



THE EMPLOYMENT TRIBUNAL

SITTING AT:

LONDON SOUTH

BEFORE:

EMPLOYMENT JUDGE HALL-SMITH

MEMBERS:

**Ms BC Leverton
Miss B Brown**

BETWEEN:

Ms K Knox

Claimant

AND

London Borough of Lambeth

Respondent

ON: 19, 20, 21, 22 September 2017; (Chambers) 6 October 2017

APPEARANCES:

For the Claimant:

Mr M Cole, Counsel

For the Respondent:

Mr J Neckles, Union Representative

RESERVED JUDGMENT

1. The Claimant was not dismissed by the Respondent within the meaning of section 95(1)(c) of the Employment Rights Act 1996, and accordingly the Claimant's complaint of constructive unfair dismissal is dismissed.
2. The Claimant's complaints of unlawful racial discrimination and racial harassment are not well founded and are accordingly dismissed.
3. The Claimant was not automatically unfairly dismissed on grounds of making protected disclosures and for the reason that she exercised or sought to exercise her right to be accompanied under section 10(2A) of the Employment Relations Act 1999. These complaints are accordingly dismissed.
4. The Respondent refused the statutory right of the Claimant to be accompanied by the union official of her choice and accordingly this complaint is well founded. The Tribunal makes a nominal award of £2.

5. The Claimant's claim under section 145A(1)(d) of the Trade Union & Labour Relations (Consolidation) Act 1992 is not well founded and is accordingly dismissed.
6. The Claimant's complaint of victimisation is dismissed upon withdrawal by the Claimant.

REASONS

1. By a claim form received by the Tribunal on 3 January 2017 the Claimant, Ms Karen Knox brought complaints of constructive unfair dismissal, automatic unfair dismissal, racial harassment, direct racial discrimination, being offered inducements relating to union membership pursuant to Section 145A(1)(d) of the Trade Union and Labour Relations (Consolidation) Act 1992, breach of her statutory rights to be accompanied and wrongful dismissal.
2. At the hearing, the Claimant was represented by Mr J Neckles, Trade Union Representative, who called the Claimant to give evidence before the Tribunal.
3. The Respondent was represented by Mr M Cole, Counsel, who called the following witnesses on behalf of the respondent namely Stuart Dixon, Capital Programme Manager, Andrew Holness, Senior HR Manager, Matt Cooper, Head of Digital. The Tribunal also read witness statements from Jacqueline Faulkner, Employment and Skills Lead, and Ms Adese Okojie, HR Advisor. There was a bundle of documents before the Tribunal.

The Issues

4. The issues to be determined by the Tribunal were considered at a Preliminary Hearing on 28 July 2017 pages 93aa to 93ae.

Constructive Unfair Dismissal

- 4.1 Was the contract of employment terminated on 7 October 2016 by the Claimant's resignation? If so, did the Claimant resign as the result of a fundamental breach of her contract of employment?
- 4.2 Alternatively was the contract terminated by the Respondent on 19 October 2016? The Respondent relies upon the decision of the Court of Appeal in **Sunrise Brokers NLP – v – Rogers 2015 IRLR 57.**
- 4.3 If terminated on 7 October 2016 the Claimant relies upon a breach of any term of the disciplinary procedure giving a right to be accompanied by a trade union representative in Section 4.4 of that procedure in relation to postponements of Hearing.
- 4.4 Did the Claimant affirm the breach?
- 4.5 If the Claimant was constructively dismissed on 7 October 2016 what was

the reason for her dismissal? Was it for a potentially fair reason under Section 98 Employment Rights Act 1996?

Whistle Blowing Claims

- 4.6 The Claimant relies on disclosures made to the Respondent on 6 September 2016, 8 September 2016, 6 October 2016 and 7 October 2016.
- 4.7 Whether, if there were disclosures of information, as alleged, whether the Claimant's reasonable belief tended to show one of the following? The Claimant relies upon Section 43B(1)(b) and (d) of the 1996 Act, namely the Respondent failed to comply with a legal obligation to which it was subject involving the failure to allow the Claimant the right to be accompanied under Section 10 of the Employment Rights Act 1996 and/or a contractual right to be accompanied under terms of the Respondent's disciplinary procedure. Further the Claimant contends that her health or safety had been put at risk in circumstances where the Respondent had imposed a condition that she should attend a disciplinary hearing when she was unwell.
- 4.8 If so, did the Claimant reasonably believe the disclosures were made in the public interest?
- 4.9 The Claimant relies upon the following detriments:
- i) Failed to allow her to be accompanied by the representative of her choice
 - ii) Did not postpone the disciplinary hearing
 - iii) Did not review her suspension
 - iv) Subjected her to the terms of the disciplinary procedure after termination of employment
 - v) Limited her choice of trade union representative
 - vi) Failed to postpone the disciplinary hearing after receiving medical information
 - vii) Failed to seek a medical opinion on the Claimant
 - viii) Refused to accept her resignation

