

RM



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr SF Ahmed  
**Respondent:** London Borough of Newham  
**Heard at:** East London Hearing Centre  
**On:** 11, 12, 13 & 14 September 2018  
**Before:** Employment Judge Ferguson  
**Members:** Mr D Ross  
Mrs L Conwell-Tillotson

## Representation

**Claimant:** Ms N Malik (Counsel)  
**Respondent:** Mr F McCombie (Counsel)

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claims are dismissed.
2. The Claimant shall pay the Respondent £6,000 in costs.

# REASONS

## INTRODUCTION

1 By an ET1 presented on 21 November 2017 following a period of early conciliation from 20 October 2017 to 6 November 2017 the Claimant brought complaints of detriments on grounds making protected disclosures and race discrimination. The Respondent defended the claims. The Claimant remains employed by the Respondent.

2 The issues were provisionally agreed at a Preliminary Hearing on 19 February 2018 and the Claimant provided further and better particulars in April 2018. That document relied on a number of additional alleged disclosures.

3 At the start of the hearing the Claimant applied to amend his claims to add a further detriment. I refused that application for reasons given orally at the time but I allowed the Claimant to rely on the additional disclosures raised in his further and better particulars. The final agreed list of issues is as follows:

### **Public interest Disclosure Claims**

1. What did the Claimant say or write?
  - 1.1 On 4 September 2015, did the Claimant report to Ananda Sirisena and/or Tony Abbs orally and/or by email that an employee by the name of BC appeared to be fraudulently claiming money on two counts:
    - 1.1.1 That he had been purchasing materials using the Travis Perkins card registered to the Respondent for a significant sum of money but BC had not been carrying out any jobs; and
    - 1.1.2 That he had been claiming a minimum guarantee payment even though the Claimant was aware that BC had been refusing work.
  - 1.2 In August 2016, did the Claimant report to Ananda Sirisena that various incorrect bonus payments were made to various operatives? This was in relation to “void” jobs or where big jobs had to be carried out in relation to empty properties
  - 1.3 In April 2017, did the Claimant notice that the operatives were still receiving bonuses for these “void” jobs and follow this up with Ananda Sirisena asking what would be done.
  - 1.4 In May 2017, did the Claimant notice that the operatives were still receiving bonuses for these “void” jobs and follow this up with Ananda Sirisena asking what would be done.
  - 1.5 On 15 June 2017, did the Claimant send an email to Ananda Sirisena timed at 11.09 stating, “I have been coming across a lot of financial irregularities on a much larger scale.”
  - 1.6 On 18 July 2017, did the Claimant forward his email dated 5 June 2017 to Justin Jupp stating that he had not heard anything back since reporting the serious management issue.
2. In any or all of these, were information disclosed which in the Claimant’s reasonable belief tended to show that a criminal offence had been committed

by Council employees or that there had been any breach of a legal obligation?

3. The Claimant says that he reasonably believed that the disclosure(s) was made in the public interest. The Claimant relies on the following as going to show reasonable belief:
  - 3.1 Public money;
  - 3.2 Public services.
- 4 If so, were the disclosures made to the Claimant's employer or other responsible person pursuant to section 43C of the ERA?

#### **Public interest disclosure detriments**

- 5 The Respondent did not consider the Claimant to have been doing the Performance Payroll Manager role since June 2014, and did not pay him as such. Was that on the grounds that he had made a protected disclosure(s)?
- 6 Did the Respondent act in the following ways, and if so, was it on the ground that the Claimant had made a protected disclosure(s)?:
  - 6.1 On the morning of 7 June 2017 at around 8.30am, the Claimant's Line manager, Nichola Munro (NM) asked the Claimant to attend a finance meeting. The Claimant stated that he needed an instruction from a Senior Manager. In response, NM became visibly angry and her face turned red. The Claimant was intimidated by her menacing and aggressive body language.
  - 6.2 On the 12 June 2017 around 11.15am NM told the Claimant that she wanted to speak with him in the meeting room. She asked the Claimant as to why he was refusing to attend weekly finance meetings. The Claimant told NM that "I do not recognise you as my line manager as I understand your appointment is illegitimate, without following council policy and HR guideline, procedure. If you want me to attend your meeting show me the proof of your appointment." In response, NM got very angry and said, "I don't give a damn f\*\*\* about what you think. You are going too far. Go and speak to Tony." The Claimant replied saying "No, you go and tell Tony what I said". NM responded "you are f\*\*\*ing making a big mistake."
  - 6.3 On the 15 June 2017 at 14.30hrs NM asked the Claimant if she could have a quick chat with him in the meeting room. She then asked the Claimant to train her on how to do the Payroll. The Claimant told NM "you need to speak to the Payroll Manager who is able to train you. I am not the payroll manager." NM said "but you are the person who is doing the payroll." The Claimant replied,

