EMPLOYMENT TRIBUNALS

Claimant:	**Mr Y Amin**		
Respondent:	**The Bradford LGB&T Strategic Partnership (a company limited by guarantee) t/a Equity Partnership**		
Heard at:	**Leeds**	**On:**	**10, 11 & 12 May 2017 & 15 & 16 May 2017**
Before:	**Employment Judge Little**		
Members:	**Ms H Brown** **Mr L Priestley**		
Representation			
Claimant:	**In person (assisted by Professor I Burkitt)**		
Respondent:	**Ms S Brewis of Counsel (instructed by DAS Law Ltd)**		

REASONS FOR A JUDJMENT ISSUED ON 17 MAY 2017

1 The parties were asked whether they required written reasons at the conclusion of the judgment delivery (when oral reasons had been given) but neither party required reasons. However both sides have now made a request, the respondent in its e-mail of 19 May 2017 and the claimant in his e-mail of 20 May 2017.

2 **The complaints**

In a claim form presented on 14 November 2016 the claimant brought claims of unfair dismissal; that he had been subjected to a detriment because of a protected disclosure and sex discrimination. The sex discrimination complaint was subsequently struck out at a preliminary hearing on 18 January 2017 on the basis that it had been presented out of time and it was not just and equitable to extend time. At the same preliminary hearing the remaining complaints were clarified to be as follows:-

- Subjection to a detriment on the ground of a protected disclosure (Employment Rights Act 1996, section 47B);
- Automatically unfair dismissal by reason of a protected disclosure (Employment Rights Act 1996, section 103A);

- Unfair dismissal (ordinary).

3 **The issues**

The issues for determination by the Tribunal were also defined at the January 2017 preliminary hearing. At the beginning of our hearing it was confirmed by the parties that these were the issues that we were to determine. However during the course of cross-examination of the claimant on day 3 of the hearing it became apparent that the respondent was contending that there was a time issue in respect of all or part of the detriment complaint. There had been a brief reference to this in the respondent's grounds of resistance but in any event as this was a jurisdictional issue it is one which we obviously had to deal with.

4 **Preliminary issues**

On day 1 we were told by Ms Brewis that her lay client had wrongly assumed that the claimant was going to be struck out in the preceding week for breach of an Unless Order. Accordingly its witnesses had been stood down. This meant that one potential witness, Kate Jones, was unlikely to be available. Another witness (Ms Thorbrian) would only be available later in the week following surgery and two other witnesses would only be available later in the week (in effect the next week) when they had returned from what seemed to be an impromptu holiday in Spain.

5 We were also told by Ms Brewis that although the respondent had made audio recordings of an investigation meeting and the disciplinary hearing, no one had thought to make transcriptions of what, certainly in the latter case, would have been a very lengthy recording. The difficulty was compounded because at least one of the recordings was on a device belonging to one of the holidaying witnesses and was at her home address. We indicated that we would require transcriptions to be made of both recordings. In the circumstances we consigned the whole of the first day to reading. The transcripts of the disciplinary hearing became available at the beginning of day 2 (although we then had to take time to read it). We did not have a transcript of the disciplinary investigation meeting (a fairly crucial document as it was during this that the claimant allegedly made one of the protected disclosures) until day 3.

6 **The witnesses**

The claimant's witnesses were himself; Christine Blessing (a counselling coordinator with Yorkshire Mesmac; Mr R E Garcia and Professor Ian Burkitt (formerly a board member of the respondent).

The respondent's evidence was given by Ms A Kendal (partnership manager); Ms Elizabeth (Libby) Beckett-Wrighton (co-chair of Trustees and the investigating officer; Clare Beckett-Wrighton (partner of Libby and the other co-chair of the Trustees and the dismissing officer) and Ms N Thorbrian (a volunteer Trustee).

7 Although the respondent had served a witness statement by Kate Jones we did not read that statement (and Ms Jones was unable to attend the hearing).

8 **Documents**

The Tribunal had before them a bundle running initially to 295 pages although for the reasons explained various significant documents were added during the course of the hearing.

9 **The facts**

9.1 The claimant's employment with the respondent commenced on 6 November 2013. His job title was BMELGBT Visibility Project Coordinator. The claimant worked 18.5 hours per week. The claimant's specific role was to increase the visibility and wellbeing of LGB&T people from ethnic minorities.

9.2 The respondent describes itself as a grassroots community organisation run by and for LGB&T people in the Bradford area.

9.3 The respondent is a small employer with, at the material time, only 3.6 full time equivalent staff. Governance of the respondent was through a board of Trustees – who were volunteers. One of the employees was Ms Kendal. Her role was as Manager.

9.4 In his evidence (certainly in his witness statement) the claimant contended that in September 2014 at two separate staff meetings he had disclosed that he "was slightly concerned about a love affair taking place between Nikki Thorbrian …. and (HH) a service user." We should add that we have anonymised that service user so that she has been referred to simply as HH during the hearing. As we understood the claimant's case as it developed during the hearing he was not contending that whatever he may have said in September 2014 was a protected disclosure. That can perhaps be underlined by the claimant's reference to being slightly concerned. We have not seen any documentation (if it exists) by way of minutes of any staff meetings in September 2014.

9.5 At a supervision meeting which took place on 9 October 2014 concerns were expressed about the claimant's timekeeping and his failure to make progress. It was recorded in those minutes that the claimant stayed within his comfort zone and avoided work which he found challenging. It was also recorded that in his own report he had indicated that publicity for a woman's group had been completed but that had been contradicted by a Trustee. The comment was made "Y to be more careful about accuracy as this does not help credibility." Minutes of that supervision meeting are at pages 126a and 126b.

9.6 By November 2014 concerns about the claimant's work had not abated, in fact they had increased. This led to Ms Kendal preparing a report, a copy of which is at pages 126d and 126e. It is dated 5 November 2014. She reported ongoing concerns about the claimant's timekeeping and commented that the claimant did not communicate sufficiently. Reference was made to supervision notes which were full of examples of the claimant agreeing to do something which was then not completed. There was also a complaint that the claimant had failed to follow instructions and had disregarded the systems of the organisation. When expressly asked to do something he often failed to do so. Examples were given. Ms Kendal considered that this was impacting adversely on other members of the team and the organisation.