Automatic Unfair Dismissal

- 4.10 Whether the Claimant was dismissed as the result of making any or all of the alleged disclosures.
- 4.11 Was the Claimant's union membership/activities or that she proposed to make use of trade union services at the appropriate time, the principal reason for her dismissal?
- 4.12 Was the fact that the Claimant sought to exercise her statutory right to be accompanied the principal reason for her dismissal?

Harassment Related to Race

- 4.13 The Claimant describes her racial group as black Nigerian of African origin.

4.14 Did the Respondent engage in unwanted conduct as relied upon for direct discrimination below?

Direct Racial Discrimination

4.15 Has the Respondent subjected the Claimant to the following treatment falling within Section 39 of the Equality Act, any of the Acts below not found to have been harassment, namely:

- i) The dismissal
- ii) Failing to allow her to be accompanied by the representative of her choice
- iii) Not postponing the disciplinary hearing
- iv) Not reviewing her suspension
- v) Been subjected to a protracted suspension of almost a year
- vi) Limiting her choice of trade union representative
- vii) Failing to postpone the disciplinary hearing after receiving medical information
- viii) Failing to seek a medical opinion on the Claimant

4.16 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following comparators: Ms Sadare, (black Nigerian of African origin). The Claimant is black British of Jamaican origin.

4.17 There are time jurisdiction issues.

4.18 The Claimant claims her notice pay

4.19 Statutory Right to be Accompanied – Sections 10 and 11 of the Employment Relations Act 1999.

4.20 Was the Respondent in breach of the Claimant's statutory right to be accompanied at a disciplinary hearing?

4.21 The Claimant contends that the Respondent made an offer to her for the sole or main purpose of inducing her to join a trade union in contravention of section 145A(1)(d) of the Trade Union & Labour (Consolidation) Act 1992.

The Facts

5. The Claimant, Ms Karen Knox, who is Black British of Jamaican origin, was employed by the Respondent, London Borough of Lambeth as a Case Officer in the Respondent's Youth Offending team. The Claimant's role included supervising non-custodial elements of sentences given to minors, as a result of Court proceedings.

6. The matters giving rise to the Claimant's Tribunal complaints involved the sentence awarded by Camberwell Magistrates Court on 19 February 2015 to a fifteen year old boy identified as "D" at the Tribunal Hearing. "D" was made subject to a twelve month youth rehabilitation Order, page 356.

7. On 31 August 2015 “D” was again before the Court as the result of a breach of the Order imposed on him.
8. Pursuant to the terms of his twelve month youth rehabilitation Order “D” was subject to a condition to attend supervision meetings with the Claimant. The meetings were scheduled by the Claimant to take place on Monday, 3 August 2015, Wednesday, 5 August 2015 and Thursday, 6 August 2015.
9. The Claimant had been made subject of the condition of supervision on Friday, 31 August 2015 and the first supervision meeting had been scheduled to take place on the following Monday, namely 3 August 2015. The Tribunal found it a fact that no letter was sent to “D” informing him of the supervision meeting on Monday, 3 August 2015 and in cross-examination the Claimant herself confirmed that she had not been at Court on 31 July 2015 so that she could not have informed “D” of any appointment that she had allegedly made.
10. The Tribunal considered the Claimant’s explanation that someone else must have informed “D” of the appointment to be wholly unconvincing, in circumstances where it could only have been the Claimant herself who could have provided the time and date of her availability. The Claimant also alleged that the Respondent’s Court team had been disbanded which had increased her volume of work.
11. The Claimant had to accept at the Tribunal hearing that “D” would never have received information from any source that a meeting had been scheduled with her on Monday, 3 August 2015. On 5 August 2015 the Claimant sent “D” the following letter which was headed ‘First Warning Notice’ in capital letters in bold:

FIRST WARNING NOTICE

You failed to attend the appointment for supervision as instructed on Monday, 3 August at 2.30pm. This appointment was due to take place at Lambeth WOS, Ivor House, 1-9 Acre Lane, Brixton, SW2 5BF.

You failed to make contact with the office in order to offer an explanation for this ?. Therefore you are being issued with a first warning.