“Tony does not want to recognise my role as a Payroll Manager.” NM then immediately raised her voice and exclaimed, “What is your f\*\*\*ing problem. I am your line manager, you must follow my instructions.” The Claimant replied, “I have no problem training you, by my role has to be recognised.” NM then said, “let me tell you something, you are f\*\*\*ing pushing your luck. Tony is not happy with you, your days are numbered.”

- 6.4 On the 20 June 2017 at approximately 13.40hrs, Ananda Sirisena (AS) Financial Controller, called the Claimant into his room saying, “Tony is not happy with you and you should be careful before you say something that may upset Nichola Munroe. If you continue behaving like that, it may cost your job.” The Claimant replied, “I have asked you for a while to show me the proof of Nichola Munroe’s appointment and you completely ignored me and are now threatening me with the possible loss of my job. I think that you are also part of that corrupt management. I am telling you now that I am prepared to face the consequence of the fact that I have disclosed the corruptions that are taking place by the management.” The Claimant the left the room.

#### **Direct discrimination because of race**

- 7 Did the Respondent, because of the Claimant’s race, being of Bengali descent, treat the Claimant less favourably pursuant to the Equality Act 2010, section ss.13 and 39, by failing to pay him the same salary as Richard West, a white British Caucasian comparator who had previously been employed in the role of Performance and Payroll Manager, or as a hypothetical comparator?
- 8 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
- 9 If so, what is the Respondent’s explanation? The Respondent says that Richard West’s role was shared out amongst the team while he was on extended sick leave, and once he returned the management of incentive payments only was retained by the Claimant.

#### **Limitation**

- 10 The claim form was presented on 23 November 2017. Early Conciliation was commenced on 20 October 2017 and the EC certificate issued on 6 November 2017. Accordingly, and bearing in mind the effects of ACAS conciliation, any act or omission which took place before 21 July 2017 is potentially out of time, so the Tribunal may not have jurisdiction.
- 11 Does the conduct of the Respondent set out from paragraph 1 onwards above, or any part of that conduct, amount to ‘conduct extending over a

period' within the meaning of EqA 2010 s123(3)(3)? In particular, when did the failure to pay the Claimant as Performance and Payroll manager occur?

- 12 If any of the acts of detriment or discrimination are outside the primary time limit:
  - 12.1 Was it not reasonably practicable for the claim to have been presented in time, and was it presented within a reasonable time thereafter (in respect of the whistleblowing allegations);
  - 12.2 Is it just and equitable to extend time for the bringing of the race discrimination complaints?

### **Remedy**

- 13 What financial loss, if any, has the Claimant suffered as a result of the alleged detriment?
- 14 What financial loss, if any, has the Claimant suffered as a result of the alleged unlawful discrimination?
- 15 What award, if any should be made for injury to feelings?

4 We heard evidence from the Claimant and, on behalf of the Respondent, from Ananda Sirisena and Nichola Munroe

### **FACTS**

5 The Claimant began working for the Respondent as an agency worker in August 2009. He is of Bengali descent. His job title was Data Analyst in the finance section of the Respondent's Repair and Maintenance Service ("RMS"). At that time his line manager was Richard West, the Performance and Payroll Monitoring Manager ("PPMM"). Mr West is white.

6 In June 2014 Mr West commenced a lengthy period of sick leave. There is a dispute about what happen to his duties while he was absent. The Claimant's case is that he took over the whole of Mr West's role shortly after he went off sick and has continued in that role to date, while also continuing to carry out his data analyst functions. The Respondent disputes that but accepts that after the first month the Claimant took over one aspect of the role namely overseeing the data required to calculate the bonus payments to operatives (approximately 190 tradespeople carrying out repairs etc on Council properties) and generating a monthly spreadsheet with bonus figures to be processed by payroll. That involved as far as we understand it extracting data from software called TASK which had been imputed by managers in another department and checking the figures for accuracy.

