



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Lokhi Roy

**Respondents:** [i] UNISON  
[ii] Mr Paul Bullivant

**HELD AT:** Leeds

**ON:** 10, 11, 12 and 14  
December 2018  
(13 December 2018 in  
chambers)

**BEFORE:** Employment Judge D N Jones  
Mr T Downes  
Ms J Noble

## REPRESENTATION:

**Claimant:** In person  
**Respondents:** Ms A Palmer, counsel

## JUDGMENT

The Tribunal unanimously holds:

1. The complaints of direct discrimination and victimisation against the first respondent, summarised in paragraphs 5 and 6 of the grounds of claim, are dismissed upon withdrawal.
2. The complaints of victimisation against the first and second respondents are dismissed.

## REASONS

### Introduction and issues

1. Mrs Roy is a member of Unison, the first respondent. She is employed by the Leeds and Yorkshire Partnership NHS Foundation Trust (the Trust). Mr Bullivant is also a member of Unison and also employed by Trust. He is the Leeds

Community Health Branch Health and Safety Officer, LGBT Officer and Equality Officer.

2. On 12 June 2018 and 24 June 2018 the claimant issued claims against the second and first respondent respectively, complaining that Mr Bullivant, in his capacity as trade union representative on her behalf, had victimised her and that Unison were liable for his actions as he acted as their agent. In the claim against Unison, she alleged that there had been a failure to obtain legal advice after Mr Bullivant handed the case on to Miss Ratcliffe, but this claim was withdrawn on the third day of this hearing when the tribunal refused to allow the claimant to amend her case.
3. The issues have been identified at case management hearings before Employment Judge Lancaster and Employment Judge Wade on 3 August 2018 and 1 November 2018. Three protected acts and three detriments were identified. The protected acts are firstly, informing Mr Bullivant of her intention to bring a discrimination claim on 13 October 2017, secondly, instigating ACAS early conciliation on 28 October 2017 and thirdly, presenting a complaint of discrimination in the tribunal on 18 January 2018. The three detriments which are said to be because of the protected acts are firstly, not referring the claimant's complaints for a merits assessment by Unison's solicitors from October 2017 to 9 February 2018, secondly, the involvement of Mr Bullivant in the ACAS early conciliation process and thirdly, not forwarding an early conciliation certificate to the claimant until 16 January 2018, it having been issued on 12 December 2017.
4. The claimant made two applications to amend the claim. The first was a renewal of an application which had been made before Employment Judge Wade both at a hearing and in writing. The claimant wished to allege that in a discussion with Mr Bullivant, on 9 August 2017, she had informed him she would like a legal opinion in respect of claims of race discrimination and that this was, therefore, a protected act. There were no new circumstances to be taken into account, in respect of this application, which had not already been considered by Employment Judge Wade. We were not satisfied it was in the interests of justice to allow the application on the first day of the hearing, as applying the overriding objective, there would be delay and additional expense arising if the claim was altered in this way. Ms Palmer would have to take instructions. The balance of hardship weighed against allowing the application. The disadvantage to the claimant in not being able to put her case in this way was substantially mitigated by reason of the fact that there were further alleged protected acts, one of which was admitted and the tribunal was prepared to make findings about what had been said on 9 August 2017, which would allow the claimant to put into context any subsequent discussions which she said amounted to protected acts.
5. The other application to amend concerned the claim against Unison. On the third day of the hearing the tribunal drew to the parties' attention the fact that the list of issues had not addressed a claim which was clearly expressed in the second claim form. The tribunal identified the issues in respect of that claim. During the cross-examination of Miss Ratcliffe, the claimant recognised that, as pleaded, that claim could not succeed. She sought permission to amend to allege Miss Ratcliffe believed that the claimant was to bring proceedings against Mr Bullivant for victimisation, arising from the contact she had had with ACAS in April 2018, and that was a protected act. The tribunal rejected the application to amend as it

would have occasioned significant delay and expense and would have prejudiced the respondent. It would have been necessary for the statements to have been redrafted and the case could not have proceeded without a postponement. The claimant had been legally represented when the list of issues was identified by Employment Judge Wade and the respondent could have expected this to have been addressed then.

