EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Majorie Hunter	**AND**	St Mark's Parochial Church Council (a body corporate created by statute) (1) Keith Airey (2) Judy Watts-James (3)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** **26 27 28 February 1 6 and 7 March 2018.**

EMPLOYMENT JUDGE Woffenden
MEMBERS: Dr N Bristow
Mr G Bagnall

Representation
For the Claimant: Mr R Swanson, consultant
For the Respondent: Mr R Williams of Counsel

JUDGMENT

1 The complaint of direct race discrimination under section 13 Equality Act 2010 fails and is dismissed.

2 The complaint of harassment related to race under section 26 Equality Act 2010 fails and is dismissed.

3 The claim of victimisation under section 27 Equality Act 2010 fails and is dismissed.

4 The claim of detriment under section 47B Employment Rights Act 1996 fails and is dismissed.

REASONS

1. The claimant (who is black British African Caribbean) presented a claim to the employment tribunal on 11 February 2017 in which she complained of direct race discrimination harassment related to race victimisation and detriment on the ground she had made a public interest disclosure. She is employed as Day Centre Organiser by the first respondent.

2. The respondents had prepared a bundle of documents of 136 pages. Although Employment Judge Harding had ordered at a preliminary hearing on 18 August 2017 that a bundle of documents be agreed by no later than 22 September 2017 Mr Swanson complained at the commencement of the hearing that the claimant's disclosed documents had not been included, an omission he had not spotted until 23 February 2018 when he had received an index for the bundle from the respondents' representative. He had prepared a supplemental bundle of documents containing the claimant's documents (58 pages). Mr Williams agreed to its inclusion in the respondents' bundle. A pro forma "Over time, Travel and other Expenses' Claim Form and a letter from the claimant's GP dated 11 July 2016 were disclosed by the parties at the request of the tribunal during the course of the hearing and added to the bundle at pages 59 and 60. The tribunal has had regard only to those documents in the bundle to which reference was made in witness statements or in cross-examination.

3. At the commencement of the hearing and after discussion the parties were asked to agree a comprehensive list of issues (liability and remedy) for the tribunal to determine. A list was agreed by the parties by 17 February 2018 but required further amendment because time limits had been omitted and (during the hearing) the respondents' knowledge of the claimant's grievance dated 6 October 2015 (which he had told the tribunal was in dispute) was conceded by Mr Williams. Mr Williams also confirmed during his submissions that the respondents accepted that the claimant's grievance of 6 October 2015 was a protected act.

4. It had been recorded by Employment Judge Harding in the order sent to the parties on 21 August 2017 following the preliminary hearing on 18 August 2017 (at which the claimant was represented by Mr Swanson) that in relation to a meeting on 26 July 2016 the claimant alleged she was required to call her GP to prove that she had been off sick and that allegation was contained in the list of issues initially agreed by the parties. However during the course of the cross examination of the second respondent and after the claimant's case had concluded Mr Swanson sought to change the allegation in the list of issues in relation to that meeting to that of the claimant being bullied into getting a letter from her GP to confirm that she was fit to return to work. He apologised for having hitherto failed to note what he described as an error in both the order made and the list of issues he had earlier agreed. Having considered the

contents of paragraph 21 (second sentence) of the ET1 Rider to the claim form which alleged the claimant was bullied into getting such a letter and after discussion we permitted an amendment to the agreed list of issues because such an allegation had been made within paragraph 21 of the ET1 rider .Mr Williams was given the opportunity to recall the claimant but chose not to avail himself of that opportunity.

5. In the event the final list of issues to be determined by the tribunal was as follows:

Direct Race Discrimination

5.1. Did the respondents subject the claimant to less favourable treatment by her:

5.1.1. Being called into a meeting on 4 June 2015.

5.1.2. On 26 July 2016 being called into a meeting and questioned about her absence from work due to illness. In particular the claimant was bullied into getting a letter from her GP to confirm she was fit to return to work.

5.1.3 Being suspended on 18 October 2016.

Harassment related to race

5.2. Did the claimant suffer unwanted conduct in relation to her race by the respondents which had the purpose or effect of violating her dignity or creating an intimidating etc. environment on the following occasions:

5.2.1 In a meeting on 4 June 2015.

5.2.2 On 26 July 2016 being called into a meeting and questioned about her absence from work due to illness. In particular the claimant was bullied into getting a letter from her GP to confirm she was fit to return to work.

5.2.3 Being suspended on 18 October 2016.

Victimisation

5.3 Did the claimant suffer either of the following alleged detriments because she made a protected act on 6 October 2015:

5.3.1 On 26 July 2016 being called into a meeting and questioned about her absence from work due to illness. In particular the claimant was bullied into getting a letter from her GP to confirm she was fit to return to work.

5.3.2 Being suspended on 18 October 2016.

Public Interest Disclosure Detriment

5.4 The claimant relies on 3 qualifying disclosures:

5.4.1 On 3 October 2016 the claimant spoke to Mr Airey and said “can you call the police”.

5.4.2 On 5 October 2016 the claimant spoke to Father Philip about the allegation of theft and told him he needed to call the police. (See claimant’s Further Particulars.)

5.4.3 On 10 October 2016 the claimant asked Mr Airey on a number of occasions if he called the police.

It is the claimant’s case that these are qualifying disclosures under section 43 B (1) (a) (b) (c) (f) Employment Rights Act 1996 (‘ERA’) . All disclosures made to the employer.

5.5 Did any of the above qualify as a protected disclosure pursuant to section 43B ERA?

5.6 Did the claimant have a reasonable belief that (a) a criminal offence has been committed, is being committed or is likely to be committed, (b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) a miscarriage of justice has occurred, is occurring or is likely to occur, (f) information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

5.7 At the time she made the purported disclosures, did the claimant reasonably believe them to have been made in the public interest?

5.8 Did the first respondent suspend the claimant on the ground that she had made a protected disclosure?

Remedy

5.9 Did the claimant contribute to her suspension by being one of those persons with access to the safe and not notifying her employer or the police earlier upon realising that the safe may have been tampered with?

5.10 What is the appropriate level of compensation that should be awarded for injury to feelings and detriment?

Jurisdiction

5.11 Are any of the claimant’s claims out of time?

5.12 To the extent that any of her claims are out of time:

5.12.1 Was it reasonably practicable for the claimant to have brought her PIDA claim within 3 months (or a reasonable time thereafter)?

5.12.2 Should the tribunal exercise its just and equitable discretion to extend time with regard to the claimant’s EqA claims?

6. For the claimant we had witness statements and heard evidence from the claimant, Michelle Fahey (an Assistant Organiser employed by the first respondent), Charlotte McKinley (a Carer/Escort employed by the first respondent) and Julie Clifford (a Cook employed by the first respondent) .Mr Swanson's application for leave to rely on the statement of Paulette Dunkley was refused for the reasons given at the time.

7. For the respondent we had witness statements and heard evidence from Fr. Philip Calvert (the parish priest of Saint Marks Church), the second respondent and the third respondent. Mr Swanson submitted repeatedly that the second respondent had lied and made misrepresentations of fact. Indeed he described him in written submissions as a pathological liar. We agree that in a number of respects his evidence in chief was plainly wrong for which he proffered no explanation or apology. Moreover, some of his evidence under cross-examination was confused. Overall, however we consider that he was endeavouring to give truthful evidence and although he was not a wholly reliable witness we did not find the second respondent a deliberate or persistent liar whose evidence should be rejected wholesale; rather we have treated his evidence with some caution.