9.7 In or about early November 2014 Saorsa Tweedale, who at that stage was Vice Chairman of Trustees, wrote to the claimant. The letter is in fact undated and a copy appears at page 126c. It was an invitation to a disciplinary hearing to be held on 6 November and explained that the issues that would be looked at were timekeeping, following instructions and systems and communications.

9.8 Subsequently the claimant received a verbal warning with regard to his timekeeping.

9.9 The claimant has contended that he made two further disclosures at what he described as staff meetings in May 2015. He said this to the Judge who conducted the preliminary hearing on 18 January 2017. At the preliminary hearing the claimant had not referred to alleged disclosures in September 2014 – they only appeared in his subsequent witness statement.

9.10 In paragraph 31 of Ms Kendal's witness statement she accepts that during what she describes as Spring 2015 the claimant had informed her in a staff meeting that he had been told by a service user that she was in a relationship with Ms Thorbrian and that Ms Thorbrian's husband had "warned the service user off." There are no minutes of this staff meeting in the trial bundle. Following the May 2015 staff meeting Ms Kendal discussed the matter with her Line Manager Clare Beckett-Wrighton who at the time was co chair of the Trustees. Those two agreed that very discreet enquiries would be made of the service user, (HH), to see if she appeared alright and if there was anything which the respondent needed to take action about. It was agreed that HH would not be informed of what the claimant had told Ms Kendal. The respondent took this discreet approach because it appreciated that it was a sensitive issue. In the event, having made that approach to HH, the respondent took the view that no action was required other than for them to keep a watching brief. We accept the respondent's evidence that no intimation of this issue was made to Ms Thorbrian. We make this finding because we were convinced that the respondent fully realised the delicate nature of what it had been told. It did not regard the service user as vulnerable and was mindful that it was necessary to respect privacy and confidentiality in relation to what was alleged by the claimant to be an extra marital affair.

9.11 We have not been told of any information being fed back to the claimant nor for that matter of the claimant at that point in time making any enquiries as to what if anything the respondent was going to do about what he had said.

9.12 Also in May 2015 the respondent's concerns about the claimant's timekeeping and performance continued. An investigation was carried out by Kate Jones, one of the respondent's Trustees, and a copy of that report is at pages 127-130. The concerns remained as before, when broadly the claimant had accepted the criticism being levelled at him. In her report Ms Jones felt that there had been two major shortfalls by the claimant in relation to communication and his ability to prioritise. Whilst she was pleased that he acknowledged these failings she noted that it was unfortunate that he had not

demonstrated sufficient change to achieve the appropriate standard. Whilst acknowledging that the claimant had not acted maliciously, nevertheless Ms Jones considered that there was strong evidence to suggest that there had been alleged misconduct on all four counts referred to therein and that there was a case to be heard. A copy of her report is at pages 127 to 130. The report is dated 11 May 2015.

9.13 The claimant was invited to attend a disciplinary hearing which was arranged for 18 May 2015. He was represented at that hearing by a union representative, Ann Morgan. The disciplinary panel was chaired by Sue Gibbons, another Trustee. Minutes of that meeting appear at pages 135 to 140.

9.14 The sanction which that panel considered appropriate having heard from the claimant was a final written warning and that was documented in a letter of 21 May 2015 which appears at pages 141 to 143. The letter referred to the loss of trust and confidence in the claimant and described his misconduct as wilful refusal to follow managerial instructions; persistent poor timekeeping; a failure to follow sickness procedures and a failure to fulfil commitments which the claimant had made in an e-mail to Ms Kendal and Ms Clare Beckett-Wrighton. At the hearing the claimant had again admitted much of the criticism of his performance.

9.15 In August 2015 there was a disagreement between the claimant and Ms Thorbrian which arose when the claimant gave out Ms Thorbrian's mobile telephone number to a service user. The claimant contended that he felt that this was in order in circumstances where Ms Thorbrian had displayed her mobile number on Facebook. There was an e-mail or text exchange between the claimant and Ms Thorbrian and transcripts of that appear at pages 144 to 145. No disciplinary action was taken.

9.16 At his supervision meeting on 30 September 2015 – conducted by Ms Kendal – it was noted that the claimant had been slipping back again in terms of timekeeping (see page 146).

9.17 A launch event for the respondent's BMELGBT Needs Assessment (a piece of work which the claimant had responsibility for) had been arranged for 26 November 2015 and was to take place at Bradford Town Hall. The run up to that launch, where most of the work required was to be undertaken by the claimant, was fraught. The difficulties are set out in a statement which Ms Kendal subsequently prepared for use at what were later disciplinary proceedings against the claimant. The Needs Assessment document in draft had been approved by the board in September 2015 and subsequently Ms Kendal had helped the claimant with the presentation that was to take place at the launch. That involved, or was intended to involve, the professional printing of the assessment document. However there were significant delays in that document being delivered to the printers and in fact it seems that ultimately they were only presented to the printers for the purposes of formatting. An agreement that the document would be professionally printed so as to create a good impression for the stakeholders who would be present at the launch had it seemed been unilaterally changed by

the claimant so that instead the document would simply be photocopied in-house. Ms Kendal was of the view that promises which the claimant had made to her during the week prior to the launch had not been kept and in fact that she had been lied to. Despite the urgency the claimant was arriving late for work. It was found that corrections, typographical and in respect of actual graphs and figures in the report which had Ms Kendal thought been corrected, had then returned in what the claimant was proposing to have published. In these circumstances it was a case of all hands on deck which Ms Kendal believed had caused significant stress not only to herself but to other members of staff. In her statement for the internal process she referred to being so stressed that she could not sleep and was irritable at home. Another employee had found that a stress related health issue had reoccurred. Ultimately the Needs Assessment document was of a much lower quality than had been intended. However in Ms Kendal's view things got worse at the launch itself which she described as being chaotic. Towards the end of her statement and referring to the point in time immediately after the launch at Bradford Town Hall she wrote as follows:

> "I decided that Y could not return to the office. I could not deal with the above issues throughout the week because they would be impossible to resolve and I felt that I would become distressed in the process. The atmosphere in the office has become unacceptable and especially for Finn as a new worker. This is a new environment for Finn, and a big transition from being out of work. I would not sacrifice his wellbeing for the sake of what feels like an irretrievable situation. Julia's health was being compromised. I ran this by Nikki (Thorbrian) who agreed with me."

