIP credible and I refer to this further in my Conclusions below.

35. On 25 April 2022 the claimant made comments about working hours in response to the Remote Working policy by adding them in the left-hand margin (40) and gave examples of breaches by GD (JG/E60) (211-212) **(i) and j) list of issues).**

May 2022

36. On 5 May 2022 AR assessed the claimant's performance as still not reaching the required standard (AR/39). On 10 May 2022 the claimant was sent a letter inviting her to a meeting on 13 May 2022 and warning her that her employment may be terminated (238). The respondent terminated the claimant's employment following the meeting with effect from 17 May 2022, 'due to continued unacceptable levels of performance' (203.3).

37. AR maintained in evidence that the decision 'had nothing to do with her having raised health and safety issues, or concern about risk assessments…' (AR/50). I accept her evidence on this and I refer to this further in my Conclusions below. On 17 May 2022 the claimant appealed the termination of her employment stating that the 'primary reason for my appeal is on the grounds of health and safety' (AR/49).

Fit Notes

38. The claimant obtained fit notes referring to work related stress dated 16 February 2022, 28 February 2022,14 March 2022 and 13 May 2022 which she claims had the effect of bringing her health and safety concerns to the

respondent's attention**. (e), f),g),k) of the list of issues).**

Breach of contract claim

39. The Employee handbook refers to a 'discretionary annual performance bonus plan' that is 'not guaranteed' (28). The employment contract states that bonuses are non-contractual and discretionary and provides that an employee is not eligible if their employment terminates prior to the date when a bonus would have been payable (83/84). A letter dated 11 February 2022 (278) which the claimant did not receive as she was off sick (JG/E35) stated that a bonus of £1498 was deferred subject to performance indicators for the first half of 2022. The claimant can recall being informed by AR that bonuses were paid 'paid fifty percent (50%) upfront and fifty percent (50%) is paid six (6) months later, so if you don't receive a performance bonus next time, you will still have the remainder of the previous performance bonus to look forward to' (JG//E6). This does not reflect the information in the letter or the contract and either the claimant or AR must have been mistaken in their understanding of the scheme.

Law

40. Section 100 (1) of the Employment Rights Act (ERA) 1996 provides that:

> 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—
>
> ……
>
> (c)being an employee at a place where—
> (i)there was no such representative or safety committee, or
> (ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
>
> At the claimant does not have two years continuous service the burden of proof to prove the reason for the dismissal rests with the claimant: Tedeschi v Hosiden Besson Ltd EAT 959/95 and Parks v Lancashire Club EAT 310/95.

41. Section 44 (1) of the Employment Rights Act 1996 provides that:

> (1)An employee 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—
>
> …
>
> (c)being an employee at a place where—
> (i)there was no such representative or safety committee, or
> (ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed

were harmful or potentially harmful to health or safety,

42. The contractual jurisdiction of employment tribunals is governed by section 3 of the Employment Tribunals Act (ETA) 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 ('the Order'). Under section 3(2) ETA 1996 and Article 3 of the Order for a tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on the termination of the employee's employment.

Conclusions

43. It is admitted that the claimant was dismissed. The claimant also claims that she was subjected to detriments; namely faults being found in her work, the removal of CAS and being place on a PIP. The claimant submits that this was because she brought to the respondent's attention by reasonable means circumstances that she reasonably believed were harmful or potentially harmful to health or safety. I will first consider whether she did bring issues to the respondent's attention as required by the wording of s.100 (1) and s. 44(1) of the ERA 1996.

44. In September 2021 (**a and b list of issues)** the claimant referred to overwork causing staff to 'burn out'. This was a circumstance which she reasonably believed was harmful to health and safety. The reference to 'burn out' indicates a risk to mental health. I find that her line manager AR was the appropriate person for the claimant to raise concerns with. The bundle did not contain a health and safety policy and the claimant was not made aware of one. Bringing the issue of overwork to the attention of her line manager and referring to the risk to mental health was appropriate and reasonable.

45. In October 2021 at a Teams talk with Human Resources (**c list of issues)** the claimant raised the same issue of long working hours**.** I find that it was reasonable and appropriate to do so at a meeting convened by HR to discuss such issues. The claimant was not identified as being the person who raised the concerns, but I accept the claimant's contention that it was likely that the respondent knew that she had raised concerns because she had already raised concerns with her line manager, AR, in September 2021.