8. Mr Williams submitted the claimant was guilty of wicked distortion. We find that the passage of time has adversely affected the claimant's recollection of some events and her strong emotions of animus towards the second and (to a lesser extent) the third respondent have affected her memories of others. Overall, however we consider that she too endeavoured to give us truthful evidence and although she too was not a wholly reliable witness we did not find any evidence to support a finding that any such distortion was wilful or malicious.

8. From the evidence we saw and heard we make the following findings of fact:

8.1 When the claimant commenced her employment with the first respondent on 2 January 2012 she was employed as Assistant Organiser at the first respondent's St Marks Day Centre for the Elderly ("the Day Centre"). Maureen Burn (a white woman) was the Day Centre Organiser.

8.2 On 2 January 2014 (after a competitive process and interview by Father Philip Calvert ('Father Calvert') and the third respondent) the claimant was appointed to the position of Organiser in place of Maureen Burn who retired. The claimant was appointed in preference to two white candidates.

8.3 At the time Maureen Burn retired the then treasurer (Pauline Salt) also retired and the second respondent took on that role.

8.4 The claimant works Mondays Tuesdays and Wednesdays. Michelle Fahey (who is white) works Mondays Tuesdays and Wednesdays. The claimant is her line manager.

8.5 Father Calvert does not work on Mondays and it is widely known he prefers not to be contacted on that day. Access can be gained to his home via the Day Centre.

8.6 The Day Centre is run by a management committee (a subcommittee of the first respondent) and includes church representatives, the incumbent Day Centre organiser and the treasurer.

8.7 In addition to his role as treasurer the second respondent is (and has been for many years) the first respondent's organist and one of its bus drivers and is currently engaged as the first respondent's Project Development Officer, a role he has carried out since 1999. He was initially an employee of the first respondent but he accepted under cross examination that he became self-employed about six years ago. His evidence in chief had indicated he was an employee.

8.8 The third respondent is a member of the Day Centre management committee and has been involved with its activities for the last 10 years or so.

8.9 Under the contract of employment dated 29 January 2014 ("the Contract") the claimant's line manager was the chair of the Day Centre committee. It is common ground Father Calvert is the chair and therefore the claimant's line manager. We heard no evidence of any HR function of or HR support provided for the first respondent.

8.10 Clause 9 of the Contract (headed "sickness or other absence and sick pay") states that:
"9.1 If you are unexpectedly absent from work for any reason you must inform us of the reason for your absence and likely duration as early in the day as reasonably possible. On the first day of your absence you should phone the centre and leave a telephone message if possible before 8:30 AM, do not phone other staff to pass on this message as there may be delays in the people at the centre being informed. This message only need state that you will not be in at this point, but you will need to phone again to explain more fully to your line manager. You or someone on your behalf must continue to tell us each day of your continued absence until you are able to provide a medical certificate. Your failure to comply with this provision will be noted in your record as a disciplinary matter.
9.2 If you are absent from work due to sickness or injury for more than 7 days including weekends and nonworking days you must provide us with a medical certificate. Further medical certificates, which must be contiguous, must be provided to cover any continued absence. The certificate will not be accepted unless it specifies legibly the cause of your absence.
9.3 Immediately on your return to work you must complete a self-certification form stating the date of and the reason for your absence, including details of sickness or non -working days as we need this information for calculating your statutory sick pay entitlement. Your manager will conduct a return to work interview. At this point you must inform the manager if there are any changes to your personal health and ability to undertake tasks that need to be considered and how these might be accommodated in your work schedule."

8.11 Prospective members of the Day Centre are referred to it by hospitals healthcare and social services the church other local agencies and individuals. The financial viability of the Day Centre is dependent on attracting and retaining members who pay for the services it provides as well as charitable donations and grants.

8.12 The first respondent has an "Overtime Travel and other Expenses" claim form which has a section for travel expenses requiring the person submitting the claim to insert the date, start mileage and end mileage and total miles. The first respondent's payroll function (including the payment of expenses) is carried out by the diocese and the second respondent is responsible for the submission of such forms to it to enable payment of expenses. He sorts out the wages of the first respondent's staff.

8.13 It was the claimant's evidence in chief that she had more to do as Organiser than her predecessor Maureen Burn. She also complained that the second respondent sought to take over a '*fair amount'* of her duties and sought to undermine her in her role but she gave no examples and provided no details. The second respondent's evidence in chief was that in fact the claimant did not undertake some tasks carried out by Maureen Burn and that the number of hours worked by staff has increased since 2013 .This is against a background of diminishing member numbers. He points to the logical inconsistency of the claimant complaining about an increase in her duties while also objecting to him taking duties away from her which would also have increased his own workload. We did not find the claimant's evidence on these matters at all cogent or credible and reject it.

8.14 The second respondent became concerned that for audit purposes the records maintained for the Day Centre were not adequate. There was for example no clear correlation between the money which came in and the members who attended the Day Centre. One of his concerns was the claimant's overtime claims which could not be cross referenced to the diary system which Father Calvert had set up .Similarly the accuracy of her mileage claims which included the total mileage only could not be verified in the absence of a clear audit trail of the member referrals she attended. The second respondent had prior experience at another organisation when queries were raised about travel claims and when the auditors had checked the mileage against the claims, discrepancies had been found. There had been an occasion a family had rung the Day Centre to inquire about the claimant's whereabouts because she was late for a referral meeting with them and no one had known where she was. The second respondent wanted to make sure records were kept accurately and all expenses could be fully verified. He therefore discussed his concerns with the third respondent and Father Calvert and they decided the claimant should be asked to attend a meeting.

8.15 The claimant accepts that she did not include the start and end mileage on the forms which she submitted. She provided the distance travelled which she felt was sufficient and she had been filling in forms in that way for some years. Her evidence was that she recorded referral visits in her own referral diary and Michelle Fahey knew where she was. Neither the first respondent's diary nor the claimant's referral diary was produced in evidence.

8.16 Although Father Calvert was the claimant's line manager we find he did not fully embrace the managerial and supervisory responsibilities which came with that role. Instead he acted in triumvirate with the second and third respondent. In our judgment it is telling that in his evidence in chief the second respondent chose to describe himself as 'a leader'. If so he was self-appointed. We find him a person who tends to assume responsibility and make decisions 'on the hoof' if he thinks they need to be made without much reflection about whether he has the requisite authority. He is not overly concerned about whether he is liked or not in the process. The claimant did not have a clear understanding of the second respondent's function in the first respondent and how it might interlink with hers. She describes herself as someone who likes to stand up for what is right; if she has concerns she has no hesitation in raising them. We find from the demeanour of both the claimant and the second respondent while giving their evidence that they are strong minded forceful and inflexible individuals unwilling to accept any shortcomings. As is often the case in small charitable institutions there is an absence of clear reporting lines and channels of communication are haphazard. Against that background it is hardly surprising that there was confusion about the management of the Day Centre and that, given her job title and the identity of her line manager, the claimant resisted any assumption of line management function by the second respondent and resented any perceived encroachment by him on her role.