9.18 In those circumstances Ms Kendal decided to suspend the claimant immediately after the launch.

9.19 The suspension was confirmed in a letter written by Ms Jones and a copy appears on page 151. Again unfortunately it is undated although the claimant says that he did not receive it until 10 December 2015. The letter informed the claimant that he was being suspended pending investigations under the disciplinary procedure and that the suspension had been because of a breakdown in professional relationships which was having a negative impact upon the wellbeing and performance of the staff team. The particular issues to be investigated were essentially the same four matters that had been considered at the two earlier disciplinary processes.

9.20 The respondent appointed Ms Tweedale to carry out the necessary investigation.

9.21 On 30 November 2015 Ms Thorbrian received a complaint from a service user who we have referred to as ZH. ZH was complaining about what she considered to be transphobic and abusive comments which the claimant had made on a Facebook page of a BMELGBT support organisation called the Bayard Project. On 7 December 2015 Ms Kendal telephoned a Mr Dwain Dawkins who

was the moderator of that Facebook page. He told Ms Kendal that there had been a discussion on the Facebook page concerning whether a transwoman called Caitlyn Jenner, who had apparently won a woman of the year award, was or was not a woman – the claimant taking the point that she was not a woman because "she still had a penis." What the respondent accepts are only extracts from the Facebook exchange appear at pages 203 to 207 in the bundle. The claimant made the following comments during the course of the online conversation with ZH:

> "Funny how the oppressed very quickly become the oppressors. Hardly equalities work is it"(sic).
>
> "I can accuse you of being a man hater, homophobic or even racist for challenging what I say."
>
> "You are an oppressor."
>
> "Go away you horrible person."
>
> "You're a freak! Serious issues!"
>
> "You're openly challenging me and spouting transphobia at every opportunity you can. Is that because I am a man or is it because I'm gay or is it because I'm not white?"

9.22 In a subsequent exchange between the claimant and Mr Dawkins (see page 202) the claimant contended that he had been bullied by ZH. He went on to refer to an event which the claimant described as "my event" in Bradford the following week (not the launch we have been referred to). The claimant wrote "Youd (sic) be very welcome but I'd just like to send out a very very strong message that should anyone from your group feel they have the right to attend and behave in the disgusting mob manner I was subjected to earlier then strong legal action will be taken and it will be harsh. Please do share the message with the man hating mob on your page."

9.23 On 7 December 2015 Mr Dawkins himself submitted a complaint to the respondent (page 152). He explained that he had always looked up to the claimant but had been shocked when he saw the comments the claimant had made. He had trusted the claimant who had seemed like a nice guy and so given him full permission on the group page. He went on to say that the claimant had had no right to comment on another person's body or their gender because he disagreed with their politics. He said that the claimant's messages were transphobic and offensive and he was also concerned about the threat of legal action.

9.24 On 28 January 2016 the Trustee Ms Tweedale unexpectedly resigned from the board. The respondent had assumed that since December Ms Tweedale had been investigating the disciplinary matters against the claimant. However when she resigned it was discovered that she had done very little if any work on that matter. In those circumstances the respondent appointed Libby Beckett-Wrighton to carry out the investigation.

9.25 On 14 February 2016 Libby Beckett-Wrighton wrote to the claimant inviting him to an investigation meeting to be held on 25 February.

The letter listed the following matters as being those under investigation:

- "Failure to follow the reasonable instruction of your line manager" (this was in relation to the claimant not following the instructions given to him by Ms Kendal in relation to the preparation of the Needs Assessment document);
- "Failure to meet deadlines";
- "Poor timekeeping and unreliability";
- Lack of open and honest communication";
- "Breach of Equity Partnership's equality and policy (*sic*) (should read equality and diversity policy) in that you harassed service users by posting transphobic comment in social media for which there was no apology or remorse when it was pointed out that there were offensive, further you defended this stance. You threatened potential service users and a stakeholder with legal action following the above postings."

In fact the claimant did not receive that letter until 22 February 2016 because insufficient postage had been put on it. In those circumstances it was necessary to rearrange the date and so the investigation meeting actually took place on 17 March 2016.

9.26 As we have mentioned earlier, an audio recording was made of that investigation interview but we did not receive the transcript until the third day of the hearing. It is now in the bundle at pages 157a to 157v. The claimant contends (in paragraph 3 of his witness statement) that he made a protected disclosure during the course of this investigation meeting which in his witness statement he refers to as being in February 2016. When explaining his case to the Judge at the preliminary hearing in January 2017 the claimant had not suggested that he had made a disclosure during the investigation meeting although he did contend that he had made one at the subsequent disciplinary hearing. In the witness statement of Libby Beckett-Wrighton as served on the claimant and as read by us on the first day of the hearing there is a concession in paragraph 14 that "During my interview with the claimant on 17 March 2016 he reported to me that he was concerned that Ms Thorbrian was having a relationship with a vulnerable service user and that he had previously raised this with Ms Kendal." However when she gave her evidence to us on day 3 (when she would have seen for the first time the transcription of the recording of that meeting) she wished to revise that part of her statement before confirming its truth by deleting the passage we have referred to. It would therefore seem to be the case that she had made her witness statement (with the assistance and advice no doubt of the respondent's solicitors) without listening to the recording of the meeting.

9.27 In any event we find that the only references (which are vague) to the matter the claimant had previously disclosed appear at page 157h where the claimant is recorded as saying:

> "I've had a funny relationship with a particular trustee"

and at page 157j, where the claimant was being asked whether there was any mitigation for his poor performance and was it in relation to an issue with the trustees. The claimant's reply was:

> "No, I think the needs assessment is purely to do with my confidence to do my own work … Not to do with the relationship with the trustee".

