Case Number: 2300430/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mr R Rawlins**

Respondent: **London Borough of Wandsworth**

Heard at: London South On: 05, 06, 07 & 08 September 2017

Before: Employment Judge Freer
Members: Ms S Campbell
Ms C L Oldfield

Representation
Claimant: In person
Respondent: Ms Gyane, Counsel

REASONS

1. These are the written reasons for the unanimous judgment sent to the parties on 04 October 2017 that the Claimant's claims were unsuccessful.

2. Oral reasons were provided at the hearing and are reproduced in writing at the Claimant's request.

3. By a claim presented to the employment tribunals on 28 January 2017 the Claimant claimed ordinary unfair dismissal, dismissal on the ground of having made a protected disclosure, dismissal on the ground of trade membership and activities and direct race discrimination

4. The Respondent resists the claims.

5. The Claimant gave evidence on his own behalf.

6. The Respondent gave evidence through Mr Andrew Booth, Head of Estate Services; Mr Dave Worth, Assistant Director of Housing Services; and Mr Brian Reilly, Director of Housing and Community Services.

7. The Tribunal was presented with a bundle of documents comprising 262 pages.

The Issues

8. The Tribunal and the parties have throughout this hearing been working to a draft list of issues as helpfully produced by the Respondent at the outset of the hearing and which was accepted by Mr Rawlins as being an accurate reflection of the issues to be determined by this tribunal.

A brief statement of the relevant law

Unfair dismissal

9. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

10. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of permissible reasons. The Respondent in this case relies upon a reason relating to the Claimant's conduct.

11. If there is a permissible reason for dismissal, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

> "the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted
>
> reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case"

12. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of a reasonable employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

13. It is established law that the guidelines contained in **British Home Stores Ltd –v- Burchell** [1980] ICR 303 apply to conduct dismissals, such as in the instant case. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) after a reasonable investigation. A conclusion reached by the employer on a balance of probabilities is enough.

Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

14. It is also established law that the Burchell guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses (also a neutral burden of proof) (see **Boys and Girls Welfare Society –v- McDonald** [1997] ICR 693, EAT).

15. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.

16. This decision was echoed by the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR 1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct.

Dismissal by reason related to union membership or activities

17. The provisions relating to the dismissal of an employee on grounds related to union membership or activities is addressed in section 152 of the Trade Union & Labour Relations (Consolidation) Act 1992:

(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a) was, or proposed to become, a member of an independent trade union,

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,

(ba) had made use, or proposed to make use, of trade union services at an appropriate time,

(bb) had failed to accept an offer made in contravention of section 145A or 145B, or

(c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.

(2) In subsection "an appropriate time" means—

(a) a time outside the employee's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take

part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

Dismissal by reason of having made a protected disclosure

18. Section 103A of the Employment Rights Act 1996 provides that an employee will be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

19. Part IVA of the Employment Rights Act 1996 contains provisions relating to protected disclosures.

20. Section 43A states that 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.

21. Sections 43B provides that a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more prescribed circumstances.

22. It is irrelevant whether or not the information is correct, provided the worker reasonably believes it to be true (**Darnton –v- University of Surrey** [2003] IRLR 133, EAT and also see **Korashi –v- Abertawe Bro Morannwg University** [2010] IRLR 4, EAT on reasonable belief).

23. Allegations are not enough, the disclosure must convey facts (**Cavendish Munro Professional Risks Management Ltd –v- Geduld** [2010] IRLR 38, EAT).

24. By virtue of section 43L(3), a disclosure of information shall have effect where the person receiving it is already aware of it.

25. Sections 43C to 43H provide the circumstances when a qualifying disclosure may be made sufficient to make it a protected disclosure.

26. The Court of Appeal stated in **NHS Manchester –v- Fecitt** [2012] IRLR 64 that: **"…** section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower".

Direct race discrimination

27. Section 13 of the Equality Act 2010 ("the EqA") provides:

"(1) A person (A) discriminates against another (B) if, because of a protected

characteristic, A treats B less favourably than A treats or would treat others".

28. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

29. The burden of proof reversal provisions are contained in section 136:

"(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".

30. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

31. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

32. The Court of Appeal in **Madarassy** above, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) 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.

33. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

34. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

35. Some main principles applicable in cases of direct discrimination have helpfully been summarised by the EAT in **Law Society -v- Bahl** (as approved by the Court of Appeal [2004] IRLR 799) and have all taken into account by the Tribunal in the instant case.