8.17 The second respondent wrote to the claimant to inform her that Father Calvert had asked that she attend a meeting with him and the second and third respondent on 4 June 2015. It was said:

"*They would like an explanation of:*

Overtime Claims

Travel Expense Claims

Letter re BD ".

This letter was left on the claimant's desk on 3 June 2015.No more details or any supporting documentation was provided. If employers invite an employee to a meeting to provide an explanation it is trite to state that the employee ought to be given sufficient information to enable the employee to know what exactly he/she will be asked to explain at that meeting. Further the manner in which the

claimant was given notice of this meeting was discourteous. Nonetheless the claimant did not ask for any more information and duly attended the meeting.

8.18 We reject the respondents' evidence that the concern that the claimant was not adhering to the first respondent's diary system in part arose out of the need to know the claimant's whereabouts in order to protect her as a lone worker .If there were concerns about the proper recording of appointments in the diary by the claimant and/or her personal safety it is reasonable to assume that this would have been included as a discrete item in the letter .We conclude that the reason for the meeting was to ensure the accuracy of the first respondent's records for audit purposes and that the claimant's claims for overtime and expenses were verified .

8.19 The meeting was a difficult one. The claimant felt upset and bullied and that she had been questioned as if she was a criminal. That no doubt was in part due to the fact it was conducted by Father Calvert and the second and third respondents. There was no need to go in 'mob handed' to such a meeting. If a witness was needed a note taker would have sufficed. It took place in a small room with the claimant placed on a chair '*in the middle of them'* as she put it in the note she made of that meeting. During the meeting the claimant got her satellite navigation device from her car so that she could show the journeys she had made tallied with her claims. In her oral evidence she strongly expressed the opinion the meeting was a sham to ask her questions about points Father Calvert and the second and third respondents already knew about. There was no evidence which supported that opinion. No disciplinary action was taken against her or further investigation made and thereafter the claimant simply discontinued making expenses claims.

8.20 The claimant first sought legal advice from Mr Swanson in July/August 2015 and he has continued to provide such advice ever since.

8.21 The claimant had been told by people who were redeployed to the Day Centre from St Luke's (another local day centre) that the second respondent had been asked to leave St Luke's .It was her understanding that several £1000s had gone missing. She formed the view the second respondent was not to be trusted (and indeed it was clear from her vehement evidence under cross-examination that her view about his untrustworthiness remains unchanged). She took it upon herself to raise her concerns at a meeting.

8.22 On 30 September 2015 the claimant, Father Calvert and the second and third respondents (among others) attended a meeting of the Day Centre management committee. It had not been made clear to the claimant before that meeting that the second respondent was treasurer .In giving her report it is minuted that the claimant raised several points as follows:
"*She stated that she did not trust the treasurer and was concerned over him having access to the safe, the committee were insistent that he must have. That*

money was counted by him solely. That when he was away, substantial amounts of money was left in the safe. That she still had not been taken to the bank to see procedures for withdrawing money. That he was taking on roles within the centre such as cooking and driving the minibus which undermined her position."
That meeting was also a difficult one. The third respondent was very concerned about the claimant's unsubstantiated comments about the second respondent's ability to be trusted with money and expressed the view this should be investigated if necessary by the first respondent. We observe that had the second respondent or the third respondent complained to the first respondent about the claimant's conduct at that meeting it would not have been unreasonable for a disciplinary/grievance investigation to have been initiated into the claimant's conduct.

8.23 On 6 October 2015 the claimant wrote a lengthy grievance letter to Father Calvert concerning the "*inappropriate treatment*" to which she had been subjected. In particular she complained about the second and third respondents' conduct and of race discrimination. The letter contains many legal terms and references to the Equality Act 2010 and deploys an extensive vocabulary. It concludes by stating that '*I reserve the right to take appropriate action in respect of the above breaches of my employment rights*'. We find on the balance of probabilities, having regard to the striking similarities in tone and content with the claimant's ET1 Rider which named him as her representative which is in stark contrast to the claimant's manuscript notes which are brief vague and with a limited vocabulary, that it (and all the other correspondence sent to the first respondent by the claimant thereafter) was drafted for her by Mr Swanson.

8.24 Father Calvert met with the claimant to discuss her grievance and had a discussion with the second respondent about it. The second respondent had denied knowledge of the claimant's grievance in his evidence in chief but accepted under cross-examination that he was aware that the claimant had complained that he was undermining her in her role and of discrimination by him and the third respondent because although he had not had sight of the document Father Calvert had spoken to him about it.

8.25 The claimant took no further action in relation to her grievance and although she complained in her evidence in chief that, after an initial easing off, the 'u*nlawful discriminatory less favourable treatment bullying harassment and victimisation'* continued she did not raise another grievance until 19 November 2016 and she has provided no salient details whatsoever nor included any such treatment as alleged acts of discrimination in the agreed list of issues. We find on the balance of probabilities there were no material intervening incidents.

8.26 On 2 December 2015 there was another meeting of the Day Centre management committee attended by Father Calvert Michelle Fahey the

claimant and the second and third respondents among others. Under “Matters arising” it is minuted that:
“*The treasurer now has access to the safe.*
There is a new locked tin in which the money once counted is kept.
Cash is counted by Michelle and then checked by KA before it is taken to the office.
When KA was away in October, P Muxlow took the money to the bank.
MH has been taken to the bank to see how it operates.” The minute refers to the efforts made by the first respondent to address the criticisms raised by the claimant at the meeting on 30 September 2015.Michelle Fahey would now usually count money up and give it to the second respondent to bank; the claimant having declined to have anything to do with it.

8.27 On 13 June 2016 the claimant’s GP issued a doctor’s note stating she was unfit for work from 13 to 20 June 2016 because of low back pain. She sent it and her self-certification form to the first respondent by post. She could not get into see her doctor again until 28 June 2016 after the expiry of that sick note. On that day her GP issued a doctor’s note stating she was not fit for work from 20 June 2016 to 11 July 2016.That note was delivered by her daughter though she did not know when. The parties’ evidence about the obtaining and provision of sick notes was not at all clear until oral evidence was given in response to tribunal questions.

8.28 On 29 June 2016 Father Calvert wrote to the claimant about her continued absence from work enclosing a copy of Clause 9 of the Contract. The letter had been drafted for him by the second respondent. In it Father Calvert said she had not contacted him or anyone else involved in the management of the Day Centre to explain the reason for her absence. He said no doctor’s notes had been received and that these were required as a matter of urgency. She was reminded she had booked 2 weeks annual leave from 11 July 2016 and told if a doctor considered her fit to return to work on that date a “return to work note” from that date was needed or she would remain on statutory sick pay. Further before she returned to work a return to work interview was needed at which she must tell them if there were “*any changes to your personal health and ability to undertake tasks that need to be considered and how these might be accommodated in your work schedule*.” Although the claimant’s oral evidence was that she received Father Calvert’s letter of 29 June 2016 after the second doctor’s note had been delivered we find on the balance of probabilities that the letter was sent to the claimant before the second doctor’s note had been received by the first respondent. The second respondent’s evidence in chief was that no sick notes or contact had been received from the claimant; however he accepted in his oral evidence that at the time of this letter the claimant’s self-certification form and doctor’s note dated 13 June 2016 had been received and by the time of the meeting which took place on 26 July 2016 the second doctor’s note had been received.