However the claimant went on to say that the relationship with the trustee "maybe slightly affected my open and honest communication, but the others, no". When asked how it had affected that area the claimant replied:

> "Erm because it was more to do with peoples' personal lives too. I've been quite reluctant … I have shared information with Ann (Kendal) but then I've been reluctant to say too much because again, I don't have the full facts … What goes on in peoples personal lives … and its not something I want to … Oh … it felt I was poking my nose really too much in someone else's business and that I felt it should not be part of my project".

Nevertheless the claimant said that it had affected the working relationship with that trustee.

9.28 During the course of the same meeting the claimant conceded that there had been problems with printing the Needs Assessment and that he had left it far too late. He had held back from sending it to the printer because he feared that it was going to cost a lot and might not be right. He accepted he had not communicated this at the time and had failed to follow instructions. He also accepted that he had not met deadlines. In relation to poor timekeeping the claimant acknowledged that he knew that was one of the biggest issues at his last disciplinary but he thought he had improved in the meantime. In relation to open and honest communications the claimant accepted that he had not been fully honest in his communications with Ms Kendal. He had been nervous about the printing and he accepted that he should just have asked Ms Kendal to help him although he acknowledged that she had provided support to him.

9.29 The claimant was also questioned about the Facebook exchange with ZH. The claimant contended that he had intervened to stop two people who he knew being bullied. He accepted that he had made allegations of homophobia but denied he had made any transphobic comments. The claimant pointed out that ZH had also made some unpleasant and insulting comments to him and that she had removed those from the transcripts which had been provided to the respondent. It was put to the claimant that he had threatened a service use and a stakeholder with legal action. The claimant accepted that it was embarrassing because he had said something in anger and not something he would say normally. It was put to the claimant that he had during the course of that exchange in effect been acting as someone representing the respondent. The claimant said that he accepted that was the position now although

he did not think it so at the time. The evidence of Libby Beckett-Wrighton to us was that at the end of the meeting there was an unrecorded discussion where the claimant's union representative made enquiries as to what the position would be if the claimant were to resign. Indeed there is a passing reference to this on pages 157u and 157v.

9.30 On 24 March 2016 Clare Beckett-Wrighton wrote to the claimant inviting him to a disciplinary hearing on 30 March 2016 (see pages 158-159). The disciplinary panel was to be chaired by Clare Beckett-Wrighton (Libby's partner). The allegations as set out in the earlier invitation to the disciplinary interview were repeated. It was pointed out that due to the claimant's previous final warning and the seriousness of the current allegations that dismissal was an option if the allegations were upheld.

9.31 In the event the date of the disciplinary hearing was put back to 13 April 2016. Again this hearing was recorded but again as we have mentioned the transcription was not done until the course of this hearing and so the document which appears at pages 161a to 161m is something which we only saw on day 2 of the hearing.

9.32 The claimant contends that he made further disclosures or repeated the initial disclosure during the course of this hearing. At page 161e the claimant is recorded as saying the following:

> "I did mention at the investigative meeting issues with Nikki. These were brought up at staff meetings on several occasions. I spoke to the staff team about my concerns about one particular service user who I class as a vulnerable service user because of their legal status in Britain. I raised the issue several times and I felt that it was brushed under the carpet."

9.33 The claimant went on to contend that after he had shared that concern more scrutiny had been placed on him. The claimant went on to refer to "at least 100 pages of text messages between these two parties [Ms Thorbrian and the service user HH] where one is actually abusing her position of trust."

At page 161j the claimant added:

> "When I raised the issues and concerns that I had … I don't want to go round telling tales or gossiping because its not my business … my concern was with the service user who approached me very upset. I raised this issue several times at staff meetings which were held weekly. I feel it was brushed under carpet. Its only now with hindsight that I realise that there began a great scrutiny of my professionalism and I would like to know why that happened. Why was it overlooked? Personally I know that a trustee instigated a sexual affair. Its against the organisation's policies."

9.34 The disciplinary hearing began with an oral report by Libby Beckett-Wrighton who was participating in the disciplinary hearing via Skype. She had not prepared a written report following her investigation. She explained that the claimant had admitted the

majority of the charges against him. The panel also considered the statement of Ms Kendal with particular regard to the Needs Assessment and launch arrangements to which we have already referred. The claimant's union representative at that meeting (Sue Pollard), a regional officer for Unite, explained that "due to the fact that he [the claimant] admitted the allegations in the investigation meeting where I was present there is no need to put forward a case statement, although you have done and so Yasar is happy to continue." (See page 161e).

9.35 The claimant was the questioned at length about the Facebook issue. He pointed out that there were 17 replies from ZH that were hidden or had been deleted. He accepted that he had retaliated to those comments. He suggested about 50% of the conversation was missing. He was asked why he did not "walk away" from the exchange. The claimant's reply was that the others had been picking on men younger than them, it was three women picking on two men. He found that sexist "hence I jumped in" (page 161i). The claimant was asked to confirm that he had to some extent accepted that the first four allegations were to do with his work and the claimant replied that yes he had owned up to that. His union representative questioned whether the first two allegations were capability issues rather than disciplinary ones. The claimant went onto describe Ms Kendal as a fantastic manager who he could not criticise at all. He suggested that his poor timekeeping and unreliability was down to medication – a matter which he had not raised previously.

9.36 The panel did not make a decision there and then but the claimant said that he wanted to collect the personal stuff that was on his desk. He was told that this would be possible but was reminded that "its not 100% certain that you will be clearing your desk."

9.37 On 19 April 2016 a dismissal letter was sent to the claimant. A copy is at pages 166 to 168. The panel did not believe that the claimant had been victimised because of reporting a situation between a trustee and a service user. The panel rejected a complaint of sex discrimination which the claimant had raised during the course of the disciplinary hearing. The panel noted that the claimant had admitted the charge of wilful refusal to follow reasonable instructions and failure to meet deadlines. They concluded that whilst the claimant had initially contested the poor timekeeping and unreliability charge he had later admitted that.