7 According to the Respondent's witnesses, who were not challenged on this issue, there were two other main aspects to Mr West's role: overseeing the performance review process including key performance indicators and issuing and training operatives in the use of PDAs (handheld devices for distributing and monitoring jobs). The Respondent says that these tasks were taken over by others in RMS when Mr West was off sick. It is unnecessary to make detailed findings about this because the only relevant issue is whether the Claimant took over these tasks. We do not accept that he did. Indeed, he did not even assert that he carried out the PDA function. There is no evidence in the form of emails or any other documents suggesting that he had been doing either task. We note that the Claimant is still working for the Respondent and would have access to any such emails or documents if they existed. We also take into account that during the later grievance process the Claimant said in his interview that he took over "parts of RW functions. Manual functions. I got it running smoothly." The Claimant's evidence when cross-examined about this was unsatisfactory. He eventually claimed that he had never said those words in the grievance meeting and that the grievance manager, Barry Marbe, had simply invented that passage in the notes. Given that the Claimant had never made that allegation before the hearing and has had ample opportunity to do so, we do not consider it to be credible. Overall the documentary evidence overwhelmingly supports the Respondent's case that the Claimant took over the part of Mr West's role dealing with operative bonus payments but otherwise he continued to carry out his previous role as Data Analyst. We do accept, however, that the bonus payments were a substantial part of the Claimant's role from then onwards.

8 In October 2014 Nichola Munro was appointed to the role of Income and Invoice Officer and took over line management of the Claimant. She is white. The Claimant claims that there was no open competition for this role and she was appointed out of favouritism. He relies on this to support his claim of race discrimination. Her evidence was that she had been with the Respondent for a long time and had moved up the pay scale. Sometime in 2014, at the request of her managers including Tony Abbs, the Operations Director, her job had been re-evaluated and she was moved to a higher grade. At the same time she was asked to take on the role of Income and Invoice Officer in the finance department and to line manage the Claimant. She does not dispute that there was no open competition for the role.

9 In December 2014 the Claimant applied for and was appointed to the permanent role of Data Analyst. He says that he took the position on the understanding that the role was to be re-evaluated in the near future.

10 In the summer of 2015 Mr West returned to work. It is not in dispute that he did not return to the finance department, but sat in the repair department and was line managed by a manager in that department. Nor is it in dispute that the Claimant continued to have responsibility for the bonus calculation. We accept the Respondent's evidence that Mr West resumed at least some aspect of his old role including in particular dealing with the PDAs.

11 On 4 September 2015 the Claimant sent two emails which he claims were the first protected disclosure. The first was to Ananda Sirisena, the finance controller and there was no content to the email but it enclosed an attachment called "monthly earnings". The second, sent a little less than an hour later, was to Ananda Sirisena as well as four other senior managers. It states "*Attached please find the summary of bonus payments that*

*have been made to RMS operatives for the last six months (P1 to 6). The negative figures (in red) represent the shortfall to make up the minimum guaranteed sum. The list of names have been sorted according to the total Bonus earnings. Please let me know if you need more information. Thanks”*

12 The attached document was a spreadsheet listing all operatives by name. It shows for the six month period what each earned above their basic pay. If they earned less than their basic pay in any month that was shown as a negative figure and they were entitled to what is called “make-up” pay, in other words their pay was variable but a certain amount was guaranteed. The spreadsheet showed approximately 10 operatives who would have been regularly receiving make-up pay over the period. The largest make-up figures were for an operative we shall refer to as BC, which came to more than £10,000 for the six-month period.

13 There is a dispute about how these email came about. The Claimant says he had spotted financial irregularities in the figures, including in particular that BC had been “making false claims, misusing Travis Perkins card, theft, fraud, and deliberate falsification of records”. The Claimant says having discussed this with Mr Sirisena he sent him the first email on 4 September 2015.

14 Mr Sirisena on the other hand says that he [Mr Sirisena] was meant to present these figures to the senior management team (“SMT”) every month. He had not done so for six months and he was pulled up for it. He therefore asked the Claimant to produce the document covering a six-month period. That is what prompted the Claimant’s email and having reviewed the document he asked the Claimant to send it to SMT.

15 We prefer Mr Sirisena’s version of events. It is logical and more consistent with the content of the emails. There is no suggestion in the Claimant’s email of any prior conversation along the lines he suggested. We also note there was nothing inherent in the figures to show that there was any wrongdoing of any kind. The Claimant accepted that such figures could represent legitimate to make-up pay. It is true that in the Claimant’s later email of 5 June 2017 he asserted that he had been the one to raise the discrepancies in BC’s pay and use of the card, but that was never accepted by Mr Sirisena or anyone else and it is not sufficient to establish that the Claimant had the conversation he alleges prior to the 4 September emails.