8.29 Having received both doctors' notes the second respondent telephoned the claimant sometime before she went on annual leave. He asked the claimant to get a letter from her doctor to show she was fit to return to work. This requirement had been indicated in the letter of 29 June 2016; he wanted confirmation she was fit for work and on holiday to ensure she was paid correctly because if she was sick during holiday she was entitled to statutory sick pay. The relevant information had to be submitted to the diocese shortly to enable the correct payment to be made. The claimant raised no complaint and duly asked her GP to provide such a letter.

8.30 On 21 July 2016 the second respondent wrote to the claimant to inform her a return to work interview had been arranged for 26 July and that at that meeting they would discuss any alterations to her work pattern she felt was necessary and concerns that had arisen during her absence relating to her contract of employment. We note this was wholly consistent with clause 9.3 of the Contract. She was asked to confirm her attendance. No mention was made of any outstanding doctors' notes or letters.

8.31 At the return to work interview on 26 July 2016 (attended by the claimant Father Calvert and the second and third respondent) the claimant was asked by Father Calvert about why she had not kept in touch with the first respondent during her absence and she said she had telephoned. She was asked about the late arrival of doctors' notes. She was then asked about the letter which she had been requested to get from the claimant's GP saying she was able to return to work from 11 July 2016 although she was on holiday. She told the meeting she had requested it before she went on holiday. It was the claimant's evidence (which we accept) that she was asked to ring her doctor to confirm she had requested the letter. The phone was put on loud speaker. She was told it had been prepared but not sent out to the first respondent and the doctor apologised for this omission. The doctor contended such a letter was not necessary. She was then asked to collect the letter which she did. A charge was made which the second respondent agreed to pay. The GP's letter dated 11 July 2016 confirmed the claimant was fit to return to work on that date as confirmed on her medical certificate. The note which the claimant made of that meeting records that she had to call the doctors during the meeting and ask for the '*sick notes*' and that she went to '*retrieve sick note*' is plainly wrong. There was no need for Father Calvert and the second and third respondents to be present at such a meeting. Return to work interviews should be carried out by an employee's line manager; in the claimant's case Father Calvert.

8.32 When she returned later on 26 July 2016 with the GP's letter the claimant gave it to the second respondent to read. However (although the GP's letter had confirmed her fitness to work) the claimant then went to see Father Calvert and the meeting was reconvened because of the claimant's concerns about lifting tables and chairs as part of her duties. Someone was subsequently taken on to help with that.

8.33 Later that day the third respondent saw the claimant in passing and the claimant's note of that encounter records that she asked if the claimant had spoken to her doctor because she was an orthopaedic nurse and she thought the claimant should ask for an x-ray and the claimant told her she would look into this on her GP's return from holiday. The third respondent (who is a former orthopaedic nurse) admits that she recommended an x ray and possible escalation to a specialist. The claimant contends in her evidence in chief she told the third respondent to leave her alone. Under cross-examination she accepted that she had told the third respondent she would look into physiotherapy but also alleged that this was only the first of several occasions on which the third respondent raised questions about the adequacy of the treatment she was getting for her back. We conclude, having regard to her own note of the exchange on 26 July 2016 which (though we do not know if it was a contemporaneous note) was certainly made much more closely to the events in question than her evidence in chief or under cross-examination, that there was no pattern of behaviour by the third respondent as alleged and the claimant has exaggerated her evidence in this regard. We conclude that on this single occasion the third respondent (because of her specialist knowledge) in the context of a return to work following absence due to a bad back volunteered a proposed course of action which the claimant was (at the time at least) prepared to consider without demur.

8.34 The claimant complains that other staff members were not required to obtain confirmation of fitness to return to work from their doctor and attend return to work interviews .Of course the claimant was the line manager of staff at the Day Centre and if she did not conduct such interviews this did not accord with the correct contractual position but in any event Julie Clifford's evidence under cross-examination was that sometime in 2013 she had attended a return to work interview with the claimant and a letter from her GP was sought to get more information on her medical condition and Michelle Fahey had been asked to attend and attended a return to work interview after her suspension had ended.

8.35 As treasurer the second respondent is responsible for banking money, usually on a Wednesday. On 19 September 2016 he banked the money in the safe before leaving for annual leave in Portugal. The claimant was on annual leave from 21 September to Monday 26 September 2016.

8.36 On 26 September 2016 Michelle Fahey was on annual leave. The claimant found the safe in the Day Centre was open and rang her. She could not recall having left it open. The claimant was not concerned because she did not think any money was missing. She did not call Father Calvert because it was a Monday. On Tuesday 27 September 2016 she and Michelle Fahey went through the money together and she formed the view that about £7 was missing and assumed the rest had been banked.

8.37 David March (another Day Centre Organiser at a neighbouring parish) gave some money to Michelle Fahey on 27 September 2016 which she put in the safe.

8.38 On Monday 3 October 2016 the second respondent returned to work. David March handed him some monies from events which took place on the 28 and 29 September 2016. There is a dispute about what else happened on that day .It is the claimant's evidence that it was on 3 October 2016 that the second respondent told her that money was missing and she asked for the police to be called. Her oral evidence under cross examination was that it was she and Michelle Fahey who asked him if anyone had done the banking because the safe was open .Michelle Fahey's evidence in chief lacked any cogent detail about the events of 3 and 4 October. The second respondent's evidence in chief is that it was not until after both the claimant and Michelle Fahey had left for the day on 3 October 2016 that he tried to reconcile the monies and came to the conclusion that money was missing and he asked Michelle Fahey about it on 4 October 2016 when she arrived for work that day. She referred him to the claimant who at that point told him about finding the safe open. He carried on working out how much was missing.

8.39 The claimant has been making manuscript notes in her diary since July/August 2015 .The entry disclosed for 3 October 2016 simply records '*Keith back*.' That for 4 October 2016 records' *advised him to tel father Philip ,he wasn't bothered and seemed to dismiss the fact that money was missing said he had to check it out properly. Kept asking him if he called police said yes left answer phone message* '.The last seven words were struck through. On 5 October 2016 her note records *'need to go to police and need to check CCTV. Had meeting with father philip'* and later in that note that *'Keith called police or so I thought, with father philips go ahead even though I wanted father philip to do it'.* We prefer the evidence of the second respondent and conclude on the balance of probabilities that it was on 4 October 2016 (not 3 October 2016) the second respondent raised the issue of missing money with the clamant who then told him about the open safe and asked him to call the police but he continued to check how much was missing..

8.40 Further we conclude on the balance of probabilities that it was on 5 October 2016 Father Calvert was told by the second respondent and the claimant that monies were missing. The claimant told him that he needed to call the police. He asked the second respondent to call the police because the latter was the Police Local Liaison contact. He left a message for the Police Local Liaison Officer. The latter rang him back on 6 October 2016 and gave him the correct number to call which he did .He was advised that given the time which had already elapsed there would be no 'forensics' if access to the safe had continued after it was discovered open and the best chance of sorting it out was to get someone to admit it. Father Calvert was evidently content to let the police

investigation take its course and no further internal investigation was undertaken by the first respondent.

8.41 The claimant was not at work after 5 October 2016 until she returned on 10 October 2016 when she asked the second respondent several times if he had called the police. Her diary entry for that date is as follows: '*Said left answer phone message for police and was waiting for a reply*.' Notwithstanding she did not believe that the second respondent had done so.