In relation to the charge of not being open and honest in communications, the panel took the view that the claimant had admitted that at the investigation meeting but then contested it at the disciplinary hearing. The panel considered that the claimant had been given a reasonable adjustment in relation to timekeeping because his start time had been put back. The panel concluded that the first four allegations were proved and that because the claimant already had a live final written warning he would be dismissed with notice.

In relation to the Facebook allegations, the panel accepted that the screenshots did not show the whole conversation but nevertheless

they did in their judgment show evidence of unprofessional behaviour by the claimant. The claimant had not removed himself from the thread and had brought the respondent into the exchange if not by name then by inference. The respondent found the comments made by the claimant to be utterly distasteful and a gross breach of its equality policy. The panel concluded that the Facebook allegation was proven and was also gross misconduct but some mitigation had been accepted and so the claimant was still to be dismissed with notice.

9.38 On 4 May 2016 the claimant wrote a letter of appeal against dismissal (see page 169). He contended that the first four allegations had been dealt with by the respondent "in punitive terms rather than supportive terms", and he felt that the evidence presented in relation to the Facebook issue was "constructed" and had been presented in a selective and highly subjective way. The claimant also said again that he had reported a situation involving what he now described as the exploitation of a vulnerable service user by a member of the board of trustees. He felt that this had not been dealt with seriously enough.

9.39 On 19 May 2016 the claimant was attending a public event arranged by an organisation called Mesmac. This event was attended by Ms Thorbrian and also by two service users of the respondent including ZH. During the course of this event the claimant was barracked by ZH who shouted things such as "Why is he here? I can't believe he's here. He's disgusting. He's vile."

9.40 The appeal hearing took place on 13 June 2016 before a trustee, Jayne Booth. It appears that this meeting was not minuted nor was any audio recording made.

9.41 The appeal outcome letter was issued on 16 June 2016 (see page 174). The letter is actually written by Kate Jones. In relation to the claimant's complaint that the issue he had raised regarding Ms Thorbrian and HH the letter assured the claimant that the management committee had addressed the matter but the outcome of that action was confidential. In relation to the claimant's ground of appeal that the four allegations had been dealt with in a punitive way rather than a supportive way, it was pointed out that during the disciplinary hearing the claimant had described his manager as being a fantastic manager. Apparently at the appeal hearing the claimant had said that he trusted Ms Kendal to give him the support he needed. In relation to the Facebook entries and noting the claimant's contention that these had been edited, the panel considered that there could never be any justification for the claimant's reaction as recorded in the screenshots and the fact that the thread was incomplete was irrelevant. The claimant's response had not fitted with the respondent's equality and diversity policy. Whilst it was accepted that the Facebook group was a private one that did not mean that the equality and diversity policy did not apply especially when the claimant was speaking to those who he was expected to befriend and nurture as part of his role with the respondent. The claimant had accepted during the course of the appeal hearing that the fact that he worked for the respondent was

known to if not all then most of the other members of the Facebook group. The appeal was therefore rejected.

9.42 The claimant's effective date of termination, taking into account the period of notice for which he was paid in lieu, was 19 June 2016.

9.43 On 18 August 2016 a Julia Borden of the respondent sent an e-mail to the claimant which is at page 177 in the bundle. It reads:

> "Hi Yasar, can you please arrange to collect your personal stuff asap as we need the space. Thanks Julie."

The claimant contends that this was the final detriment on the ground of a protected disclosure.

10 **The relevant law**

The Employment Rights Act 1996, section 43A provides:

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

Section 43B provides insofar as it is relevant to this case as follows:

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following - …..
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered."

Section 43C provides that a qualifying disclosure can be made to, among other people, the employer of the relevant worker.

Section 47B provides:

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

Section 103A of the same Act provides as follows:

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

In relation to what could be described as ordinary unfair dismissal, section 98(2) of the Act provides that among the potentially fair reasons for dismissal is one which relates to the conduct of the employee.

Whether the potentially fair reason is actually fair is governed primarily by the statutory test of fairness contained in section 98(4).

In a conduct case the Tribunal will need to consider whether the employer had a genuine suspicion that there had been misconduct. There will then need to be a reasonable investigation so that if the employer decides to dismiss it has sufficient material to sustain the belief in misconduct.

It is often said that the question can be framed as - was the decision to dismiss within the reasonable band?

One of the factors to be taken into account under the statutory test of fairness is the size and administrative resources of the employer's undertaking.

11 The parties' submissions

11.1 The claimant's submissions

On the penultimate day of the hearing we suggested to the claimant that he may wish to prepare written submissions although he could of course also or instead address us orally. In the event he chose to briefly address us orally. He still believed that he had successfully delivered the launch of the Needs Assessment. He had had a genuine concern for the safety of a vulnerable service user. He had hoped that the respondent would deal with that. In relation to his timekeeping at work, that had been affected by his medication. There had been excessive scrutiny. The suspension period had caused some anxiety. The incident on 19 May 2016 had made matters worse. Returning to the suspension period, the claimant felt that that was punishment.

11.2 The respondent's submissions

Ms Brewis had prepared a skeleton argument and she also addressed us orally. The respondent accepted that the claimant had made a disclosure in Spring 2015 regarding the relationship and that Ms Thorbrian's partner had warned the service user off. However it was not accepted that the claimant had disclosed that there had been any threats of violence towards HH. Accordingly there had not been disclosure of a relevant failure, that is danger to health and safety. The respondent denied in any event that the claimant had a reasonable belief that any disclosure was in the public interest. His contention in evidence that that was because HH was seeking support in Britain was not sufficient to meet the threshold. It was also denied that the claimant had made disclosures at either the investigatory or disciplinary meetings. There had been no mentions there of threats of physical violence.