16 On 7 September 2015 Tony Abbs the Operations Director responded to the Claimant’s email of 4 September 2015 in the following terms:

*“Barry/Richard/Keith [other senior managers]*

*For tomorrow’s SMT can I have a report from you explaining why all the people on make-up pay are on make-up pay and why they have not been managed out of the company. Particularly with [BC] [he then mentions three other operatives] ... I also note [LB] is up to his “tricks” again and would like to know why we are not on top of this.*

*Thanks”*

17 There is no mention in any of those emails of the misuse of a Travis Perkins card but it is common ground that BC was investigated in relation to this. It is not clear how this issue came to light. There is no evidence of the Claimant having brought it to anyone's attention and we do not accept that he did.

18 What is clear is that on or before 9 September 2015 Mr Sirisena asked another employee, Noorul Kabir, for the figures relating to BC's use of Travis Perkins card and they were provided to SMT. We accept that the Claimant may have later been asked to investigate this and any other suspicious claims by BC.

19 On 31 March 2016 the Claimant sent an email to Tony Abbs with the subject "Payroll Manager role/ Review my job role/ pay grade". It stated:

*"Tony,*

*Following to our last week meeting in regard to the above, please can you let me know when you would be in a position to review job role. You are aware that I have been covering Richard West's job as Payroll Manager for over one year. In the past few months I spoke to you and Ananda for a number of times. Each time I was assured that my job role/job title will be reviewed soon. I am still waiting to hear from you."*

20 It is not disputed that the Respondent did not conduct any review of the Claimant's job role. Nor, incidentally, did he have any appraisals at any time after becoming a permanent employee.

21 Over the following year the Claimant says that he told Mr Sirisena on a number of occasions that incorrect bonuses were being paid to operatives in relation to void properties. Our understanding of this issue is that operatives were not entitled to certain incentive payments for jobs carried out on empty properties. The Claimant says he discovered that such incentive payments were wrongly being paid for such jobs and he raised this on three particular occasions in August 2016, April 2017 and May 2017. Each of these is said to be a protected disclosure. In light of our conclusions below it is unnecessary to make a finding about whether these conversations occurred.

22 On 5 June 2017 the Claimant sent two emails to Mr Sirisena. The first at 11.09 was copied to Tony Abbs and is essentially a complaint about his role, the fact that he had not been recognised as the payroll manager, and that Ms Munro, who had less understanding of the role, had been appointed above him. He said that the appointment of Ms Munro was "completely biased and I believed a discriminatory decision has been taken by senior management." He referred to the BC investigation and claimed that he had brought these to Mr Sirisena's attention and subsequently investigated the matter. At the end of the email he says "I have been coming across a lot of financial irregularities on much larger scale". This is relied upon as a protected disclosure.

23 The second email, sent at 12.17, was copied to HR and entitled "Bullying and Harassment by Line Manager". It was a complaint mostly about Ms Munro allegedly ordering the Claimant to sit at a desk next to hers. He said that this amounted to bullying and harassment and that he could no longer work with her. He also complained again



about Ms Munro's lack of technical knowledge and queried how she had been appointed.

24 Ms Sirisena's evidence was that he escalated these emails by sending them to HR. We accept that. The "bullying" email led to a grievance investigation being conducted by a senior manager, Barry Marbe, and some of the matters raised in the earlier email about the Claimant's role were also discussed in that investigation. The Claimant claims that he raised the issue of race discrimination during the grievance investigation meeting but that Mr Marbe was not interested in it. We do not accept that. There is no mention of it in the notes of the investigation meeting, and having received copies of the notes and Mr Marbe's investigation report the Claimant never complained that an allegation of race discrimination had been ignored.