Your next appointments will be on Wednesday, 5 August at 2.30pm, Thursday, 6 August at 3.30pm.

Please ensure that you attend these appointments and make sure you are on time to avoid any further warnings and your Order being returned to Court.

12. The letter was dated on the same day as the first appointment scheduled in the letter namely 5 August 2015. The Claimant accepted that it would have been impossible for “D” to have received the letter in advance of the

meeting on 5 August 2015 and that it was unlikely that he would have received it before the meeting scheduled on the following day, namely 6 August 2015.

13. The Claimant prepared a further letter in relation to “D” which bore the date 6 August 2015, at page 373, which included the following:-

You have failed to attend your scheduled appointment on Wednesday, 5 August at 2.30pm. You are required to make contact with this office within 24 hours to give an explanation for your missed appointment. As you have failed to do this, this is a final warning letter.

Failure to comply with your Order can result in further warnings being issued or your Order being returned back to Court.

Your next appointment at Lambeth WOS is on Thursday, 6 August 2015 at 3.30pm. Please ensure that you attend this appointment on time to avoid any further warnings and your Order being returned to Court”.

14. Although the letter bore the date 6 August 2015 requiring “D” to attend on the same day for a supervision Order, the letter was not in fact created until 9 August 2015. Included in the Tribunal bundle was a printout of the computer generated properties of the document relating to “D” which revealed that it had been created on 9 August 2015 at 22.35 and had been last saved at 22.45.

15. The Tribunal concluded that “D” could not have received any of the letters from the Claimant relating to his supervision. The Tribunal found that the Claimant created all the letters knowing that they would not be received by “D” and that a letter created three days after the event, namely a supervision on 6 August 2015, could only have involved deliberate and serious deceit on the part of the Claimant.

16. The Claimant in the knowledge, as we found that “D” would have been unaware of any of the appointments scheduled for him, aggravated her conduct by preparing a summons and laying the following information at Camberwell Green Youth Court dated 4 September 2015, page 349, namely:

ALLEGED BREACH: D is in breach of youth rehabilitation Order imposed on 31 July 2015. D has failed to comply with his Order in that he has failed to attend his supervision appointments on 3 August; 5 August and 6 August 2015.

17. In a breach report prepared by the Claimant for the Magistrates the Claimant stated the following under the heading “Response to Supervision”, page 357:

4.1 Since being made the subject of this Order on 19 June 2015 D has been offered three appointments after his

breach Hearing on 31 July 2015. D has failed to attend the YOS for any of these appointments. It is therefore not possible to comment on his response to any interventions that have been included as part of this Order.

4.2 D has been notified of his YOS appointments at the Court after his Court Hearing.”

18. The Claimant in the knowledge that “D” could have received no notification of the appointments particularly having regard to the dates of the letters, failed to draw the magistrate’s attention to the true position and “D” received a custodial sentence. Fortunately, after a period of approximately two weeks, the Respondent had become aware of the Claimant’s own conduct, and “D”’s sentence was set aside and he was released.
19. The Tribunal has rarely if ever been confronted by such flagrant conduct of an individual whose job role involved a position of trust and was aimed at offering supervision and potential rehabilitation to troubled young people. As a result of the Claimant’s conduct an adolescent boy aged fifteen was subjected to a custodial sentence and the Tribunal could only speculate on the effect of such injustice on him. The Tribunal noted that in her breach report for the Magistrates the Claimant included the following which she must have known was wholly untrue, page 359:

Since Daniel has been made subject to the Order, he has demonstrated that he has persistently and wilfully failed to comply with this Order.

20. Throughout the disciplinary process which followed even at the Tribunal Hearing the Claimant never expressed any remorse or even provide any convincing explanation for behaviour which the Tribunal considered was wholly disgraceful for an individual in her position, involving power and trust. The Tribunal reminded itself that it should avoid emotive or condemnatory language, but we considered that this case was so exceptional that we were unable to employ any other alternative description of the Claimant’s conduct.
21. Having regard to the Claimant’s own deceit and conduct and her unconvincing and inconsistent explanations at the Tribunal Hearing, the Tribunal was unable to place any reliance on her evidence.
22. Fortunately for “D” the Respondent became aware of the Claimant’s conduct and she was suspended on or about 11 September 2015. An investigation was undertaken in relation to the Claimant’s conduct by Stuart Dixon, Capital Programme Manager, who finally prepared a report on 17 March 2016, page 205-219.
23. The matters Stuart Dixon was asked to investigate involved the following:

- **The records produced by the Claimant for the Camberwell Youth Court on 4 September 2015 had the effect of**

misleading the Court with the result that the young person who was the subject of the proceedings was given a custodial sentence.