11.3 In any event the respondent's submissions then took us through the various alleged detriments – in some cases disputing that what the claimant alleged could be a detriment and in other cases reminding us of the respondent's case that as regards detriments allegedly done by Ms Thorbrian, the respondent's evidence was that she had not known of the alleged disclosures. In any event there were valid non disclosure related reasons for certain of the alleged detriments. For instance the regular cancellation of planned meetings alleged against Ms Thorbrian were explicable by reason of her poor health and such cancellations had been suffered by others as well. It was fanciful to suggest that Ms Thorbrian could have influenced ZH during the course of the Facebook exchange. There had been a valid reason for the delay in the disciplinary process – not least Ms Tweedale's resignation. The claimant had been offered access to collect his belongings on several occasions and Julia Borden's e-mail of August 2016 could not be interpreted as being patronising as the claimant alleged. It was also fanciful to suggest that Ms

Thorbrian had been behind the abuse levelled at the claimant by ZH at the 19 May 2016 event.

11.4 In relation to the claimant's dismissal, the sole reason for that had been his misconduct, much of which he had admitted. The dismissing officer, whilst aware that the claimant had made a disclosure about the alleged relationship, had not known about any allegations of violence.

11.5 The claimant's contention that he had been performing very successfully in his project was contradicted by the evidence of Ms Kendal. The decision to dismiss was well within the range of reasonable responses. If the Tribunal should find unfair dismissal it should also find that the claimant had contributed to his dismissal.

12 **The Tribunal's conclusions**

12.1 **Did the claimant make one or more qualifying protected disclosures?**

During our fact finding exercise above we have noted that there has been a degree of confusion in the claimant's evidence as to when disclosures were made. There were contradictions between what was in the claim form, what the claimant told the Judge at the January preliminary hearing and then what was in the claimant's witness statement. In fact the claimant's witness statement said very little about the protected disclosures. For this reason and prior to the claimant being cross-examined the Employment Judge asked the claimant a series of questions to elicit more information about this subject; about four of the alleged detriments which were not referred to at all in the witness statement and about the disciplinary investigation and dismissal, where there was only a passing reference in the witness statement, despite the fact that the claimant was complaining of two types of unfair dismissal.

On the evidence before us we do not find on the balance of probabilities that the claimant had made protected disclosures as early as September 2014. That is because he has only mentioned this in his witness statement; there is no documentary proof and the respondent denies that any such disclosures were made. At most we consider that the claimant might have previously expressed his concerns about the alleged relationship between Ms Thorbrian and HH. If that was mentioned the claimant would not have been disclosing information which tended to show that the health and safety of any individual was being endangered. During cross-examination the claimant explained that initially he had been concerned about the relationship itself but subsequently became concerned about the alleged threats made towards HH by Ms Thorbrian's husband. We also remind ourselves that during the course of cross-examination the claimant said:

> "I was not disclosing the affair – but the threats of violence by Finn. The affair was not a concern of mine."

12.2 This brings us to the staff meeting in early May 2015 – or Spring 2015 as Ms Kendal dates it. The Tribunal has not heard evidence from anyone else who would apparently have been at the staff meeting (Julia Borden or Rachel Neauwalerts) and the Tribunal has

not seen any minutes of such a meeting if they exist or were taken. Nevertheless there is something of a concession in paragraph 31 of Ms Kendal's witness statement, where she accepts that the claimant did at such a meeting inform her that he had been told in confidence by a service user that she was in a relationship with Ms Thorbrian and that Mr Thorbrian had "warned the service user off." Ms Kendal's evidence to us was that she did not understand the reference to warning off as being a threat of physical violence. She believed it to be that HH was simply being told to stay away from Ms Thorbrian. We note that the claimant never sought to show Ms Kendal any of the text messages which he now refers to in paragraph 4 of his witness statement. He alleges that there were text message from Finn threatening to attack HH. Having heard evidence from Ms Kendal we think it most unlikely that if she had been shown such a text she would have continued to take the discreet and non interventionist approach which she in fact did.

12.3 Accordingly we find that even at this stage the claimant was not disclosing information which tended to show that the health and safety of HH had been, was being or was likely to be endangered.

12.4 **Was there a protected disclosure during the course of the disciplinary investigation meeting on 17 March 2016?**

As we have noted, Libby Beckett-Wrighton's statement at paragraph 14, as served, suggested that the claimant had at least reported concern about the relationship. However for the reasons we have explained, Ms Beckett-Wrighton revised this part of her statement before affirming its truth. We now have the benefit of the transcript of the disciplinary investigation (157at to 157v) and in our findings of fact we have quoted what we found be by only vague references to the claimant's relationship with "a particular trustee". We conclude in these circumstances that Ms Beckett-Wrighton could not have been given any understanding of what the claimant had previously told Ms Kendal at the May 2015 meeting which we have not found that to be a protected disclosure in any event. We therefore find that the claimant did not make a qualifying protected disclosure during the course of the disciplinary investigation meeting.

12.5 **Did the claimant make a protected qualifying disclosure during the course of the disciplinary hearing on 13 April 2016?**

Again we now have the benefit of a transcript of that hearing (page 161a to 161m). In our findings of fact we have referred to various places within that transcript where the claimant spoke about the relationship. However nowhere does the claimant during the course of the disciplinary hearing say anything about Mr Thorbrian making threats towards HH. In the circumstances we are again of the view that the claimant did not at that hearing disclose information which tended to show that HH's safety was being endangered or was likely to be endangered.

12.6 **Conclusion regarding disclosure issue**

In these circumstances we find that the claimant did not on any occasion make a qualifying protected disclosure within the meaning of the Employment Rights Act 1996, sections 43A to 43C.

12.7 Despite that finding we nevertheless for the sake of completeness go on to deal with the alleged detriments in any event.

12.8 **The alleged detriments**

At the preliminary hearing in January 2017 eight separate alleged detriments were identified. Two detriments were said to have occurred after the date of dismissal. It is established that a Tribunal has jurisdiction to deal with post dismissal detriments (see **Woodward v Abbey National**).

12.9 In respect of certain of the detriments we needed to make findings as to whether the alleged detriment occurred and in all the cases we need to make a determination as to whether (if we had found protected disclosures to have been made) the detriment had been done on the ground that a protected disclosure had been made.