8.42 The second respondent was told by the police they would attend on 12 October 2016 but having put back their arrival time until after the staff would have already left for the day it was rearranged for 18 October 2016.

8.43 On 18 October 2016 a police officer met with the second respondent in the office which the claimant shared with him. The second respondent made a statement to the police officer. The police officer expressed surprise that people had not been suspended and told the second respondent those who had access to the safe should be suspended. This had not been something the second respondent had hitherto considered. Since the claimant had not been told about the police visit in advance and the office space was a shared facility she went into the office during the meeting to retrieve items she needed which the second respondent perceived as her deliberately interrupting the meeting .This was however entirely a problem of his own making which he could have easily avoided by using another office. After the meeting the second respondent rang Father Calvert's number and in the absence of a reply or call back or his coming through to the Day Centre assumed he was out. He therefore rang the third respondent and asked her to come to the Day Centre because the police had been in and advised him to suspend the claimant and Michelle Fahey and he wanted her there as a witness.

8.44 On 18 October 2016 the second respondent suspended the claimant in the presence of the third respondent. The third respondent's evidence in chief was that there had been a committee meeting at which the decision to suspend the claimant and Michelle Fahey was taken. That was plainly wrong. There was no such meeting; that decision was taken by the second respondent and the third respondent was there simply to witness events. The second respondent told the claimant that the police had advised that she and Michelle Fahey be suspended because they had keys to the safe. The claimant pointed out the second respondent also had keys and the second respondent told her that he was on holiday at the time the money was supposed to have gone missing so it could not have been him. Her suspension came as a considerable shock to the claimant. She was asked to and did return her keys .The third respondent alleged in her witness statement that the claimant shouted and swore at the second respondent .She was less robust under cross examination describing the claimant as having shouted loudly and been very very rude and abusive. She gave no examples. The second respondent made no such complaints

about the conduct of the claimant in his witness statement and the claimant denies she behaved in that way. We find on the balance of probabilities that the claimant became distressed at being suspended but did not manifest this by swearing .The third respondent told the claimant that she was not being accused of something and that the second respondent was acting on police advice. There was a dispute between the claimant and the third respondent about whether she told the claimant to get herself a good lawyer (which the claimant took as making it clear that contrary to what the third respondent said she was accused of something) or to seek advice. The claimant's manuscript note for 18 October 2016 merely records she was '*sent home after Keith spoke to police*'. However under cross-examination the second respondent accepted the claimant had been told to get a good lawyer by the third respondent. We prefer the claimant's version of events and conclude that she was told by the third respondent to get herself a good lawyer.

8.45 Michelle Fahey was off work sick on 18 October 2016. Father Calvert the third respondent and Pat Plant went to her house after the claimant was suspended. They found the claimant already there. She had already told Michelle Fahey they were both suspended. Michelle Fahey was then told she was suspended.

8.46 Father Calvert agreed the contents of a letter dated 20 October 2016 which the second respondent wrote to the claimant to confirm her suspension on 18 October .The reason given (which was said to follow '*Police advise (sic) '*), was '*to allow them time to investigate the theft of money from the day centre. They will contact you shortly about the time and date of your interview*.' A letter in similar terms was written to Michelle Fahey.

8.47 The police investigation made little progress and it is common ground that in a letter dated 15 November 2016 written at the instigation of the second respondent the claimant and Michelle Fahey were asked to attend an investigatory meeting about money being taken from the Day Centre. Both declined to do so.

8.48 On 18 November 2016 the claimant attended an interview with the police. Her evidence in chief was that she was told by the police officer who interviewed her that the second respondent had not been advised to suspend her and Michelle Fahey. There is no independent evidence to corroborate this. The claimant formed the view that the second respondent had lied to her. We did not hear evidence from the police officer; we do not know whether the police officer who spoke to the claimant and met with the second respondent on 18 October 2016 were the one and the same; if they were the same police officer and that comment was made it could have been untrue or the officer could have forgotten what had been said at a meeting over a month before. However the second respondent's decision to suspend followed immediately after the meeting with the police and we accept his evidence he had not considered

suspension until that meeting. The third respondent's evidence about her telephone call in which he asked her to come in as a witness and his evidence the third respondent's evidence and the claimant's evidence about what he said when suspending her were very similar and the letter confirming suspension (see paragraph 8.49 below) confirmed the suspension followed police advice. . We find on the balance of probabilities that he was advised by the police to suspend those who had access to the safe and that was why he suspended Michelle Fahey and the claimant.

8.49 The claimant alleges that after the suspension the second respondent sent Michelle Fahey a friend request on FaceBook which she relies on to contrast the way she was treated in relation to the suspension with the way Michelle Fahey was treated. Neither the claimant nor Michelle Fahey refer to this in their evidence in chief .The claimant did however contend in her evidence in chief that Michelle Fahey's suspension was used as a ruse by the second and third respondents to provide an excuse for suggesting the claimant was not being targeted. Indeed in response to questions from the tribunal she stated in unequivocal terms that the second and third respondents (but not Father Calvert) were engaged in a conspiracy and that they had tried to make it look good by also suspending Michelle Fahey as an 'afterthought'. That Michelle Fahey's suspension was an afterthought does not fit happily with what the claimant was told at the time of her suspension i.e. that both she and Michelle Fahey were being suspended. The second respondent's evidence was that it was he who had received a Face Book request from the claimant and Michelle Fahey. It is highly unlikely that at this juncture either of them would send such a request to him. It was clear from his evidence that the second respondent has only rudimentary knowledge of FaceBook and how to use it. It is highly unlikely that he sent such a request to Michelle Fahey or that, if he did so, it was deliberate rather than inadvertent. There was no relevant documentary evidence put before us .The claimant has failed to prove on the balance of probabilities that any such FaceBook request was sent to Michelle Fahey by the second respondent. The serious allegation that the second and third respondent had conspired together to discriminate against the claimant because of her race in the way alleged would require cogent evidence and there was no evidence whatsoever upon which to reach such a conclusion (nor was it put to them in cross-examination).

8.50 On 19 November 2016 the Claimant raised another grievance. She complained (among many things) about the remark made by the third respondent that she should '*get a good lawyer'* and concluded in the penultimate paragraph that "*Please note I absolutely intend to bring a claim in the employment tribunal for discrimination, harassment and victimisation. I will be naming both Keith Airey and Judy Watts-James in those proceedings as it is very clear to me that unless I take appropriate action to prevent the unlawful treatment I have been subjected to continuing, the management of the centre will do nothing to address that unlawful conduct*."

8.51 A meeting took place to discuss the claimant's grievance on 6 December 2016.The claimant was very upset and Father Calvert made an apology to her. Michelle Fahey was interviewed by the police on 2 December 2016.

8.52 On 8 December 2016 Father Calvert wrote to the claimant to confirm the "*full and unreserved apology for the way you feel you have been treated which I made to you at the meeting*."

8.53 The claimant raised another grievance on 12 December 2016 in particular complaining about the limited terms of the above apology which was not consistent with the one which Father Calvert had made to her at the meeting on 6 December.