46. In respect of the other instances referred to (**(d) to k) list of issues)** I do not find that the claimant raised, by reasonable means, circumstances that she reasonably believed were harmful or potentially harmful to health or safety, as required by the statutory wording.

47. The grievance and outcome in February and March 2022 did not refer to health and safety circumstances **(d and h list of issues).** There were some references to the excessive workload, but the principal complaints were bullying and unfair treatment. These complaints to not amount to bringing health and safety concerns to the respondent's attention and I find that the respondent could not reasonably be expected to view the complaints in the context of circumstances that were harmful to health and safety.

48. In April 2022 the claimant made comments on the remote working policy **(i)**

and j) list of issues). The specific wording of the comments is not in the bundle but is referred to in a letter subsequently (211). Again, there is some reference to the practice of working long hours, but I do not accept that this amounted to bringing to the respondent's attention, by reasonable means**,** circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety. The respondent could not reasonably have been expected to link these comments to health and safety risk.

49. I do not accept that the Fit Notes amounted to bringing to the respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety, **(e),f),g),k) of the list of issues).** The Fit Notes relate to the claimant subjectively and are not a reasonable means to bring health and safety risk to the respondent's attention.

50. I have also taken a step back and considered the position overall. I accept that the claimant was in an ongoing conversation about the workload; bringing the heavy workload issue to the respondent's attention may have occurred on occasions other than those referred to specifically in the list of issues, for example in October and November 2021 **(**JG/D23-24**).** This was a continuation of the concerns she first raised in September 2021. However, even if there were other occasions, or if I am wrong about the occasions referred to at **d) to h) of the list of issues** that does not alter my conclusion that the dismissal and detriments were not caused by them.

51. On the issue as to whether the dismissal and the detriments were linked to the health and safety concerns, I find that was not the reason. The claimant was dismissed for an independent reason. The treatment which the claimant alleges amounted to detriments also occurred for an independent reason.

52. The outcome of the file review, which was routine and applied to all CAS staff, led to a chain of events: the removal of CAS, being placed on a PIP and ultimately the termination of employment.

53. I have reached this conclusion for the following reasons. The mistakes made by the claimant were found in December 2021 and January 2022. The claimant's case is that everything changed at the beginning of November 2021. The implication is that GD and AR looked for the faults because she had raised health and safety concerns. I find that this was not the case. I accept AR's explanation that the mistakes were found as part of the routine file review. I take into account that the claimant accepts that she had made mistakes. The claimant stated in cross examination that she should not have been granted CAS at all and the logical conclusion that follows from this is that the respondent was justified in removing it, even if that felt unjust to the claimant. The removal of CAS led to being placed on the PIP because the claimant was unable to perform the role for which she had been recruited without the CAS rating.

54. It is clear that there was a culture of long hours. The claimant was supported by her witness, JE, on this. It is clear that the respondent was aware of it, as others had raised it, including JE. However, there is no evidence that the respondent was critical of the claimant for raising

concerns. I find it more credible that the respondent was motivated by the realisation that the claimant was making mistakes than by complaints of overwork.

55. The claimant has not discharged the burden of proof that the raising of concerns was the sole or principal reason for the termination of employment. She has not been able to establish a causal link between raising health and safety concerns and the subsequent actions of the respondent. It follows from my conclusions that the claimant's complaints of unfair dismissal under sections 100 (1) (c) ERA 1996 and her complaints of detriment made on the same basis under sections 44(c) ERA 1996 must fail and are dismissed.

56. With regard to the breach of contract claim I find that the claimant was not entitled to a bonus. I have found that the bonus was discretionary and non-contractual. It would have been based on her performance in the first half of 2022 and she was not entitled because her contract was terminated before the bonus payment was due. In any event even if the entitlement to a bonus was contractual the claim was not outstanding on the termination of employment and the Tribunal would therefore not have jurisdiction to hear the complaint. The claim for breach of contract is therefore dismissed.

_____

Employment Judge **S. Matthews**

_____

Date 10 February 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

23 February 2023

NG

.

FOR THE TRIBUNAL OFFICE