- **The Claimant's actions put the Council at risk of being found to have failed in its statutory duty to safeguard young people and its management of the risks associated with its obligation to protect the public.**
 - **The Claimant's conduct and behaviour in the Youth Court on the day in question had the potential to cause significant reputational damage to the Council and was in breach of the terms of the Council's code of conduct.**
24. The Tribunal considered that the delay in producing the investigation report was excessive. In his evidence to the Tribunal Stuart Dixon said that there had been a major restructure of the lead department which made it difficult for him to contact individuals and also because his elderly mother had suffered a serious stroke and in circumstances where he had been her sole carer, he had prioritised seeking and obtaining suitable residential care arrangements for her. Stuart Dixon had taken time off in February 2016 in order to make the necessary arrangements for his mother.
25. Unsurprisingly Stuart Dixon recommended that the matter should proceed to a disciplinary hearing. There was further delay involving major restructuring taking place throughout the Respondent Council, causing staff vacancies including relevant HR individuals, and the case was eventually passed to Andrew Holness, HR Manager, page 672. The Claimant's case was one of several cases which had been allotted to Andrew Holness following the restructure, which had caused a reduction in staff and consequent increased workload. Further delay was involved in identifying a disciplinary panel chairman and the fact that Andrew Holness had himself been away on sick leave.
26. Eventually Matthew Cooper, Head of Digital was identified as the panel chairman and Jacqueline Faulkner, Employment and Schools Delivery Lead was appointed as panel member. On 9 August 2016 Andrew Holness wrote to the Claimant pages 690-692 informing her that a disciplinary hearing would take place on 1 September 2016. In his letter to the Claimant Andrew Holness pointed out that there was a case for the Claimant to answer in relation to the following:
1. **That records produced by you at Camberwell Youth Court on 4 September 2015 misled the Court. These records were part of a breach pack, which was presented to the Court on the basis of which a young person was resentenced to a custodial sentence.**
 2. **The records produced at Camberwell Youth Court has left the Council exposed in terms of its statutory duty to safeguard young people and manage the risks presented under our obligation to public protection.**

- 3. That your conduct and behaviour on 4 September 2015 in Camberwell Youth Court in the presence of young persons, their legal representatives and the Bench, have the potential to cause significant reputational damage to the Council and was in breach of the Council's code of conduct.**
27. The letter also pointed out that the Claimant was in breach of disciplinary rules and that her conduct had involved misconduct involving negligence in performance of duties and gross misconduct involving serious breaches of the staff code of conduct. The letter pointed out that the allegations amounted to gross misconduct.
28. The Respondent initially understood that the Claimant would be represented by a Unison Representative, but on 25 August 2016 the Claimant emailed Andrew Holness, page 703 requesting a postponement on the basis of unavailability of her trade union official Mr John Neckles of the PTSC Union. The Claimant had terminated her membership with Unison.
29. The Respondent's disciplinary policy at Clause 4.2.1 required the employee concerned to be advised of their right to be represented at the hearing by either a recognised trade union representative or a workplace colleague. The PTSC was not a union recognised by the Respondent, but the Respondent conceded that the Claimant had a statutory right to be accompanied by a union representative of her choice.
30. On 31 August 2016 Andrew Holness emailed the Claimant, page 717 to inform her that she could only be accompanied at the disciplinary hearing by a recognised trade union representative and that the Respondent only recognised Unison, GMB and Unite. There followed some correspondence between the parties in relation to the Claimant's right to be accompanied by Mr John Neckles, her trade union representative. The original disciplinary hearing had been postponed and was rescheduled to take place on 7 October 2016.
31. On 6 October 2016 John Neckles on behalf of the Claimant wrote to Andrew Holness requesting a postponement of the disciplinary hearing on the following day on grounds of the Claimant's health. There was a medical report from the Claimant's GP dated 6 October 2016, page 745 which stated the Claimant had been diagnosed with depression secondary to work related stress. The report stated that the Claimant would be currently unable to deal with or attend any hearings conducted under the disciplinary process. Andrew Holness refused the application on behalf of the Claimant for a postponement. He did not consider there was any reason for a further postponement and he bore in mind the fact that the hearing had already been postponed from 1 September 2016.
32. On 7 October 2016 John Neckles wrote to Andrew Holness enclosing a copy of the GP report, page 745, relating to the Claimant. John Neckles' letter concluded with the following:

Please additionally note, if it is your/the Council's decision to continue with this disciplinary hearing irrespective of the contents contained in Ms Knox's GP medical letter of 6 October 2016 and if I receive no response from you by 9.30am. I will assume the disciplinary hearing is still going ahead and will advise Ms Knox of her legal options/redress.