25 One of the detriment relied upon by the Claimant is Ms Munro's conduct towards him on 7 June. That is described in the Claimant's witness statement as follows:

*"After I raised a formal complaint of bullying and harassment by Nicola she approached me asking to attend a finance meeting on 7<sup>th</sup> June 2017, which I said I would attend if asked to do so by a senior manager. I said this as I had raised a complaint, therefore I was surprised that the Respondents or Ananda who was her line manager wanted Nicola and me to have contact after the complaint was raised. I would assume they would intervene somehow to facilitate our working whilst the complaint was being considered or dealt with, however despite my raising a formal bullying complaint, Ananda had instructed Nicola to carry on as normal and told her all about my complaint and she said she knew about it. In response to my comment to her Nicola got very angry and her face turned red. I felt intimidated by her menacing and aggressive body language. ... I feel she acted this way in response to the complaint I made against her two days before."*

26 The Claimant accepted in cross-examination that he had refused to attend the meeting without a written instruction from senior management. Ms Munro disputes the Claimant's version of events save that she agrees the Claimant refused to go to the meeting. She denies that she was angry. She says she told the Claimant that she was going to speak to Tony Abbs, which she did.

27 The Claimant spoke to Mr Sirisena about the incident shortly afterwards and sent an email alleging that Ms Munro had behaved aggressively, with menacing body language and that she intimidated and scared him. This email was then added to the Claimant's grievance.

28 The Claimant claims that there were two further incidents with Ms Munro after this. Again, quoting from his witness statement:

*"On the 12<sup>th</sup> June 2017 at around 11.15 am Nicola told me that she wanted to speak to me in the meeting room. She asked me why I was refusing to attend weekly finance meetings. I told her that I did not recognise her as my line manager and explained why, to which she got very angry and offensive. She told me to go and speak to Tony and told me to tell Tony what she said, and I was told I was making a big mistake."*

He described the second incident as follows:

*“On the 15<sup>th</sup> June 2017 Nicola asked me if she could have a quick chat with me in the meeting room. She then asked me to train her how to do payroll. If I was given the title of Payroll manager I may have considered her request however as the Respondents for the past few yaers failed to recognise me as a payroll manager and ignore my requests and e-mail about my job role or my grievance against her, I felt it was not my place to train her.*

*I got really upset and told her to speak to the payroll manager to train her. I told Nicola that ‘Tony’ did not recognise my role as a payroll manager, to which she raised her voice and exclaimed ‘what is your f\*\*\*ing problem. I am your line manager and you must follow my instructions’ to which I said that I had no problem training her but my role has to be recognised. To which Nicola Munroe replied ‘let me tell you something, you are f\*\*\*ing pushing your luck. Tony is not happy with you. Your days are numbered.’”*

29 Ms Munro disputes the Claimant’s version of events and says that there was only one meeting not two as the Claimant alleges.

30 A further detriment relied upon by the Claimant is Mr Sirisena’s alleged conduct towards him on 20 June 2017. The Claimant says that Mr Sirisena called him in his room and said *“Tony is not happy with you and you should be careful before you say something that may upset Nicola. If you continue to behave like that it may cost you your job.”* Mr Sirisena denies saying those words but agrees that he met the Claimant on or around that date to discuss why the Claimant was unhappy.

31 On 18 July 2017 the Claimant emailed Justin Jupp, Mr Abbs’s line manager, forwarding his first email sent to Mr Sirisena on 5 June relating to the Claimant’s role and saying that he had not had any response.

32 The Claimant was notified of the outcome of his grievance on 16 October 2017. The grievance was not upheld, but Mr Marbe made a number of recommendations in his investigation report, including *“There is a clear need for the finance manager defines roles of his staff and to recruit a new Performance & Payroll Manager”*.

33 Mr West left the Respondent’s employment towards the end of 2017 it is not in dispute that he has not been replaced.

## **LAW**

### Detriment on grounds of protected disclosures

34 As regards protected disclosures, the Employment Rights Act 1996 (“ERA”) provides, so far as relevant:

#### **43A Meaning of “protected disclosure”**

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

43H.

**43B Disclosures qualifying for protection**

(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—

- (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
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

...

**43C Disclosure to employer or other responsible person**

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . .—

- (a) to his employer, ...

**47B Protected disclosures**

(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.

...

35 As to s.43B, the definition has both a subjective and an objective element: the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1), and that belief must be reasonable.

36 The Court of Appeal recently gave guidance on the meaning of “disclosure of information” in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436. Sales LJ upheld the finding of the EAT that an allegation of “inappropriate behaviour” was far too vague to constitute a qualifying disclosure. The Court of Appeal also confirmed that in order to constitute a qualifying disclosure, the communication must itself tend to show one of the listed behaviours. It is not enough for the employee to have the alleged wrongdoing in his or her mind.