### Evidence

6. The Tribunal heard evidence from Mrs Roy, the claimant, from Mr Bullivant, the second respondent and Miss Ratcliffe, regional organiser. A witness statement of Mr Tony Pearson, regional manager, had been served but, in the light of the issues as clarified during the hearing, his evidence was not relevant and so he was not called. A bundle of documents of 1577 pages was submitted and some further documents were added during the hearing.

### Background/The Facts

7. Mrs Roy commenced work with the Trust on 30 June 2003. In July 2011 Mrs Roy presented claims against the Trust in the Employment Tribunal. These included claims of sex and race discrimination. On 9 January 2012 the parties to those proceedings entered into an agreement which was recorded in a document known as a COT3, in settlement of all claims.
8. On 1 July 2016 the claimant joined Unison. A complaint was made by another employee of the Trust against Mrs Roy in July 2016. She contacted Mr Bullivant, in his capacity as union representative/steward, for advice and assistance.
9. Mr Bullivant next had involvement with Mrs Roy when he was consulted by a number of employees who wished to submit a collective grievance concerning a change in work location, in April 2017. Mrs Roy was one of those affected. She emailed Mr Bullivant on 12 July 2017 asking for his support and setting out the concerns of the group.
10. On 18 July 2017 Mrs Roy attended a sickness review meeting with the team leader Mrs Wilkes. It was described as a stage 1 meeting, in the Trust's procedures. Mrs Axall, human resources manager, was also in attendance. The claimant had been absent several times through stress, fatigue and memory problems. The claimant left the meeting before it had concluded. Mrs Axall was concerned about her state of health and contacted Mr Bullivant, as she knew the claimant was a member of Unison.
11. On 20 July 2017 Mr Bullivant contacted Mrs Roy, by email, to inform her that Mrs Axall had been in touch with him to let him know Mrs Roy had become upset at the meeting. He suggested they meet to have a discussion.
12. Mr Bullivant also became aware that one of the managers at the meeting was considering raising a complaint about the claimant because of her attitude during this meeting. In his evidence Mr Bullivant was unclear as to how he had become aware of this and which manager it was, but he acknowledged it was probably Mrs Wilkes.
13. On 31 July 2017 Mr Steven Taylor, the claimant's line manager, wrote to her to inform her that there was to be investigation into the complaint concerning her conduct at the meeting on 18 July 2017. She was suspended until she was to be

- redeployed to a band 2 post (from a band 4 post) pending the disciplinary investigation. The claimant received this letter on 1 August 2017.
14. On 3 August 2017 case forms were sent to Mrs Roy from the branch office at which Mr Bullivant worked.
  15. On 9 August 2017 Mrs Roy met Mr Bullivant to discuss the events at the meeting on 18 July 2017. She covertly recorded part of the meeting on her telephone. She sought permission to produce that recording on the second day of the hearing. The tribunal refused to admit this evidence as it had not been served on the respondent and was still only accessible on the claimant's telephone or laptop. It would not have been possible for Mr Bullivant to consider the recording and provide instructions to Ms Palmer without significant delay to the progress of the case.
  16. This was a lengthy meeting, lasting up to one and a half hours. Mrs Roy was upset and expressed her annoyance with Mrs Axall for contacting the union without her agreement. She informed Mr Bullivant of the earlier settlement, recorded in the COT 3, and expressed her belief that the Trust were in breach of its terms. Although Mr Bullivant said he could not remember it, we are satisfied it is likely Mrs Roy referred to the circumstances in which that agreement had been reached, against a background of a complaint of race and sex discrimination. Mrs Roy said that she believed Mr Bullivant had said something to suggest he was aware of the recent complaint which might be made against her and he agreed in evidence that was quite possible.
  17. On 11 August 2017 Mrs Roy was invited to an investigatory meeting. She was informed the purpose of the meeting was to discuss behaviour towards Miss Wilkes which had made her feel intimidated upset and offended. There were no further details.
  18. Mrs Roy forwarded the letter to Mr Bullivant on 15 August 2017 and asked him if she should request further information about what offended Mrs Wilkes or if he would do it on her behalf. Mr Bullivant replied and stated that Mrs Roy needed to write a detailed version of what happened.
  19. On 18 August 2017 Mrs Roy wrote to Mr Bullivant with a number of questions about the procedure and querying why she had been redeployed temporarily. Mr Bullivant replied and informed Mrs Roy that she needed to write a statement not ask for answers at that stage.
  20. On 22 August 2017 Mrs Roy wrote to request an extension of time to submit her written statement. On 25 August 2017 Mrs Roy sent Mr Bullivant the COT 3 agreement and the letter of Mr Taylor, together with a timeline of events, including her recollection of the meeting of 18 July 2017. She expressed the opinion that what had occurred had tarnished her relationship with colleagues, that she had been treated oppressively, that she had previously been awarded compensation in the employment tribunal settlement and that matters were repeating themselves. She said that she would be requesting the employment tribunal to reopen her case. On 29 August 2017 Mrs Roy sent a draft statement and a counter grievance to Mr Bullivant. It was a more complete version of the narrative she had sent on 25 August 2017.
  21. Mr Bullivant had been on annual leave and only read these emails upon his return on 5 September 2017.
  22. On 7 September 2017 the claimant met Mr Bullivant and discussed her statement in some detail. On 11 September 2017, Mrs Roy sent an updated