36. A tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A tribunal should not extend the range of complaints of its own motion (**Chapman -v- Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

Facts and associated conclusions

37. This case essentially arises out of periods of sick leave the Claimant took from his employment at the Respondent's organisation on the 4th and 5th of April 2016. There was no issue taken by the Respondent of the fact that at the material times the Claimant was working in two employments. The Claimant was working for both the Respondent and the London Borough of Greenwich. The Claimant worked for the London Borough of Greenwich during the day and it is not an issue that the Claimant did not declare the second job to the Respondent.

38. The issue of concern for the Respondent was that there was no justifiable explanation for why Mr Rawlins was sick from his work at the London Borough of Wandsworth but had managed to work for the London Borough of Greenwich on those two particular days.

39. The Tribunal received live evidence throughout the hearing but with regard to submissions Mr Rawlins informed the Tribunal that he had a job interview on the morning of the second day when submissions were due to be heard. Upon consideration the Tribunal was not minded to delay the presentation of submissions and gave Mr Rawlins the opportunity of either making written submissions or attending to give oral submissions. Mr Rawlins e-mailed to the tribunal written submissions, which the Tribunal has taken fully into account.

40. Addressing the matters on the list of issues and the race discrimination claim first, it is a claim based on the Claimant's colour. The Claimant confirmed and was forced to accept in cross-examination, that the issues at paragraph 7.3 to 7.6 in the list of issues were in fact not complaints of race discrimination. Mr

Rawlins clarified in his oral evidence was that it was a claim in respect of a Mr Quinn and related to matters in issues 7.1 and 7.2 within the list of issues.

41. Addressing issue 7.1 the organisation of the working rotas and the allegation that black members of staff worked on their own and therefore worked harder, more often that white members of staff, the Claimant raised a complaint in an e-mail dated 15 September 2015, set out at page 121 of the bundle, relating to the colour of night staff who worked alone. That email was immediately responded to by Mr Booth who had done some research and compiled a table of figures based on the period from 1 January 2015 to 31 August 2015 (see page 123 of the bundle). That table in itself demonstrates a lack of discrimination in respect of the organisation of the work rotas. For example, Mr George Campbell, a white male, had the most shifts alone (57%) and Ms Yvonne Khan, who is a black female and of Jamaican ethnic origin, had one of the least amount of shifts (38%). The remaining figures in the table do not contradict this interpretation. Therefore, simply on the figures produced by Mr Booth, which were not materially challenged by the Claimant, there is no evidence from which the Tribunal could conclude the Claimant has been less favourably treated because of his colour as alleged. The Tribunal concludes that the speed and detailed way in which Mr Booth responded to the matter demonstrates he took it seriously and in part militates any against any discrimination on his behalf. The Tribunal had no further evidence from the Claimant upon which any other sensible assessment of the alleged discrimination could be made and therefore it is the Tribunal's conclusion that the Claimant has not fulfilled the *Madarassy* criteria and proved facts from which the Tribunal could conclude he was less favourably treated because of his colour.

42. With regard to the issue at paragraph 7.2 and physical threats of violence, that was addressed by Mr Booth as set out in his contemporaneous email at page 124 of the bundle: "Spoke to Rawlins last night and today. The personal attack was verbal between the two of them with no suggestion of violence. I explained that the figures do not support his allegation. Although he stated it is the way he feels and it is maybe his perception. He is happy with the outcome and will sign and accept a statement to that effect".

43. Further, as confirmed in *Madarassy* above, even if it was proved that there were physical threats of violence as alleged, being subjected to a detriment and having a protected characteristic, in this case colour, is not sufficient. The Claimant has not shown, even by inference, the 'something more' required to establish the required causal link with his race.

44. There was no persuasive evidence put before the Tribunal and again, when considering all the circumstances, it is the Tribunal's conclusion that the Claimant has not proved facts from which the Tribunal could conclude that he was less favourably treated because of his race.

45. In addition, the Tribunal accepts the submissions of Mr Gyane for the Respondent that both of the alleged events of direct race discrimination are significantly out of time. It is the conclusion of the Tribunal that having

considered all the circumstances it is not just and equitable to extend time and the Tribunal has no jurisdiction to consider the claims in any event.

46. There is no presumption in favour of an extension of time. The Tribunal has considered the factors in section 33 of the Limitation Act 1980 as a guide. The onus is on the Claimant to justify an exercise of the extension. No impediment was suggested by the Claimant for not presenting his claim in time. The events were argued to exist in or around September 2015. The claim was presented in January 2017. The Tribunal concludes the balance of prejudice tips in favour of the Respondent and an extension is not granted.

47. With regard to the unfair dismissal claim on grounds of trade union membership or activities, that claim also fails on the basis of that the Tribunal finds as fact that the Claimant was not a trade union representative or trade union member at any particular point in time relevant to this claim. The Claimant was elected as an employee representative. At one stage in his evidence the Claimant was referred to an email he sent to the Respondent's Chief Executive (see page 258 of the bundle) where Mr Rawlins describes himself as the "(GMB) shop steward". After receiving the Claimant's evidence, the Tribunal finds as fact that this description was manifestly inaccurate. Therefore for those reasons this claim fails.