37 Pursuant to Section 48(2) ERA, on a complaint under Section 47B it is for the employer to show the ground on which any act or deliberate failure to act was done. The employer must prove on the balance of probabilities that the protected act did not materially influence the employer’s treatment of the employee (Fecitt v NHS Manchester [2012] ICR 372).

Race discrimination

38 Sections 13 and 136 of the Equality Act 2010 (“EqA”) provide, so far as relevant:

**13 Direct discrimination**

(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.

...

**136 Burden of proof**

(1) This section applies to any proceedings relating to a 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.

...

Jurisdiction

39 The time limit for presenting a complaint to the Employment Tribunal, in respect of both of the causes of action above, is three months less one day from the date of act complained of. In respect of race discrimination, s.123 EqA provides that “conduct extending over a period is to be treated as done at the end of the period”. Further, under S.123(3)(b) EqA a failure to do something is to be “treated as occurring when the person in question decided on it”. Thus a failure to confer a benefit on an employee is treated as being done when the employer decides that the employee should not receive that benefit. S.123(4) states:

In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

40 As to detriment on grounds of protected disclosures, S.48(4) ERA further provides that where the act extends over a period, time runs from the last day of that period.

41 In respect of discrimination, the appellate courts have drawn a distinction between a continuing act and an act that has continuing consequences. The latter may amount to “conduct extending over a period” if the respondent operates a discriminatory policy that remains in place for the whole period, but in the absence of such a policy time would start to run from the date of the act or omission itself.

42 The Tribunal has a discretion to extend the time limit, in the case of a detriment

complaint, where the Claimant can show that it was not reasonably practicable to present the claim in time and the claim was presented within a further reasonable period. In respect of race discrimination, the Tribunal has a discretion to extend the time limit if it considers it just and equitable to do so. The Tribunal has a broad discretion (Southwark London Borough v Alfolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the Claimant to show that it is just and equitable to extend the time limit.

## CONCLUSIONS

### Jurisdiction

43 It was agreed at the start of the hearing that Early Conciliation having been commenced on 20 October 2017, in principle any act before 21 July 2017 is out of time unless the Claimant can establish conduct extending over a period beyond that date or persuades us to extend time. The Respondent argued that all of the Claimant's complaints are out of time. The Claimant's argument on this is that the failure to recognise the Claimant as the PPMM is a continuing act that persists to date and that the other detriments relied upon are to be treated as part of the same act.

44 Dealing first with the other detriments, we do not accept that they can be treated as part of the same conduct. They are allegations of specific incidents involving the conduct of Ms Munro and Mr Sirisena. The fact they may have been loosely connected to the Claimant's broader complaints about his job role does not make them part of the same conduct. Even if together they amounted to an act extending over a period, the last of them occurred on 20 June 2017 and is therefore out of time. There is no basis on which we could find that it was not reasonably practicable for the Claimant to bring his claim in time. He was legally represented by 13 September 2017 at the latest, before the primary limitation period would have started on 20 June incident. He did not contact ACAS for more than a month later. The fact that the Claimant had not received the outcome of his grievance is not a good reason to have delayed. We find that these complaints are out of time and we have no jurisdiction to hear them.

45 As to the Claimant's complaint about his role, this is relied upon for both the detriment and race discrimination complaints. Although he alleges there is a continuing failure to recognise that he was doing the PPMM role, this was not pursuant to any policy of the Respondent's, let alone a discriminatory policy. After Mr West had returned from sick leave in March 2016 the Claimant asked for his job role to be reviewed. His complaint is essentially that the Respondent failed to do so. That was an act or omission with continuing consequences but it was not "conduct extending over a period". We are therefore minded to find that this complaint is also out of time. Particularly in view of our conclusions below, we would not be minded to extend the time limit for the race complaint on just and equitable grounds, but for completeness and having heard all the evidence we have reached the following conclusions the Claimant's complaints.

### Detriment on grounds of protected disclosures

46 We are not satisfied that the Claimant made any protected disclosures. The emails on 4 September 2015 did not disclose information that tended to show that a

criminal offence had been committed or that there had been any breach of legal obligation. The Claimant could only possibly establish this if they were sent following an earlier conversation in which he had disclosed alleged wrongdoing by BC. We have not accepted that any such conversation took place.