copy of the statement and asked Mr Bullivant if he would obtain a second opinion as to whether she should submit a counter grievance at the same time. Mr Bullivant replied the same day and made a number of suggestions in respect of the statement. He advised Mrs Roy that if she wished to put in the grievance, the grievance procedure was attached for her information. He told her the grievance would be investigated separately.

23. On 9 October 2017 the claimant sent an email to Mr Bullivant to ask for his comments on further points she wished to add to her statement.
24. On 13 October 2017, the claimant sent an email to confirm she would attend a meeting with Mr Bullivant on 26 October 2017. She stated that she had a concern as to whether that would leave sufficient time to take any external action through the employment tribunal if required.
25. On 23 October 2017 the claimant sent Mr Bullivant a copy of her grievance. It was extensive, running to 49 pages. She set out detailed complaints about how she believed she had been unfairly treated by her managers. It spanned back a considerable period of time. She made reference to issues of race, for example the progression of the career paths of particular ethnic groups.
26. On 24 October 2017 Mr Bullivant replied to Mrs Roy, acknowledged receipt of the draft grievance and suggested that they discuss it when they met. Mrs Roy replied and agreed not to do anything before discussing it with Mr Bullivant. She thanked him for his help and said it was appreciated.
27. On 26 October 2017 the claimant attended the disciplinary meeting, accompanied by Mr Bullivant. She received a written warning and was informed she had the right to appeal.
28. On 27 October 2017 Mrs Roy sent an email to Mr Bullivant and asked him to obtain a legal opinion in respect of the grievance, both with regard to County Court and employment tribunal proceedings. She referred to employment tribunal timescales and said that she believed she would have to submit her grievance by 30 October 2017. She said it would assist if he obtained the opinion as soon as possible.
29. On 28 October 2017 the claimant contacted ACAS for the purpose of entering into early conciliation with respect to a claim as against the Trust. She named Mr Bullivant as her representative.
30. On 28 October 2017 the early conciliation officer wrote to Mr Bullivant acknowledging his role in the claim that Mrs Roy had notified ACAS of and providing an early conciliation number. She asked Mr Bullivant to contact her as soon as possible.
31. On 30 October 2017 a senior branch administrator of Unison sent to the claimant the case form, which was for the purpose of requesting a merits assessment in respect of her complaints. Whilst not referring to the purpose of the form, the administrator did ask Mrs Roy to complete it as soon as possible and offered assistance, if required. She asked her to send the completed form to Mr Bullivant. On the same day the claimant submitted her 60 page grievance to the Trust.
32. On 31 October 2017 Mr Bullivant sent an email to Mrs Roy and asked why she had acted alone, by which he meant having contacted ACAS. She replied the same day and said she was really sorry, but she had called him the previous day but it was the deadline. She asked if he had received her phone call. Mr Bullivant responded and said "no worries". He informed Mrs Roy that he only worked in

Unison on Tuesdays, Wednesdays and Thursdays and said that they would deal with the ACAS early conciliation. He asked her to fill in the case form for the grievance and another for the appeal against the written warning. He told her to send it to him when she had completed it.