8.54 In his letter to the claimant dated 14 December 2016 Father Calvert gave the claimant a "*full and unreserved apology*" for the way she had been treated. He acknowledged that she was correct to say the second respondent was not her line manager and did not have the authority to suspend her following the alleged theft of monies and that she should not have been suspended. He said he had officially disciplined the second respondent for this. He also confirmed that he would write to Day Centre staff to confirm she was the Day Centre manager and that in all matters pertaining to the day-to-day running of the Day Centre they were to report to her and would tell them her suspension should not have occurred and there was no suggestion of her being in any way involved with the alleged theft.

8.55 On receipt the claimant confirmed in writing to Father Calvert on 19 December 2016 that she would return to work on 3 January 2017.

8.56 Father Calvert issued a "*New Year's Message*" on that day in which he welcomed the claimant and Michelle Fahey back to work following the ending of their suspension and provided the confirmation to staff set out in his letter to the claimant dated 14 December 2016 including in particular that any decision on the suspension of staff fell to him and only him.

8.57 Michelle Fahey had also raised a grievance and she too received an apology from Father Calvert. Having returned to work in January 2017 both the claimant and Michelle Fahey remain employees of the first respondent.

8.58 Michelle Fahey gave evidence under cross examination that the claimant and the second respondent had not got on from the beginning and Julie Clifford gave evidence under cross examination of a real personality clash of between the two. Their evidence was that the third respondent regularly spoke to certain clients at the Day Centre. Charlotte McKinley (a black woman employed at the Day Centre since 2015) complained in her evidence in chief that the second respondent had said he did not want to work with her and attributed this to her

race but accepted under cross-examination that this occurred when he was the van driver and she was an carer/escort and he had said that it was because she was slow and the claimant (her line manager) had explained to him why she was slow. She also said neither the second nor third respondent spoke to black workers but under cross-examination accepted that she had conversed with the second respondent and that they had worked together as recently as February 2018 and that she herself had only spoken to the third respondent on one occasion. Ms McKinley's evidence was not put to the second and third respondent in cross-examination.

The Law

8 Under section 13 (2) (a) and (4) Equality Act 2010 ('EqA') 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. One of those protected characteristics is race (Section 10 EqA).

9 Under section 26 (1) EqA:

'(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 an intimidating, hostile, degrading, humiliating or offensive environment for B."

10 Under section 26 (4) EqA:

' (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect. '
The relevant protected characteristics include race and religion or belief (section 4 EqA).

11 A complainant is entitled to complain to the Tribunal that a person has committed an unlawful act of discrimination, but it is the act of which complaint is made and no other that the Tribunal must consider and rule upon. It the act of which complaint is made is found to be not proven, it is not for the tribunal to find another act of discrimination of which complaint has not been made to give a remedy in respect of that other act **(Chapman -v- Simon [1994] IRLR 124).**

12 Under section 212 (1) EqA 'detriment 'does not, subject to subsection (5), include conduct which amounts to harassment.

13 In **Shamoon v Chief Constable of the Royal Ulster Constabulary**

[2003] IRLR 285 HL it was held that in order for a disadvantage to qualify as a 'detriment', it must arise in the employment field in that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. The test is whether *"the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold*". So there is, first, the need to identify the subjective view of the Claimant and then to look at whether that view is reasonable; an objective test. 'Paragraph 9.8 of the Equality and Human Rights Commission: Code of Practice on Employment (2011) states ""Detriment" in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards." An unjustified sense of grievance cannot amount to 'detriment' (**Shamoon).** This applies to claims of detriment under EqA or ERA.

14 Section 23 (1) EqA states that "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

15 Under section 27 EqA:
(1) 'A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.
(2)Each of the following is a protected act—
……
making an allegation (whether or not express) that A or another person has contravened this Act'.

16 The courts in approaching discrimination claims have taken account of the fact that it is difficult for a Claimant to establish discrimination. It is accepted that primary evidence that directly indicates discrimination may often not be available and that it is usually necessary for the Tribunal to draw appropriate inferences from the primary findings of fact they make.

17 Section 136 EqA reverses the burden of proof if there is a prima facie case of discrimination. The courts have provided detailed guidance on the circumstances in which the burden reverses[1] but in most cases the issue is not so finely

[1] Barton v Investec [2003] IRIR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA

balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred. The two-stage test reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

18 In his written submissions (paragraph 95) Mr Swanson said "*It is accepted there should be some evidence that the difference in treatment is based on the claimant's race or "something more" as established in the case of* ***Madarassy v Nomura International plc [2007] ICR 867.*** *It is contended that the something more is evidenced in the unsatisfactory evidence given by Keith Airey in his treatment of the claimant, the instigation of various investigations of potential wrongdoing against the claimant for matters the claimant's predecessor Maureen Burns, a white female, would not have been subjected to, and which other staff had not been subjected to."* He contended that *"the evidence in this case clearly allows the tribunal to infer from the circumstances that he (sic) has been discriminated against on the grounds of his (sic) race*."

19 We believe Mr Swanson was referring to the following passage "*The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. "Could conclude" in s 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage, the tribunal needs to consider all of the evidence relevant to the discrimination complaint, such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the claimant were of like with like as required by section 5 (3), and available evidence of the reasons for the differential treatment. The correct legal position was made plain by the guidance in Igen v Wong."*

20 The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

21 It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the **Igen** test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.[2]

22 It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

23 It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. However, as the EAT noted (in **Ladele**) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

24 If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same

[2] By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA

or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).

25 Tribunals are urged to take an over view of the totality of the evidence before making findings in respect of individual allegations made by a Claimant. The necessity of setting out chronological findings of fact should not lead to the assumption that they have been made piecemeal. In looking at this case we looked at the totality of the evidence before reaching our findings of fact as set out above and before reaching the conclusions which follow below.

26 Complaints to employment tribunals relating to a contravention of Part 5 (Work) of the EqA may not be brought after the end of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable (section 123 (1). Under section 123 (3) EqA conduct extending over a period is to be treated as done at the end of the period.

27 The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal's enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs rather than a series of isolated or specific acts (**Commissioner of the Metropolis v Hendricks 2003 ICR 530**).

28 If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In discrimination cases the test is whether it is just and equitable to allow the claims to be brought.

29 When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule.

30 Under section 43A ERA a protected disclosure is defined as ‘a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.’ 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—

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

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

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

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

There must be the disclosure of ‘*information’*. As Slade J put it in:**Cavendish Munro Professional Risks Management Ltd v Geduld *[2010] IRLR 38*, EAT**

"… the ordinary meaning of giving “information” is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating “information” would be “The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around.” Contrasted with that would be a statement that “You are not complying with Health and Safety requirements”. In our view this would be an allegation not information."

31 In **Chesterton Global v Nurmohamed 2017 EWCA Civ 979** the Court of Appeal considered the meaning of the phrase ‘in the public interest.’ At paragraph 27 Lord Justice Underhill said” The tribunal thus has to ask a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest and b) whether, if so , that belief was reasonable.’

32 Under section 47B ERA:

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

31 Under section 47 (3) ERA ‘An employment tribunal shall not consider a complaint under this section unless it is presented—

(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4)For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, .'

32 In **NHS Manchester v Fecitt &Ors [2011] EWCA Civ 1190** it was said that "s47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

33 Although Employment Judge Harding had ordered each party to prepare a summary/skeleton of the case for use during closing submissions to be exchanged by 22 February 2018 the claimant did not provide written submissions until 5 March 2018 and the respondent failed to prepare a skeleton or written submissions. Both parties made oral submissions. We have carefully considered all of the submissions made to us.