47 As to the “voids” disclosures, even if these conversations took place the Claimant has not established that he disclosed anything that tended to show that a criminal offence had been committed or that there had been a breach of a legal obligation. He would have to do more than simply highlight “incorrect” payments to operatives and he has not pointed any legal obligation he reasonable believed to have been breached.

48 The 5 June disclosure, “I have been coming across a lot of financial irregularities on a much larger scale”, is far too vague to constitute a qualifying disclosure. That statement in itself does not tend to show that anyone has committed a criminal offence or breached a legal obligation.

49 Finally, the 18 July 2017 email did no more than forward the 5 June emails so cannot constitute a qualifying disclosure.

50 Even if the Claimant had established protected disclosures we would not have found that the failure to recognise him as the PPMM had anything to do with them. The failure began, according to the Claimant, in late 2014 when he was appointed as a permanent employee. That was long before the first alleged disclosure so cannot have been motivated by it. Mr West’s return to work and allocation to another department also predated the first alleged disclosure. The most likely reason for any subsequent failure or refusal to review the Claimant’s role was that the relevant managers, Ms Munro, Mr Sirisena and Mr Abbs, did not agree with the Claimant that he was performing Mr West’s role. The Claimant may have had grounds to argue for his job to be re-evaluated on the basis that he was performing a substantial aspect of Mr West’s role but that is not how the case has been put and in any event there is no evidence that anyone involved was motivated by the alleged protected disclosures.

51 As to the alleged bullying allegations, which we have already found are out of time, for completeness we agree with the Respondent’s submission that even on the Claimant’s own account they were not on the grounds of any disclosure. The highest the Claimant puts it is that Ms Munro behaved in the way he alleges towards him because of the complaint he had made against her shortly beforehand. On his own account, he acted in a way that on any view was extremely challenging, refusing to accept Ms Munro’s authority and refusing to comply with her instructions. If she did act in the way that is alleged it is most likely that that was the reason. Similarly, if Mr Sirisena had warned the Claimant about his conduct on 20 June, that is hardly surprising and there is no basis that he was motivated by any disclosure.

### Race Discrimination

52 This complaint does not get off the ground. There is an obvious difficulty in the Claimant alleging that the failure to recognise him as the PPMM was both because of the protected disclosures and because of his race. It is very unlikely to have been both and we conclude that it was neither. The Claimant relied on Mr West as a comparator but we have already found that the Claimant was not carrying out the whole of Mr West’s role, so

he is not a proper comparator.

53 We do not consider that the Claimant has established facts from we could conclude that his treatment was because of his race. The Claimant relies on the Respondent's failure to address the race issue in his grievance, but we do not consider that the Respondent's conduct was unreasonable or calls for any explanation. It is true that the Claimant mentioned the word discrimination in his first email of 5 June 2017, but he did not mention anything to do with race in the second email or at any stage during the grievance process. The Respondent was dealing with the substance of the Claimant's complaint and was not obliged to investigate a vague assertion of discrimination or infer without the Claimant having said so that he meant race discrimination. We also note that there is no mention of race discrimination in the "letter before action" sent by the Claimant's solicitors on the 13 December 2017. If the Claimant had had grounds to believe that race was a factor in his treatment, which he says went back to 2014, one would expect him to have mentioned it at some stage before bringing his claim to the Tribunal. We do not therefore consider that the burden shifts to the Respondent. Even if it did, we are satisfied that any refusal or failure to recognise the Claimant as the PPMM and pay him accordingly was because the Respondent did not accept that he was carrying out that role.

## **COSTS**

54 After we had delivered the liability judgment, the Respondent applied for its costs on three grounds:

- a. The Claimant had acted vexatiously towards witnesses in the case.
- b. The Claimant's claim had no reasonable prospects of success.
- c. The Respondent had made a reasonable offer of settlement six months ago and the Claimant's refusal to accept that offer amounted to unreasonable conduct.

55 The Respondent did not produce a schedule of costs, but Mr McCombie asserted that the total sum consisted of his fee of £12,000 plus solicitors' costs. After we indicated that we would need to see a schedule before awarding solicitors' costs, he limited the claim to his brief fee of £12,000. We were content to accept his assertion that that was his fee and the Claimant did not raise any issue about it.

56 The facts underlying the costs application were not in dispute.

57 As to the alleged vexatious conduct, the Respondent relies on an email dated 3 July 2018 from Claimant to Mr Sirisena, copied to two directors and an HR consultant, in response to an ordinary request Mr Sirisena had made to the Claimant and others about work matters. The email begins with a response to Mr Sirisena's request, but then continues with several paragraphs addressing the Tribunal proceedings and making a number of allegations against Mr Sirisena, including:

"you have given false statements in the ET3, amended Ground of resistance

submitted to the Employment Tribunal”

“You have submitted information to the tribunal which is clearly false.”