33. On 6 November 2017 Mrs Roy sent an email to Mr Bullivant and asked if he had any news from ACAS or human resources in respect of the grievance she had submitted on 30 October 2017.
34. On 7 November 2017 Mr Bullivant sent the claimant an email containing a number of questions about the COT 3 agreement and asking what protected characteristic she thought had not been observed. The claimant replied on 8 November 2017 and said it was race. In another email of the same date Mrs Roy asked Mr Bullivant if he could look at her counter allegation, complaint and appeal. He replied later that day to inform her that ACAS had logged her case properly and would be in contact in five days or so. He had spoken with the early conciliation officer and given her his understanding of the history of the claimant's concerns, including that she was to submit a grievance about disability and race discrimination. He mentioned to her that a manager at Carers Leeds had made it clear he or she wanted the claimant out of the service. Mr Bullivant thought the claimant must have told him about this, but Mrs Roy said she had not.
35. In his email, Mr Bullivant asked Mrs Roy to fill in the two case forms. He informed her his availability would be much reduced from 9 November 2017 because he would be working full-time in another role. He provided a new telephone number for Mrs Roy to contact him on.
36. On 9 November 2017 Mr Bullivant commenced his new role with the Trust as a therapy coordinator. This included additional managerial responsibilities. He no longer worked for three days for Unison, but he retained his responsibilities as a steward and representative. He had handed over a significant amount of his previous caseload, but retained that of the claimant.
37. On 13 November 2017 the claimant sent Mr Bullivant a copy of her appeal and a further copy of her complaint against Mrs Axall and counter complaint against Ms Wilkes.
38. On 17 November 2017 Mr Bullivant sent an email to the claimant to inform her that the investigation meeting in respect of her grievance would be held on 28 November 2017.
39. On 21 November 2017 Mrs Roy sent Mr Bullivant what she described as a more polished version of her grievance and asked him to read it, if he had time. She was due to submit it later that day. She said she wished to receive a legal opinion from Unison on that version. Mr Bullivant was on leave on that day. An automatic response was sent to the claimant informing her of that fact.
40. On the 22 November 2017 Mrs Roy sent an email to Mr Bullivant and asked him if he had any feedback from the solicitors. She asked if she would need to attend a meeting with them and that she was only available for the next seven days. Mrs Roy completed the case forms for the purpose of obtaining the merits assessment and sent them to Mr Bullivant. He replied that day, apologising for not returning her call because he had been on annual leave. He informed her that the two case forms would be used for the purpose of obtaining advice from Thompson's solicitors. He confirmed the date of the grievance meeting was on 28 November 2017.