48. With regard to the claim of automatic unfair dismissal on grounds of having made a protected disclosure ("whistleblowing"), it was accepted by Mr Rawlins in his own evidence that Mr Worth and Mr Reilly were unaware of any protected disclosure made by him as set out at 1.1 and 1.2 of the list of issues and this was also confirmed by Mr Worth and Mr Reilly in their own evidence. On that basis it must follow that the decision to dismiss the Claimant made by Mr Worth and the appeal decision upholding that dismissal made by Mr Reilly cannot have been by reason of the Claimant having made a protected disclosure as alleged.

49. Dealing with the protected disclosure points in any event, with regard to 1.1 and exposure to asbestos, the Tribunal finds there was no record of any complaint of asbestos exposure until 16 December 2016, post dismissal. This further confirms that the decision to dismiss could not have been on that ground. The alleged exposure to asbestos as a protected disclosure issues is not referred to in the Claimant's claim form, further and better particulars, or his witness statement. Therefore the Tribunal finds that the Claimant's allegation of a protected disclosure is not made out as a matter of fact.

50. With regard to the alleged protected disclosure at paragraph 1.2 of the list of issues and the Claimant having told Mr Booth in April 2016 that he had been placed into an area to work mostly on his own and that there was systematic fraud taking place within his team, having regard to the principles set out in the *Geduld* case, it is the conclusion of the Tribunal that this matter does not amount to a disclosure of information.

51. The Claimant's claim is made under section 43B(1)(a) and (f) of the Employment Rights Act 1996 with regard to this issue and there is nothing in

the disclosure email replied upon that suggests the Claimant was disclosing *information* that tended to show any of those two matters. The Claimant also relied upon a telephone conversation that he records at page 134 of the bundle. The first part of that transcript relates to text exchanges but halfway down is the Claimant's account of a telephone call with Mr Quinn ("called Trevor") that the Tribunal finds as a matter of fact is not an accurate and contemporaneous note of that conversation. It was not ever subsequently referred to by the Claimant and in addition the timings on that note do not fit with the timings on Mr Booth's e-mail at page 159.

52. It is also notable that the Claimant had not used the Respondent's whistleblowing procedures and has only escalated this matter through the Respondent's grievance process.

53. It is, however, the Tribunal's primary conclusion that the protected disclosures relied upon were not the reason for the Claimant's dismissal.

54. With regard to the Claimant's ordinary unfair dismissal claim, this matter can be considered under the well-established guidelines in *British Home Stores -v- Burchell*. It is the conclusion of the Tribunal that the Respondent genuinely believed the Claimant's conduct. Mr Worth and Mr Reilly were the two decision-makers and we find as a matter of fact that the Claimant's conduct was their genuine reason for dismissal.

55. The general process fell comfortably within the range of reasonable responses. The Claimant was invited to an investigation meeting, that meeting took place. The Claimant was invited to a disciplinary hearing and the letter of invite sets out all the relevant details. There was a disciplinary hearing and an outcome letter. The Claimant had a right of appeal, he did appeal, there was an appeal hearing and an outcome was provided in writing. The Claimant had the right to be accompanied on all the required occasions.

56. At one stage the Claimant was suspended from work on full pay which was lifted once the Respondent had established that particular matter was not one of gross misconduct.

57. In our conclusion there were only three particular procedural elements that required specific consideration. The first was an application for a postponement at the outset of the disciplinary hearing in order to have the right to be accompanied; the second was whether Mr Booth had any conflict of interest or bias in his investigation process; and third, whether the Claimant was unreasonably denied the opportunity to ask Mr Booth questions during the appeal process.

58. With regard to the right to be accompanied issue, the Tribunal considered the notes of the disciplinary hearing which we find are broadly accurate. Those notes state that the question was put to Mr Rawlins "Can I confirm that you have no representation today?" to which he answered "No", and the question was put "Are you happy to proceed without representation?" to which Mr Rawlins replied "Yes I'm happy to continue". That is consistent with the

Claimant's evidence at the appeal hearing (cross reference pages 290 to 291 paragraph 79 through to 84).