12.10 **Time issue**

As we noted under the section above dealing with issues, this issue was raised briefly in paragraph 4 of the Ground of Resistance, which contended that the bulk of the detriments complained were out of time. Whilst we acknowledge this challenge has been made, we also bear in mind our primary finding that no qualifying protected disclosures were made. For present purposes we will assume that we do have jurisdiction.

12.11 **The burden of proof**

The burden of proof is on the claimant to establish that the detriments occurred. If he does that then the burden shifts to the respondent to show the ground on which any act was done (see Employment Rights Act 1996, section 48(2)).

12.12 **Detriment 1 – Rachel Nauwelearts subjected the claimant to inappropriate scrutiny in respect of his timekeeping from May 2015 and reporting that to Ms Kendal**

Having regard to what the claimant had admitted in the first disciplinary proceedings – which as we have noted led to a final written warning in May 2015 - and despite the claimant's contention that there had been an improvement when the same issue arose as part of the subsequent disciplinary proceedings commenced in November 2016 – we find that the respondent was entitled to have ongoing concerns about the claimant's timekeeping and general reliability. The respondent has shown to our satisfaction that the reason for the scrutiny he was placed under was a genuine concern about his timekeeping and was not on the ground of any protected disclosure which the claimant might have made.

12.13 **The alleged detriments imposed by Ms Thorbrian (Detriments 2,3,4 and 8)**

These are:

- Her complaint to the claimant in or about August 2015 that the claimant had given her mobile phone number to a service user.
- That between May 2015 and September 2015 Ms Thorbrian regularly cancelled planned meetings with the claimant.
- Ms Thorbrian's alleged involvement in, or encouragement of, the Facebook conversation between ZH and the claimant (which subsequently led to disciplinary action against the claimant).
- Ms Thorbrian's alleged involvement in or encouragement of ZH and another service user (Ingi) when ZH abused the claimant at an event on 19 May 2016.

As we have noted, Ms Thorbrian contends that she was at the material time unaware that the claimant had made the alleged disclosures. In fact she told us that she only learnt of those alleged disclosures approximately a month prior to when she was giving evidence before us. We are satisfied on the balance of probabilities that that was so. Ms Kendal and Clare Beckett-Wrighton have explained the approach that they took when, in May 2015 the claimant informed Ms Kendal about the alleged affair. Having regard to the sensitivity of the subject matter we find the respondent's evidence here credible. Whilst discreet enquiries, but not direct enquiries, were made of HH, nothing was said, say the respondents, to Ms Thorbrian. Before us the claimant has been unable to challenge Ms Thorbrian's stated lack of knowledge. Clearly any detriment that Ms Thorbrian did impose on the claimant could not have been on the ground of a disclosure of which she was unaware. Our primary finding therefore is that these four alleged detriments are not made out.

However even if Ms Thorbrian had in someway become aware of the alleged disclosures we are satisfied that plausible non protected disclosure reasons have been given in respect of the following matters:

The giving out of the mobile phone number

Having considered the text or e-mail exchange between the claimant and Ms Thorbrian about this (see page 145 in the bundle) we are satisfied that Ms Thorbrian had a genuine concern that her mobile phone number had been given out against her wishes. In fact it seems that she herself had managed to achieve that both in relation to the Facebook page to which the claimant referred and in respect of postcards which Ms Thorbrian admits that initially she issued with her mobile phone number on. Perhaps the claimant should have checked with Ms Thorbrian before giving the number out, but on the other hand Ms Thorbrian had been careless about guarding her own phone number. There was a genuine dispute which really we do not need to adjudicate upon if we are satisfied that Ms Thorbrian was not raising the issue or seeking to magnify it because of any protected disclosure she might have been aware of. We are satisfied that the latter was not the case.

Cancellation of planned meetings

Here Ms Thobrian has explained that she did cancel meetings at short notice with the claimant but also with others within the organisation. The reason for that she says was her own health condition (chronic fatigue syndrome, fibromyalgia and possible muscular sclerosis). She told us that her health could deteriorate quickly leading to her being unable to drive or sometimes even walk. Ms Kendal wryly acknowledged that she too had been the "victim" of meetings being cancelled by Ms Thobrian at short notice. Again therefore we find that there was a valid non protected disclosure reason.

The Facebook exchange

We find it wholly implausible for the claimant to suggest, as he does, that Ms Thobrian was in some way inducing or encouraging ZH during the course of the Facebook exchange which led to the claimant being disciplined about that matter. Ms Thobrian was not a party to that online conversation. She was however the recipient of the first oral complaint by ZH. That that was passed on and dealt with by the respondent as a disciplinary issue is in no way surprising and does not suggest that Ms Thorbrian "had it in for the claimant".

The 19 May 2016 incident

Here the claimant has given evidence so as to suggest that Ms Thobrian, ZH and the other service user arrived together at the event and that Ms Thobrian was then the ringleader for what turned out to be the abusive approach of ZH and possibly the other service user. This account was disputed by Ms Thobrian. She said that she arrived separately from the other two. Ms Thobrian knew who ZH and Ingi were but they were not there as friends. The BMELGBT community was a small one and therefore one would know other people within it. She only knew ZH to the extent that she would say hi to her. The only reason that she went over to the other two was in order to try to resolve an altercation which had already begun between ZH and the claimant. On balance we find Ms Thorbrian's explanation credible and the claimant's argument that she was the ringleader or promoter of that abuse to be implausible.

12.14 **The delay in the disciplinary process (detriment 5)**

Here the respondent accepts that there was a delay and we accept that a delay to a disciplinary process could well amount to a detriment. However we conclude that the respondent has given a plausible explanation for the delay. This was primarily due to the inactivity of Ms Tweedale (the person first appointed to be investigator) followed by her unexpected resignation towards the end of January 2016. This meant that the newly appointed investigator (Libby Beckett-Wrighton) had in effect to start from scratch. Nevertheless, by 14 February 2015 Ms Beckett-Wrighton was in the position to write her letter of that date to the claimant inviting him to a disciplinary investigation meeting on 25 February. Regrettably that letter was late arriving with the claimant because

the proper postage had not been paid. In turn that resulted in the investigation meeting being rescheduled to 17 March 2016. Whilst it is unfortunate that the incorrect postage was paid we find that that was a genuine mistake. We cannot accept that it would be in the interest of the respondent to delay the disciplinary process. It was a small organisation and it needed to get matters resolved. We also find that the reason the meeting could not be rearranged until 17 March was in part due to limited availability of the claimant's trade union representative who was not prepared to conduct evening meetings. In circumstances where the disciplinary hearing then took place on 13 April 2016 the disciplinary process (at least when it was restarted by the appointment of the second investigating officer) had taken under two months. On the basis of the explanation which the respondent has given we are satisfied that whilst it was unfortunate that there were some delays there is no evidence to suggest that the reason for those delays was any disclosure which the claimant might have made.