33. On 7 October 2016 the Claimant sent a letter of resignation to Mr Andrew Holness, pages 751-752. In her letter the Claimant pointed out that she had asserted her statutory rights of accompaniment to be represented by an official from the PTSC Union and that the Respondent's refusal had breached a fundamental term of her contract of employment "*express/implied by an operation of law.*" The Claimant's letter continued with the following:

That my employer's actions and reasons given for denying me my statutory rights of accompaniment, amounts to the operation of a closed shop in favour of the recognised unions contrary to Section 152 TULRA 1992.

Having sought a postponement of my disciplinary hearing scheduled for 7 October 2016 on medical grounds which was refused by my employer in breach of my health and safety at work to my detriment. I consider like above that such refusal is wholly unreasonable and amounts to a fundamental breach of a term of my contract of service and the duty of care owed to me by my employer.

Finally, I further consider the pending disciplinary actions being taken against me by my employer to amount to a disparity and less favourable treatment on grounds of my race and sex for the following reasons:

- (i) There were/are employees of the Council who are allegedly guilty of the same allegations levelled against me and were never subjected to the terms of the contractual disciplinary procedure;**
- (ii) That the department who previously was responsible for the production and vetting of Court bundle have been disbanded with no training in regards to the same have been given to those employees who now have the responsibility to perform said tasks;**
- (iii) That the managers and supervisors whose job and responsibility it is to quality check and assure their finalisation of the said Court bundles were grossly negligent in their duty in regards to same and have not been subjected to the terms of the contractual disciplinary procedure.**
- (iv) That as a direct result and consequence of the fundamental**

breaches referred to above, I have now lost the trust and confidence for the London Borough of Lambeth being a reasonable employer, which has now resulted in the tendering of my resignation to take effect forthwith”.

34. The Tribunal was astonished by the tone of the letter in which she attributed the blame for her conduct on managers and supervisors for what she alleged amounted to their gross negligence to quality check and assure the finalisation of the said Court bundles. The Claimant failed to display any insight into the fact that it was her deceitful documentation, involving letters which D could not have received in time for any supervision meetings with the Claimant, and the Claimant's own conduct in laying the information before the Magistrates and compiling the breach report which had led to the wrongful detention in custody of "D".
35. Matt Cooper, the Chairman of the disciplinary panel, emailed the Claimant to inform her that under advice he could not accept her written resignation in advance of the panel hearing the case and reaching its conclusion. The Claimant was informed that the disciplinary hearing would go ahead and she was provided with the opportunity to submit any statement she wished to make in writing within five working days as an alternative to her attendance.
36. The Tribunal noted that in paragraph 21 of her witness statement, the Claimant alleged that the reasons set out in her resignation letter of 7 October were the full reasons for tendering her resignation without notice due to the Respondent's conduct.
37. The Hearing was postponed on 7 October 2016 because a panel member, Ms Faulkner had received news of the sudden death of an individual who was close to her. The Claimant did not provide any written statement and the hearing was rescheduled for 13 October 2016. The Tribunal noted that the hearing was rescheduled before five working days had expired. The Claimant was neither informed that the disciplinary hearing had been postponed on 7 October 2016 nor that it had been rescheduled to take place on 13 September 2016, omissions which the Tribunal considered unjustified.
38. In circumstances where an employee is facing the risk of dismissal, the Tribunal considered that the employee or her representative, in this case Mr Neckles, were entitled as a matter of natural justice to be informed both that the hearing had been postponed and of the new hearing date. However by this stage the Claimant herself considered that she had resigned. Further in circumstances where the Claimant had been informed that the Respondent had not accepted her written resignation the Tribunal was surprised that the Respondent had failed to treat her as an employee by its failure to inform her of the postponement and the new hearing date.
39. The disciplinary panel met on 13 October 2016. Stuart Dixon presented the Respondent's case and the panel had evidence from an individual who had been present in Court on 4 September 2015 and the Head of the WOS. The hearing was recorded and lasted about four hours. The panel

concluded that the Claimant's conduct had amounted to gross misconduct and it took the decision to dismiss the Claimant summarily.