59. With regard to the disciplinary hearing itself, some matters are worth noting, Mr Rawlins asked "are you calling any witnesses" to which he replied "No". Mr Worth set out the detail of the process that was going to be adopted through the meeting. Mr Booth gave the management case, was thanked by Mr Worth, and Mr Rawlins was asked if he had any questions to which Mr Rawlins replied: "No, what AB has said is correct". At page 225 of the bundle, the disciplinary hearing notes record an exchange in paragraphs 71 to 78. Mr Worth states: "In particular it is your chance to provide your response to the allegations" to which Mr Rawlins replies: "Everything is in the paperwork". Mr Worth confirms: "Are you saying you accept the allegations as fair and accurate", to which Mr Rawlins replied: "I do accept that yes". Mr Worth asked: "Do you have anything else to you would like to add?" and Mr Rawlins replied: "No I'm happy with the way that Mr Booth has carried out the investigation and what he said about the case".

60. Shortly afterwards the notes record Mr Rawlins said: "Mr Booth carried out the report without bias and treated it like a copper". Mr Rawlins suggested in his evidence that that was a sarcastic comment which the Tribunal understood him to mean was that it was not true. The Tribunal concludes that the Claimant's suggestion of sarcasm in relation to "treating it like a copper" is entirely at odds with the previous statement where Mr Rawlins confirmed he was happy with the way Mr Booth had carried out the investigation.

61. It is also notable that there was no issue of bias, whistleblowing or race discrimination raised in respect of Mr Booth's handling investigation during the disciplinary hearing and the Claimant chose not to ask questions of him during that hearing.

62. The Claimant raised objections to the minutes in an email dated 05 November 2016, some two months later. The Claimant argued that the notes do not record that his request for an adjournment was denied. However, there is nothing mentioned in the Claimant's appeal form at page 247, which only raised two grounds of appeal: Mr Booth had a conflict of interest and in essence, the decision to dismiss was too harsh.

63. The Tribunal concludes that the content of the 05 November 2016 email again conflicts with the appeal hearing notes at paragraphs 80 to 84 on page 291. On balance, in all the circumstances, the Tribunal accepts Mr Worth's evidence as set out in his witness statement at paragraph 9.

64. With regard to the issue of Mr Booth's alleged bias, the Tribunal finds as fact that there was no conflict of interest with Mr Booth undertaking an investigation into the disciplinary matter. The original matter raised by the Claimant was dealt with by Mr Booth as demonstrated in the email correspondence to which the Tribunal has been referred. It was not a matter raised by the Claimant at the disciplinary hearing and therefore the Tribunal concludes that there was no

conflict of interest and certainly none that places investigation process outside the range of reasonable responses.

65. With regard to the issue of questions to Mr Booth during the appeal hearing, none were asked of Mr Booth during the disciplinary hearing and although the invitation letter to the appeal hearing and the conversation at the outset of the appeal states that the Claimant could call Mr Booth as a witness, is the conclusion of the Tribunal that it was within the range of reasonable responses for Mr Reilly subsequently to decline the Claimant's request in the manner he did when he clarified why Mr Booth was required for questioning. That exchange is set out at the bottom of page 289 to the top of page 290 in the notes of the hearing. The Tribunal also accepts the evidence from Mr Reilly in paragraph 9 of his witness statement.

66. All matters considered the Tribunal concludes that the disciplinary process was comfortably within the range of reasonable responses and was fair overall.

67. With regard to whether the Respondent held a reasonable belief in the Claimant's conduct, it is the conclusion of the Tribunal that the conduct issue was effectively proved on the documents before the Respondent. That set of circumstances was not offset by the Claimant's evidence during the disciplinary hearings.

68. The Claimant did not argue that that the circumstances arose because they were two different types of jobs that allowed him to work in one with an illness but which prevented him from working in the other. The Claimant's reason for sickness was that he had ‘flu’.

69. Notwithstanding family difficulties there was no argument put forward by the Claimant that he reacted the way that he did because of stress and/or family difficulties. The Tribunal refers to the dismissal letter at page 228B where these potentially other circumstances were expressly considered by Mr Worth and we note that as a matter of fact that family circumstances and types of jobs were not arguments raised by the Claimant during the appeal process.

70. It is the conclusion of the Tribunal that it was within the range of reasonable responses for the Respondent to hold a reasonable belief in the Claimant's conduct and reaches the same conclusion on whether sanction of dismissal was fair in all the circumstances.

71. The Tribunal accepts the evidence of both Mr Worth and Mr Reilly that they considered the earlier final written warning that was given to the Claimant and the period in respect of which that was active and in all the circumstances considered that dismissal was appropriate. At the end of their considerations dismissal was deemed appropriate due to lack of confidence in the Claimant moving forward. That conclusion was reasonably open to the Respondent.

72. The Tribunal concludes that decision was within the range of reasonable responses. It was a decision open to an objectively reasonable employer.

73. Accordingly, all of the Claimant's claims are not well founded and are unsuccessful.

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Employment Judge Freer
Date: 06 September 2018