41. On 24 November 2017 an early conciliation officer sent an email to Mr Bullivant to ask what the claimant sought by way of resolution and to inform him that the conciliation period would end on 27 November unless he sought an extension. On 27 November 2017 Mr Bullivant requested an extension and it was granted. He informed the early conciliation officer that there was to be a grievance meeting the following day.
42. On 27 November 2017 Mrs Roy sent an email to Mr Bullivant and asked him when she could expect an update from Unison's solicitors. She stated she was going away and needed to discuss timescales and whether anything further was required of her.
43. On 28 November 2017 Mrs Roy attended the grievance investigation meeting and was accompanied by Mr Bullivant.
44. On 29 November 2017 Mrs Roy sent an email to Mr Bullivant and asked for a copy of a list he had sent to ACAS. He replied and enclosed the information.
45. On 2 December 2017 the claimant went to India for a two-month career break.
46. On 8 December 2017 Mrs Roy sent an email to Mr Bullivant and requested an update in respect of the ACAS process and the respondent's solicitors review of her case. Mr Bullivant responded the same day to inform her that ACAS were in negotiation with the Trust and were awaiting a response to her requirements. He said he would update her when he had some news.
47. On 12 December 2017 ACAS issued the early conciliation certificate against the Trust and sent a copy to Mr Bullivant. On the same day the claimant sent an email to Mr Bullivant and asked for feedback from the Unison solicitor in respect of any County Court claim. She expressed her understanding that this would occur alongside the ACAS negotiations.
48. On 14 December 2017 the ACAS conciliator sent an email to Mr Bullivant to inform him that the early conciliation certificate had been issued on 12 December 2017 and that he would have to consider lodging an employment tribunal claim to protect the claimant's position before the internal processes were completed.
49. On 7 January 2018 Mrs Roy sent an email to Mr Bullivant to wish him a happy New Year and to enquire how the negotiations with ACAS were going. On 12 January 2018 Mr Bullivant sent Mrs Roy a copy of a letter he had received from the Trust which summarised the first grievance investigation meeting. He asked when she was to return to work. At 8:42pm that day, Mr Bullivant sent a further email to Mrs Roy to tell her that he had just found the happy New Year greeting email in his trash email box when looking for something else. He informed her that the ACAS early conciliation certificate had been issued. He stated that when the Trust had reached its conclusions they would be informed and involved again. Mrs Roy did not believe that the email had diverted to the junk box of Mr Bullivant's email account. We accepted what he said about this. We cannot see why he would have emailed her earlier in the day without making reference to this. Why would he have bothered to reply at all, if he was seeking to avoid addressing her question? He could simply have maintained the stance that the email remained in his junk account.
50. On 15 January 2017 Mrs Roy sent an email to Mr Bullivant and asked him to confirm when the ACAS certificate had been issued. She stated that it was her understanding that she would have a further month within which to take legal action from the date the certificate was issued. She asked him to confirm that.

51. On 15 January 2018 Mr Bullivant sent an email from his iPhone to the conciliation officer to ask her how to lodge the claimant's tribunal claim. On the same date Mrs Roy sent an email to Mr Bullivant to confirm she had received the letter from the Trust about the first grievance meeting and to express concern about the length of time they were taking to deal with it. She again asked when the ACAS certificate had been issued.
52. On 16 January 2018 Mr Bullivant replied and informed the claimant she would have to fill in the claim form including the details from the early conciliation certificate. He copied and pasted information from the online guidance about the details required in a claim form. He attached a copy of the certificate.
53. On 17 January 2018 the claimant emailed Mr Bullivant. She noted that the certificate had been issued on 12 December 2017. She pointed out that she had understood she had one month from the date of the certificate to bring a claim and that it appeared she was out of time. She asked him when he had received the certificate and what advice he had been given from ACAS about timescales. She asked if he had received an appraisal from the Union's solicitors and whether they were prepared to take on her case. Mr Bullivant replied by simply saying "Fill in the documentation I have requested you to do, Lokhi".
54. On 18 January 2018 Mrs Roy asked Mr Bullivant if he could provide her with an email address and contact number for the Unison solicitor. He replied by requesting her to complete the documentation sent and submitted as requested.
55. On 18 January 2018 the claimant submitted a claim form to the tribunal but inadvertently included her name and address in the box for the respondent's details. This led to the claim being rejected by the tribunal.
56. On 19 January 2018 the claimant confirmed she had sent a claim to the tribunal and asked Mr Bullivant to send the grievance document for the tribunal or provide her with ACAS's email address so she could forward it to them. She again asked for the Unison's solicitors telephone number, because she required legal advice.
57. On 24 January 2018 Mrs Roy again wrote to Mr Bullivant and asked if he had heard from Unison's solicitor. She asked him to chase the matter urgently. She sent a further email in which she had attached the completed case form relating to the appeal against her written warning. She included the case form relating to the grievance in addition. She again asked to be able to speak to the solicitor directly. Mr Bullivant replied and informed her she needed to firm up the section in the case form with further details. He informed her that the information would then go to the branch secretary and regional officer and then for a legal opinion. He informed her that there would be no direct contact between her and Thomsons at that stage.
58. On 25 January 2018 Mrs Roy replied. She asked Mr Bullivant what he wanted her to firm up in the case form. She said she was happy with them and wanted them to be sent. She emphasised that both were overdue and they should have been sent in December.
59. On 31 January 2018 Mr Bullivant emailed the claimant and said he wanted her to include more of a 'synopsis' in the case forms, but said he would escalate them if she was happy.
60. On 1 February 2018 the claimant received a letter from the employment tribunal explaining why her claim had been rejected.