“At the final hearing this will be abundantly clear to the Tribunal that fabricated information has been provided. There are obviously graver consequences. Also the Tribunal Judge may impose a financial penalty to the Respondent/ LBN...”

58 The Claimant apologised to Mr Sirisena, via counsel on the first day of the final hearing, for sending this email.

59 The Respondent also relies on the fact that the Claimant asserted several times in his witness statement that Ms Munroe was having an affair with Mr Abbs and Ms Malik asked Ms Munroe about this in cross-examination. Ms Malik also suggested on a number of occasions during cross-examination of the Respondent’s witnesses that a number of senior managers had been “compromised out” of the Respondent due to financial irregularities.

60 It is not in dispute that more than six months before the hearing the Respondent offered the Claimant an increase of £267 per month gross salary plus a payment of £3,000 on condition of withdrawing proceedings. The offer was rejected.

61 The Employment Tribunals Rules of Procedure provide, so far as relevant:

**When a costs order or a preparation time order may or shall be made**

**76**

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success [or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins].

...

**84**

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a



wasted costs order is made, the representative's) ability to pay

62 As to the email of 3 July 2018, we consider that it was extremely unwise for the Claimant to have sent an email in those terms and we accept that it meets the threshold of vexatious conduct. It is broadly threatening and relates to matters which should have been confined to the tribunal proceedings, rather than being raised in the workplace. We note that the Claimant was legally represented at this stage. Having said that, we would probably not consider it sufficient on its own to justify a costs award, and we take into account the apology which was made on Tuesday from the Claimant to Mr Sirisena via counsel.

63 As for the other allegations of wrongdoing, which Mr McCombie termed "mudslinging", we do not criticise the Claimant for alleging that there was a personal relationship between Ms Munroe and Mr Abbs. We can just about see that it was potentially relevant to the race discrimination complaint, and it was part of the Claimant's pleaded case. Ms Malik did not push the issue in cross-examination after Ms Munroe denied it. The position is different in relation to the other allegations of wrongdoing. It was said by Mr McCombie (and not disputed) that the Claimant never made any application for disclosure or sought any further information about the reasons for any suspensions or dismissals. Having not done so, and without any evidence of his own to back up the serious allegations, we consider it was unreasonable conduct of the proceedings to pursue those lines of cross-examination, in Mr McCombie's words, "to create a whiff of corruption in what are public proceedings".

64 On the merits, we agree with the Respondent's submission that there was no reasonable prospect of success on either complaint. On the public interest disclosure complaint there was a causation problem in relation to the essential complaint that the failure to recognise the Claimant in the PPMM role was motivated by protected disclosures, the first of which was made a year later. As for the bullying allegations, they were obviously in principle out of time and no argument was put forward as to why it was not reasonably practicable for the proceedings to be brought in time.

65 As to the race discrimination complaint, we noted in our judgment that no issue about race had ever been raised before the Tribunal proceedings. There was no other evidence on which the Claimant was able to say that the treatment had anything to do with his race. We do not agree that the purpose of the Tribunal is, as Ms Malik suggested, "to air grievances". Nor is it, as she also suggested, for an employee to establish *whether* he or she has a good case. The purpose is to uphold statutory employment rights. A claimant who brings a claim with no reasonable prospect of succeeding can expect to face a possible costs award. We consider in the circumstances of this case and bearing in mind that the Claimant was legally represented, it was unreasonable for him to pursue these unmeritorious claims and this was particularly so after a not trivial offer was made to him some six months ago, involving a permanently higher salary and a payment of £3,000.

66 We therefore consider that the threshold for awarding costs is met on all three grounds relied upon by the Respondent and exercising our discretion we consider that we should award costs in favour of the Respondent.

67 We note that under Rules we are not obliged to take account of the Claimant's means or ability to pay but we may do so. We have heard evidence about it and we have

taken into account that he is a person of relatively modest means, although we note that he has substantial equity in his home and he is on a reliable regular salary of more than £25,000 a year. We have decided that the appropriate amount to award in costs is half of the amount that was claimed, namely £6,000.

Employment Judge Ferguson

8 October 2018