Conclusions

34 It is common ground that the claimant was called into a meeting on 4 June 2015 (albeit that she had been made aware on 3 June 2015 that a meeting was to be held on the next day).

35 It is common ground that the claimant was called into a meeting on 26 July 2016 and questioned about her absence from work (albeit that she had been made aware by the letter of 21 July 2016 that a return to work meeting had been arranged for 26 July 2016).We conclude that the claimant was not required at that meeting to call her GP to confirm she was fit to return to work; she was required to ring her GP to confirm she had requested the letter which sometime prior to her departure on annual leave the second respondent had asked her to obtain (see paragraph 8.29 above) but which had not been sent to the first respondent . We remind ourselves that we must consider and rule upon the act of which complaint is made. We have found the allegation that on 26 July 2016 she was bullied into calling her GP to confirm she was fit to return to work was not proven.

36 It is common ground that the claimant was suspended on 18 October 2016.The decision to suspend her was taken and implemented solely by the second respondent. The third respondent attended on 18 October 2016 only as a witness to the claimant being informed of that decision. The third respondent did not subject the claimant to less favourable treatment or unwanted conduct or

subject her to a detriment to race by suspending her and any such claims against her fail and are dismissed.

37 Neither Mr Swanson nor Mr Williams made any submissions about the circumstances of any hypothetical comparators for the purposes of the claiamnt's claims of direct race discrimination. Indeed the claimant made it clear at the preliminary hearing that she relied on an actual comparator in the person of Maureen Burns. However on a comparison of cases for the purposes of section 13 EqA there must be no material difference between the circumstances relating to each case. Although these matters were not relied on unlawful acts of discrimination by the third respondent Mr Swanson submitted that the second respondent had not tried to take over the duties of Maureen Burn as he had done in the case of the claimant. However the claimant has failed to prove that the second respondent had acted in the way alleged (see paragraph 8.13 above). Further in relation to the acts of direct race discrimination alleged we have heard no evidence that there were any occasions on which queries had arisen about whether Maureen Burns correctly completed the 'Overtime Travel and other expenses' claim forms or other record keeping, or that she had been absent from work due to ill health, or that there were any police or other investigations into the theft of money from the Day Centre. We must therefore reject Maureen Burns as an actual comparator.

38 Although Mr Swanson relied solely on Maureen Burn we have considered whether for the purposes of the meeting on 26 July 2016 other members of staff who were absent due to ill health provided assistance as actual comparators or in the construction of a hypothetical comparator. On the facts we have found in relation to the conduct of return to work interviews the pattern is inconsistent and we are unable to conclude that a white Organiser who had been absent from work for several weeks would not also have been asked to attend a return to work interview (in compliance with and for the purpose set out in clause 9.3 of the Contract).

39 Mr Williams relied on Michelle Fahey as an actual comparator for the purposes of the suspension on 18 October 2016. In our judgment there were no differences between her circumstances (other than she was not at work which we do not consider material) and those of the claimant. Like the claimant she was suspended. After having been suspended she was behaved and was treated in the same way as the claimant; there was no less favourable treatment of the claimant when she was suspended.

40 We are however mindful of the observations of Lord Nicholls in **Shamoon** that disputes about the identification of the appropriate comparator can be *'arid and confusing'* and of the potential pitfalls for tribunals identified by the Honourable Mr Justice Elias (as he then was) in **Ladele** and have therefore considered whether the claimant proved facts from which inferences can be drawn that the respondents

have treated her less favourably because of race or engaged in unwanted conduct related to race so that the burden of proof has passed to the respondents**.**

41 Having alluded to **Madarassy** Mr Swanson went on in paragraph 95 of his written submissions to contend the 'something more' was evidenced by the second respondent's unsatisfactory evidence and the instigation of 'various' investigations of potential wrong doing against the claimant for matters that her predecessor would not have been subjected to and other staff were not subjected to .As we made clear in paragraph 7 above we did not find the second respondent's evidence wholly reliable. However in our judgment that the second respondent's evidence has been found wanting in some areas is insufficient in and of itself for us to draw any inference that it betrays a racist attitude on his part. There was nothing about his conduct towards Ms McKinley which supports an inference of race discrimination; he had found her slow in the performance of her duties and this criticism was evidently warranted because the claimant provided him with an explanation for this. There was no evidence on which we could conclude that investigations of potential wrong doing would not also have been instigated against other white members of staff. In his oral submissions Mr Swanson was asked to expand on any facts from which he invited us to draw an inference of race discrimination. He pointed (in general terms) to the undermining of the claimant's position and said the race discrimination was not so clear in the matter of the claimant's sickness absence but was very clear in relation to her suspension. We did not find that the second respondent had undermined her (see paragraph 8.13) and such unspecified assertions are not facts from which we are able to draw any inference of race discrimination. As far as the third respondent was concerned Mr Swanson pointed to her having said the claimant should get a good lawyer (which had not been said to Michelle Fahey and suggested the claimant's guilt) and she had suggested the claimant had sworn at the second respondent. He said her conduct was not so blatant but from it we could infer that she was motivated by race (either consciously or subconsciously) and he was not sure he could put it any higher than that. In our judgment these are not facts from which we could conclude or infer a prima facie case of discrimination has arisen. In our judgment it is highly unlikely that after having preferred the claimant over other white candidates in her appointment to the role the third respondent would thereafter (but only extremely intermittently) subject the claimant to the acts of race discrimination /harassment alleged against her. The remarks of which the claimant complains (see paragraphs 8.33 and 8.44 above) (though these were not relied on as acts of race discrimination/harassment) betray at worst an occasional tendency to offer unsolicited advice.

42 If however we are wrong and the burden of proof has passed to the respondents an explanation is called for under stage two of **Igen** the respondents have shown on the balance of probabilities that the reason for the treatment had nothing to do with the claimant's race. The claimant was called to a meeting on 4 June 2015 for the reason set out in paragraph 8.18 above. She was called into a

meeting on 26 July 2016 because she had been absent from work and a return to work interview was required for the purposes clearly set out in Father Calvert's' letter of 29 June 2016 in accordance with clause 9 of the Contract. Father Calvert questioned her about her absence because he wanted to know what she had done to comply with her obligations to keep the first respondent informed during her absence and the provision of sick notes. She was suspended on 18 October 2016 because the second respondent had discovered money had gone missing from the safe while he was away on holiday and was informed by the claimant the safe had been left open and having reported the matter to the police in the course of the ensuing tardy police investigation he was told by the police on 18 October 2016 those who had had access to the safe should be suspended. That he did not have authority to suspend and should not have suspended the claimant or Michelle Fahey does not affect the reason why he did so.

43 The claimant's claims of direct race discrimination and harassment therefore fail and are dismissed.

44 As far as the claimant's claim of victimisation are concerned Mr Swanson submitted in his written submissions that the claimant suffered detriments' as a result' of making a protected act. He made no reference to this claim in his oral submissions. Mr Williams did no more than deny the claimant had suffered detriments.