40. On 19 October 2016 Matt Cooper wrote to the Claimant, pages 773-776 informing her of the decision of the panel. The letter included the following main points raised in a management presentation namely:

- **You falsified several documents relating to the youth rehabilitation Order of a child under Lambeth Youth Offending Services supervision, in particular letters supposedly sent to the child in question which were falsely dated to compare to both the intended issuing date and the actual creation date of the Microsoft Word files.**
- **These falsifications which have also been shown to make receipt of these documents by the child in question an impossibility, were presented as evidence to Court which directly led the child receiving a custodial sentence for non-attendance of appointments.**
- **You deliberately and knowingly misled the Court both in the production of these documents and in your actions and behaviour during the Court Hearing itself. This left Lambeth Council exposed in terms of it's statutory duty to safeguard young people and it's obligations to public protection.**
- **That your behaviours and actions as stated had the potential to cause significant reputational damage to the Council.**
- **There was significant evidence produced by the investigating manager supporting all of the above findings, including witness evidence and documentary evidence supplied by ICT.**

41. The letter informed the Claimant of her right of appeal.

Whistle Blowing

42. The Claimant's alleged disclosures were set out in further and better particulars, dated 10 August 2017, pages 883-889. In general terms they related to the correspondence in September and October 2016, involving the Claimant's request to be accompanied by Mr John Neckles, her union representative, the Claimant's application for a postponement and the Respondent's refusal to postpone on grounds of the medical evidence she had provided.

43. When cross-examined by Mr Cole about her claims under the public interest disclosure provisions of the Employment Rights Act 1996, the Tribunal noted the following exchange in cross-examination:

'Q' (Question) "You understand the expression whistle blowing?"

'A' (Answer) I have heard about it

Q: Did you whistle blow to the Council?

A: I was concerned about my treatment. I did not realise I was whistle blowing.

Q: Take me to your whistle blowing document.

Q: What about that?

A: When it was pointed out to me.

Q: Take me to your whistle blowing document?

A: Page 3 of her witness statement.

Q: I am asking you whether you made any disclosure of information in the public interest either in the witness statement or bundle.

Q: It is at page 753.

A: Page 751 is the disclosure in the public interest.

Q: It is your case – you should know what they are.”

44. The above section of the cross-examination provides a flavour of the Claimant's approach to her pleaded whistle blowing case. Further on in her cross-examination it was put to the Claimant that she was asked to particularise her public interest disclosure complaints and she was referred to page 883. The Claimant stated she had not seen that document before. It was put to her that she did not know what documents she was relying on and she did not know what Mr Neckles had been saying about whistle blowing. It was finally put to her that she did not know what disclosures were being relied upon and the Claimant answered "No".

Race Discrimination and Harassment

45. The Claimant was cross-examined about her complaints of racial discrimination and harassment and it was put to her that throughout the whole period of her suspension she had never mentioned race. The Claimant maintained that managers such as Matt Cooper and Andrew Holness would have been aware of her race because of her application for her post at the Council. The Claimant's application, unsurprisingly, pages 97-105, made no reference to the Claimant's race. Had the Claimant completed an ethnicity questionnaire, such questionnaire would have been separately filed and entered onto a different database. The only references to protected characteristics in the Claimant's application form completed by her were in relation to age and disability.
46. It was pointed out to the Claimant that she had never maintained in her

witness statement that any of the matters about which she complained. The Claimant stated, referring to the Respondent's managers, "*they know your race and they were white British*". She further stated "*they are white, English and European*". The Claimant further alleged that paragraph 57 of Matt Cooper's witness statement was untrue, namely that he did not know what the Claimant's race or ethnicity was. When asked how she knew that Mr Cooper was white British she said the following:

Most of people who have lead roles are white British. It is an assumption, I do not know precisely.

47. When asked how she knew Andrew Holness was white British, the Claimant said that he was in a senior role. It was pointed out to the Claimant that Andrew Holness was black of Jamaican origin, and the Claimant replied "OK".
48. When asked whether she was still maintaining that Andrew Holness was guilty of discrimination although being black the Claimant replied "*Yes, it is not only just about colour*".
49. In relation to an identified comparator Ms Sadare the Claimant alleged she had no personal knowledge of her case. The Claimant in cross-examination said that she didn't know whether Ms Sadare had been allowed to be accompanied by Mr Neckles or not.
50. It appeared that the Claimant had little knowledge of the contents of her own witness statement because when it was put to the Claimant whether she had read her witness statement the Claimant replied "*most of the time I know what's in it*".