61. On 2 February 2018 the claimant asked for an update from Mr Bullivant. He replied repeating his request as previously. She instructed him to submit the forms and Mr Bullivant said he would, early the following week.
62. On 5 February 2018 Mrs Roy sent the case forms directly to the regional office of the union. On the same date Mr Bullivant emailed her to ask if she had received a reply from the tribunal.
63. On 6 February 2018 Mrs Roy emailed Ms Miller at the regional office and attached a quote for legal advice. She asked if Unison would pay for this. She was informed the union would not pay for private legal advice. The claimant obtained an early conciliation certificate against Valerie Hewison, the chief executive of the Trust.
64. The 7 February 2018 Mrs Roy sent the tribunal's communication to Mr Bullivant. He replied and set out the correct details she should insert about the Trust as the respondent to the claim in a new claim form.
65. On 9 February 2018 Mr Bullivant forwarded the details of the claimant's case to David Syms the regional officer. The case was taken over by Miss Ratcliffe. Miss Ratcliffe telephoned the claimant to inform her that she had received the forms. The claimant covertly recorded this discussion.
66. Ms Ratcliffe submitted the case form to Thomsons for advice on 14 February 2018. A meeting was held with Mrs Roy, Miss Ratcliffe and Mr Smith, of Thomsons, on 21 March 2018 at the solicitors' offices. Mrs Roy was asked to provide further documents, but she chose not to do so. Mr Smith provided a legal opinion in respect of the merits of the employment tribunal claim on 1 May 2018
67. On 30 April 2018 the claimant contacted ACAS for the purpose of early conciliation as against Unison and on 25 April 2018 in respect of Mr Bullivant. Certificates were issued on 13 May and 25 May 2018 respectively.

### **The Law**

68. The relevant statutory provisions are contained in section 27, section 57(5)(d), section 109 (2), section 120, section 123, and section 136 of the Equality Act 2010 (EqA).
69. Under section 27 of the 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 – (a) bringing proceedings under this Act (b) giving evidence or information in connection with this Act (c) doing any other thing for the purposes of or in connection with this Act (d) making an allegation (whether or not express) that A or another person has contravened this Act.”
70. Section 136 of the EqA provides:
  - “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. But [that] subsection does not apply if A shows that A did not contravene the provision.”

71. In **Madarassy v Nomura International plc [2007] ICR 867**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof and this principle applies equally to claims of victimisation, so that establishing a detriment and a protected characteristic are not of themselves sufficient to shift the burden, see **Bailey v Greater Manchester Police [2017] EWCA Civ 425**. In **Laing v Manchester City Council and another [2006] ICR 1519**, the President of the Employment Appeal Tribunal said that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. This approach has been approved by the Supreme Court, in a case in which Lord Hope expressed the opinion that in most cases the tribunal is unlikely to need to trouble itself with the shifting burden, **Hewage v Grampian Health Board [2012] ICR 1054**<sup>1</sup>.
72. In **Glasgow City Council v Zafar [1998] ICR 120** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. In **Nagajaran v London Transport [1999] ICR 877** the House of Lords held that the essential question was why the employer had acted in a particular way and that the reason may be a subconscious one. Lord Nicholls pointed out that most people will not admit to acting in a discriminatory way and are often unaware they are doing so.