12.15 **The respondent's "use" of the complaint made by ZH (detriment 4 -again)**

The implication here from the claimant is that the respondent over reacted to this matter and used it to bolster its reasons for dismissing the claimant. However we are not at all surprised that the respondent felt that it was necessary to add this incident to the list of disciplinary charges. It was a matter which any employer would be troubled by, but particularly an employer with the mission statement of this employer. Clearly in those circumstances the respondent was almost duty bound to investigate this issue. We will return in due course to how this was then treated in relation to the decision to dismiss.

12.16 **The alleged refusal to allow the claimant access to his belongings and the "patronising text" from Julia Borden (detriments 6 and 7)**

On the facts before us we find that the claimant was given ample opportunity to remove his belongings. It is to be noted that prior to the decision in respect of the claimant's disciplinary matter being concluded the claimant was all for removing his belongings. We do not interpret the respondent's approach of counselling the claimant to reconsider and not assume he would be dismissed when no decision had been made, as amounting to a refusal. In relation to Ms Borden's e-mail of 18 August 2016 (page 177) we do not consider that to be patronising. It was simply stating a fact. Some two months had elapsed since the claimant's dismissal and it is unsurprising that the respondent did not want to continue storing the claimant's "personal stuff" and that it would need the space for other purposes. Accordingly we do not consider that to be a detriment, but even if it was it was not on the ground of any disclosure the claimant might have made.

12.17 **The complaint under section 103A – automatically unfair dismissal**

In the first place this complaint must fail as we find that no protected disclosure was made. However even if that had not been our finding we are satisfied that the respondent has shown that the reasons for dismissal were the five disciplinary charges laid against the backdrop of a live final written warning. Of those charges two were very significant – the claimant's behaviour in the run up to the 26 November 2015 launch and his comments in the Facebook exchange with ZH. Having regard to the weight of those charges it is all the more difficult to conclude that the stated reasons were a sham. We find there was no sham and this complaint fails.

12.16 **Ordinary unfair dismissal**

Can the respondent show a potentially fair reason?

The respondent seeks to show the reason of conduct or in the alternative some other substantial reason such as to justify dismissal – that is that there had been a breakdown of trust within the working relationship. Both of these reasons are within the category of reasons set out in section 98(1) and (2) of the Employment Rights Act 1996. We find that the respondent has shown the reason of conduct.

Was that reason actually fair?

Here the starting point is the statutory test of fairness to which we have referred previously – that contained within section 98(4). We again bear in mind that the claimant had in effect accepted that three of the charges in the initial list of four were valid criticisms of his performance. In relation to the two more contentious issues (lack of open and honest communication and the subsequently arising Facebook issue) we need to consider whether the so called **Burchell** test has been met. Dealing first with the question of communications, we find that the respondent was entitled to have concern and suspicion about misconduct on the basis of the comprehensive report from Ms Kendal as to the traumatic lead up period to the Needs Assessment launch. Indeed during the course of the disciplinary hearing the claimant accepted that he had not given accurate accounts to Ms Kendal, especially with regard to the printing of that document. Further we are satisfied that the respondent carried out a reasonable investigation as can now be seen from the transcript of the lengthy investigation meeting during the course of which the claimant was represented by the union. By the time the respondent was making its decision on this matter (which of course was not made in isolation) we are satisfied that it had a genuine belief that the claimant had been guilty of misconduct.

With regard to the Facebook issue, as we have previously indicated any reasonable employer particularly one dealing in the areas with which this employer dealt would have been concerned by what it learnt of the exchange between the claimant and ZH. As there was a transcript – albeit not complete – the claimant could not and did not deny that the words he was recorded as using were used. He was given the opportunity at the investigation and disciplinary meetings to put forward mitigation whereby he indicated

that his motive had been to protect two men who he thought were being bullied. He was given the opportunity to explain why he thought that his comments were being viewed out of context. We take the view that the decision to dismiss for this matter alone comes well within the reasonable band. There were the three other charges where the claimant admitted his guilt and those were the subject matter of the current live final written warning. We find that the respondent was entitled to be concerned that even though the claimant had been engaging in the Facebook conversation in his own time he was likely to have been seen as an ambassador of the respondent, with the result that there was the risk of reputational damage. Significantly the claimant had been described as someone to whom the LBGT community looked up to. That had then been put in jeopardy as a result of the Facebook conversation. The claimant had also offended the ethos of the respondent overall and its equality and diversity policy (see page 114).

Breakdown in trust

Although we find that the respondent has primarily shown the reason of conduct, as far as the breakdown in trust is concerned, we accept that it was reasonable for this employer to conclude that the views expressed by Ms Kendal towards the end of her statement made for the internal process (page 200 from which we have quoted previously) were true. It is also to be noted that the claimant had described Ms Kendal during the course of the disciplinary process as “a fantastic manager” and someone whom he could not criticise. Accordingly it is most difficult for the claimant now to question what Ms Kendal was saying about the relationship. We take the view that that would have added to the weight which a reasonable employer would give to the line manager’s statement..

It follows that we are satisfied that the decision to dismiss was well within the reasonable band. Despite a considerable amount of support given to the claimant, he was not, as he contended, performing very successfully. We find he was not dismissed for “technical reasons”. We need to address the question of delay again at this stage but conclude that this was not of such magnitude as to cause prejudice. Memories had not faded. We therefore find that the dismissal was fair and so this complaint fails also.

Employment Judge Little

Date 5th July 2017