Submissions

51. The Tribunal heard submissions from Mr Cole on behalf of the Respondent and from Mr Neckles on behalf of the Claimant. The parties' submissions are not repeated in these Reasons

The Law

Constructive unfair dismissal

52. Section 95(1)(c) of the Employment Rights Act 1996 provides:

(1) For the purposes of this Part an employee is dismissed by his employer if (and,....only if) –

...(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

53. To found a complaint of constructive dismissal the Claimant has to show that his resignation has been caused or justified by a fundamental or repudiatory breach of his contract of employment by the Respondent

employer, namely a breach which goes the very root of the contract between them; in other words conduct on the part of the employer which evidences the employer treating the contract of employment as discharged. The Claimant alleged that the Respondent was in breach of contract relating to the disciplinary process.

Right to be accompanied

54. Section 10 of the Employment Relations Act 1999 provides:

(1) This section applies where a worker –

(a) Is required or is invited by his employer to attend a disciplinary or grievance hearing, and

(b) Reasonably requests to be accompanied at a hearing.

55. Where section (1) applies the employer must permit the worker to be accompanied by one companion who is chosen by the worker or is someone within the provisions of subsection (3) namely if he is an official employed by a trade union.

56. Section 12 of the 1999 Act provides that a worker has the right not to be subjected to any detriment on the ground that he has sought to exercise his right under section 10(2A), namely in the circumstances of this case by Mr Neckles, a trade union official.

57. Section 12(3) of the 1999 Act provides that a worker is to be treated as automatically unfairly dismissed if the reason or if the principal reason is that he has sought to exercise his right to be accompanied under section 10(2A) of the Act.

Direct sex discrimination

58. Section 13 of the Equality Act 2010 provides:

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

59. Section 26 of the 2010 Act defines harassment as the following:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating and intimidating, hostile, degrading, humiliating

or offensive environment for B.

60. Section 136 contains burden of proof provisions and provides:

(1) This section applies to any pleading proceedings relating to contravention of this Act.

(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) does not apply if A shows that A did not contravene the provision.

Protected disclosures

61. Section 43B of the Employment Rights Act 1996 provides:

(1) In this part a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following

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

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

Conclusions

62. The Tribunal reached its conclusions having regard to the evidence to the submissions of the parties' representatives and to the relevant law.

63. The background to the Claimant's case was her gross misconduct in relation to the young person "D". There was no possible justification for the Claimant's conduct involving deceitful and misleading letters and wholly false information provided to the Court. The Claimant gave no explanation for her actions which were not referred to in her witness statement apart from blaming others. We consider there is very significant force in Mr Cole's submission to the Tribunal that it is difficult to think of worse misconduct in the Claimant's case. The Claimant's actions were dishonest and probably criminal in nature and that they were catastrophic for the child involved and no doubt were liable to reflect very badly on the Respondent Council.

64. In our judgment, dismissal of the Claimant against such background was inevitable. It was the Claimant's case throughout that she had resigned from her employment on 7 October 2016 and she clearly regarded herself as no longer employed by the Respondent. We have considered at length

the speeches or judgments of the Supreme Court in **Guys – v - Société Generale, London Branch [2013 2WLR50]**. We very respectfully consider that that case involved a rather different situation than the situation in the present case where it was held by the Supreme Court that a repudiatory breach of a contract of employment did not terminate the contract unless the other party elected to accept the repudiation.

65. In the circumstances of the present case the Claimant had resigned and we do not consider that in the context of an employment relationship a resignation amounts to a repudiatory breach of contract. The consequence for an employee if he or she resigns in breach of the contractual notice provisions is that the employee may be liable for damages for a failure to provide the employer with the required contractual notice. In any event, if we are wrong about the effect of the Claimant's resignation we do not consider that it makes any practical difference as far as this case is concerned.
66. It may well have been the case that the Claimant had resigned for tactical reasons rather than face the inevitable namely, her dismissal for gross misconduct. The Tribunal concluded that the sole reason for the Claimant's suspension was her gross misconduct, involving her disgraceful conduct towards D, and that the Respondent's conduct involving the length of her suspension had no bearing on her race or that the refusal to grant the Claimant a postponement was because of the matters complained of by the Claimant. We concluded was no causal link between the Claimant's suspension, the decision to hold a disciplinary hearing as the result of any of the matters complained of by the Claimant.
67. Mr Neckles on behalf of the Claimant appeared to accept that the Claimant's evidence in relation to her whistle blowing and race complaints had no substance, because he merely said in his oral submissions that he would leave it to the Tribunal to determine. The Tribunal has determined that such complaints were wholly without substance or foundation and accordingly it is the judgment of the Tribunal that they were not well founded and are accordingly dismissed.
68. The Claimant was unable to articulate what her complaints of whistleblowing and race involved, apart from alleging that the Respondent's managers were white, which was not the case in respect of Andrew Holness and that managers must have been aware of her race because of her application for her post at the Council. The Tribunal found no facts from which we could have decided in the absence of any other explanation, that the Respondent had discriminated against the Claimant or had subjected her to harassment because of her race.
69. the Claimant was not refused union representation, she was refused representation by Mr John Neckles of the PSCT. The Respondent accepted that the Claimant's rights under the Employment Relations Act 1999 had been infringed by the Respondent's refusal to allow her to be accompanied by Mr John Neckles. The Tribunal concluded on the evidence that the Claimant had suffered no detriment as a result of the Respondent's refusal to allow her to be accompanied by Mr Neckles and that accordingly