45 As far as the meeting on 26 July 2016 was concerned the claimant's opinion was that this constituted bullying by the respondents. The question to be asked is whether, looking at the issue from the point of view of the claimant, in all the circumstances a reasonable worker would or might take the view that the meeting was to her detriment. The claimant had been off work for some time. The Contract provided for a reporting absence procedure and a return to work interview. She was informed that there would be a return to work meeting in the letter of 29 June 2016 and given a copy of clause 9 of the Contract and given notice of the return to work meeting in the letter of 21 July which also told her the purpose of the meeting. The position with regard to reporting and the provision of sick notes was not clear. The meeting and the provision of the delayed letter from the GP resolved any query as to the correct basis on which she should be paid and any problems as far as her ability to carry out certain tasks were concerned and appropriate arrangements to assist were put in place after it. There was nothing novel about meetings taking place with Father Calvert the second and the third respondent. We conclude that a reasonable employee with the claimant's state of knowledge would not take the view that being called into a meeting and questioned about her absence from work due to illness was a detriment.

46 As far as the act of suspension is concerned the claimant regarded the suspension as malicious and disgraceful and the cause of distress and upset.

The respondents seemed to lay great store on suspension being a neutral act in their evidence in chief. That is not an answer to whether or not it was a detriment. It may well have been reasonable for an employer to suspend employees on police advice to facilitate an investigation .A reasonable employee might recognise the need to investigate and not regard the suspension as a detriment particularly if she is not the only employee to be suspended. However it does not follow that because a suspension might be justified it cannot amount to a detriment. On balance we conclude that a reasonable employee would perceive the suspension as detrimental because it was carried out with no notice was wholly unexpected and resulted in her immediate removal from her work she enjoyed. Furthermore it was implemented not by her line manager but by someone who had no authority whatsoever to do so.

47 However even if the meeting on 26 July 2016 and the suspension on 18 October 2016 were detriments more than 9 months elapsed after the protected act before the first alleged detriment and more than a year elapsed before the second. In our judgment after the claimant's discussion with Father Calvert for all parties it was simply 'business as usual' and the working relationships continued. The grievance was a matter of indifference to the second respondent. There is no evidence on which we could conclude that that the protected act had any significant influence (in the sense of being more than trivial) whatsoever on the respondents in relation to either of the alleged detriments.

48 We now address the claimant's claims under section 47B (1) Employment Rights Act 1996.

49 The claimant relies on 3 qualifying disclosures. As far as the first alleged disclosure is concerned we have concluded that it was not on 3 October 2016 that the claimant spoke to Mr Airey and said "can you call the police". She asked him to do so on 4 October 2016 but, irrespective of the date in our judgment, she conveyed no facts whatsoever; she merely made a request that the police be called.

50 As far as the second alleged disclosure is concerned Employment Judge Harding identified in her order that it was alleged on 5 October 2016 the claimant spoke to Father Philip about the allegation of theft and told him he needed to call the police. She recorded Mr Swanson was unable to tell her precisely what it was asserted the claimant had said about the allegation of theft noting ' *further particulars will need to be provided*.' to provide the further details needed as to what was said about the allegation of theft. When further particulars were provided by Mr Swanson no such details were given; all that was said was the claimant '*reported the matter to Father Philip and again asked that the police be called*.' We have concluded the claimant and the second respondent told Father Calvert that money was missing and that the claimant also told him he needed to call the police. The claimant had been told money was missing by the second respondent and had found the safe open. She was of the opinion that the police

needed to be called, an opinion she conveyed to Father Calvert. In those circumstances the claimant could have had a reasonable belief that the information she disclosed i.e. that money was missing did tend to show that a criminal offence (theft) had been committed but she provided no evidence whatsoever on which we could conclude that she had such a reasonable belief. Her evidence in chief was wholly silent both on this point and the reasonableness of her belief as far as sub sections 43B (1) b) c) and f) are concerned.

51 As far as the third alleged disclosure is concerned we have concluded that on 10 October 2016 the claimant asked the second respondent on a number of occasions if he called the police. In our judgment she conveyed no facts whatsoever; she repeatedly inquired whether her earlier request that the police be called had been complied with.

52 Further there is no evidence before us that the claimant had or has any belief (reasonable or otherwise) that any disclosures were made in the public interest. In our judgment the claimant did not consider the public interest at all; it has simply never entered her mind. She made no qualifying disclosures and therefore her claim under section 47B (1) Employment Rights Act 1996 fails and is dismissed.

53 If however we are wrong in the conclusions above and the claimant made protected disclosures the first respondent has shown on the balance of probabilities that the disclosures had no material influence on the second respondent in suspending the claimant. He suspended the claimant at the same time as he suspended Michelle Fahey (who had not made any disclosures) and they were not suspended until 18 October 2016 immediately after the second respondent's meeting with the police .It was not put to him in cross-examination that in suspending the claimant he was in anyway influenced by the disclosures. We have concluded that he did so for the reason set out at paragraph 44 above.

54 The claimant presented her claim on 11 February 2017.The last act /detriment complained of is 18 October 2016 (suspension). Having regard to the effect of Early Conciliation (ACAS Certificates issued 12 January 2017 notification having been received on 12 December 2016) claims in relation to the suspension are within time. However claims in relation to the acts of discrimination/harassment on 4 June 2015 and 26 July 2016 are out of time unless the claimant proves either by direct evidence or inference they were linked to each other and were evidence of a 'continuing state of affairs' rather than a series of isolated or specific acts (**Hendrick**). That case preceded section 123 (3) a) Equality Act 2010 which refers to 'conduct extending over a period 'but there are no authorities to indicate this wording requires a different approach. Mr Swanson submits in his written submission that the claimant asserted there were acts of discrimination since some unspecified time in 2014 up to and including the suspension 'extending over a period of time.' We have not found any proven acts of discrimination (whether by way of background or otherwise) in 2014 and Mr

Swanson did not refer us to any evidence in support of his assertion. Father Calvert and the second and third respondents conducted the meetings on 4 June 2015 and 26 July 2016 but Father Calvert played no part in the decision to suspend or implementation of the claimant's suspension. The purpose and subject matter of the three meetings were completely different. More than a year elapsed between the first two alleged discriminatory acts with no intervening incidents between them or the meeting on 26 July 2016 and the suspension two and a half months' later. Although there is a common theme in that on these occasions the second and third respondents acted as if they were part of the claimant's line management these were on the evidence before us isolated and specific acts and did not amount to conduct extending over a period.

55 Mr Swanson did not advance a single argument (other than she had delayed presenting her claim on time because she was seeking to resolve the matters of which she complained without the need to bring proceedings) about why it would be just and equitable for time to be extended in her favour in relation to claims of race discrimination which were out of time. He did not refer us to any evidence in support of that submission nor did the claimant provide any evidence whatsoever about that issue in her evidence in chief. The delay in relation to both acts is substantial and unexplained. There was no evidence that the claimant was unwell or ignorant of her right to make a claim of race discrimination or of any relevant time limit. We note Mr Swanson has been advising her since at least July/August 2015 and engaging in correspondent with the first respondent since 6 October 2015 when he made it clear in the claimant's grievance letter that she was aware of her right to make claims with reference to or under Equality Act 2010 and the nature of those claims. In our judgment there are no grounds whatsoever on which we should exercise our discretion to extend time on just and equitable grounds.

Employment Judge Woffenden
19 April 2018