we make a nominal award of £2, see *Toal v GB Oils Limited* [2013] IRLR 696.

70. In relation to the Claimant's complaints under section 145A(1)(d) of the Trade Union Labour Relations (Consolidation) Act 1992, we are unable to understand the contention that the Claimant had been induced to join one of the recognised unions. The Claimant did not join one of the recognised unions and it appears that she resigned her membership of Unison after she had been told that she could not be accompanied by Mr John Neckles. This allegation is without foundation.
71. In relation to constructive dismissal we did not conclude that the length of the Claimant's suspension involved a repudiatory breach of contract on the part of the Respondent, in other words conduct on the part of the Respondent which evinced the Respondent in treating the Claimant's contract of employment as discharged. Had the disciplinary hearing taken place within a month or so of the Claimant's disgraceful conduct in relation to "D" we have concluded she would have inevitably been dismissed at that stage.
72. The Claimant never complained or sought information from the Respondent about the length of her suspension and she was on full pay throughout. We concluded that the disciplinary policy did form part of her contract of employment having regard to the terms of a collective agreement with relevant unions, as evidenced in the Tribunal documentation, in particular having regard to the national agreement on pay and conditions. We were driven to the conclusion that on the balance of probabilities the Claimant resigned to avoid the inevitable consequences of the outcome of a disciplinary hearing.
73. The Tribunal noted the fact that the Respondent had refused the Claimant a postponement of the disciplinary hearing, but we did not conclude that there was a contractual right to a postponement, which was a matter for the discretion of the Respondent. Of course, a failure to postpone a disciplinary hearing might well amount to unfairness or unreasonableness in the context of an employee's entitlement not to be unfairly dismissed, but we do not consider that the right to a postponement amounted to a contractual right or even if it did, that in the circumstances of this case a failure to postpone involved a repudiatory breach of contract.
74. Having regard to the Claimant's approach to her whistle blowing and race claims, which in our judgment evidenced the fact that the Claimant had little or no understanding of the issues involved, we considered that it may well have been the case that Mr Neckles, rather than the Claimant herself, who was essentially orchestrating the Claimant's approach to the disciplinary process and to her Tribunal proceedings.
75. At the Tribunal Hearing an issue was raised as to whether the Respondent should have referred the Claimant to Occupational Health on receipt of the letter from the GP. We did not conclude there was any contractual entitlement of the Claimant to be referred to Occupational Health on the

Respondent's receipt of a GP letter. In any event the Tribunal has concluded that the Claimant did not resign as the result of any conduct or failure to act on the part of the Respondent.

76. This was not a finely balanced case, where the result of a disciplinary hearing might well have been in doubt. On the grounds set out in these Reasons, the Tribunal concluded that the Claimant's dismissal was inevitable.
77. Turning to the issue of wrongful dismissal the Tribunal concluded that the Claimant did not resign pursuant to Section 95(1)(c) of the Employment Rights Act 1996. According the issue of wrongful dismissal does not arise. This complaint is not well founded and is accordingly dismissed.
78. On behalf of the Respondent, Mr Cole did submit that were the Tribunal to conclude that the Claimant had been constructively dismissed it would not have been unfair. He submitted that the reason for her dismissal was her conduct which was the reason why the Claimant had found herself subject to a disciplinary process in the first place.
79. The Tribunal concluded that, with the exception of the Claimant's complaint under the Employment Relations Act 1999 involving the right to be accompanied, the Claimant's Tribunal claims were entirely without foundation and should never have been brought.

Employment Judge Hall-Smith

Date: 29 November 2017