#### Discussion, analysis and conclusions

##### Protected acts

73. The respondents accept that the presentation of claims for discrimination against the Trust and Mrs Hewison on 18 January 2018 was a protected act, namely the bringing of proceedings under the Equality Act 2010.
74. Ms Palmer submitted that the email dated 13 October 2017 was not a protected act. Although it refers to employment tribunal proceedings, there was no specification that these related to discrimination claims brought under the EqA. We reject that submission, because of the discussions and emails which had passed between the parties up until that date. We have found that Mrs Roy did refer to the earlier history of the proceedings which led to the COT 3 agreement, at the discussion on 9 August 2017. Because of the amount of information provided to him, we can accept that Mr Bullivant may not have taken on board the significance of that on that day. However, Mrs Roy later sent him a copy of the COT 3 agreement on 25 August 2017 which, on its face, makes reference to

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<sup>1</sup> “As Underhill J pointed out in *Martin v Devonshires Solicitors* (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.”

sex and race discrimination proceedings. In the statement sent on that date, Mrs Roy referred to her belief things were starting again. On the 11 September she sent Mr Bullivant a copy of her counter grievance. Although it did not expressly refer to race discrimination, it did emphasise the significance of the COT 3 agreement and her concern that she was being oppressed and bullied and that history was repeating itself. We are satisfied that it is likely Mr Bullivant had read the COT 3 agreement and did recognise that Mrs Roy was contemplating further proceedings concerning race discrimination. This is doubtless why he later asked Mrs Roy specifically which protected characteristic she relied on 7 November 2017, for clarification purposes.

75. We also find that the instigation of the early conciliation process on 28 October 2017 was a protected act. Mr Bullivant became aware of it when ACAS contacted him and he learned the claimant had submitted his name as her representative. Ms Palmer relied on the fact that the initial stages of the process do not require the potential claimant to provide details of the nature of the claim. However because of the history which we have set out, we are satisfied that Mr Bullivant knew that the complaints to which the ACAS referral gave rise included discrimination on the grounds of race.

#### Detriments

76. There was a considerable delay from the provision of case forms to Mrs Roy and the submission of those forms for a legal opinion. The completed case forms were sent by Mrs Roy to Mr Bullivant on 22 November 2017. He admitted that he did not read the entire form and had not appreciated that at the end, the claimant had included substantial details in the additional information section from pages 18 to 56 of the form. There was no adequate justification, on Mr Bullivant's own admission, for not submitting this information to the regional office for onward transmission to the solicitors within a day or two of his receipt of them. It is a detriment for a union member to have to wait for legal advice which is required in good time to ensure that the statutory time limits for bringing employment tribunal claims are met. The detrimental delay in this case ran from the last week in November to 9 February 2018 when the case was handed over to Miss Ratcliffe.
77. We do not accept the case advanced by Mrs Roy, that there was an earlier detrimental delay for which Mr Bullivant was responsible. She suggested that he had informed her in July 2016 that case forms were required for administrative matters and were to be retained in a virtual vault. We can see no good reason for Mr Bullivant to have ever said this. The forms themselves are very clear as to their intended purpose. Mrs Roy was provided with these case forms on two occasions, in August and October. The union administrator had emphasised the need for her to complete them and had offered assistance if she required it. Mr Bullivant also asked the claimant to complete the forms and later chased her for them. It was the claimant's own tardiness which led to the delay up until 22 November 2017. The claimant is an educated and intelligent person and she would immediately have appreciated that the form was for obtaining advice, upon reading the first page.

78. The second detriment was said to have been the involvement of Mr Bullivant in the ACAS early conciliation process. Given that the claimant had chosen to name him as her representative, this would be a hopeless complaint of detriment, because it would be wholly self-inflicted.
79. In closing submissions Mrs Roy clarified what she had meant in respect of this. That was that she believed the handling of the ACAS process should have been undertaken by a union official or representative who was experienced in that procedure. In other words, Mr Bullivant should have passed the matter on to Miss Ratcliffe or another suitable person because he had never dealt with any tribunal claim or the ACAS early conciliation procedure. He agreed he did not fully understand the time limits or the effect the ACAS procedure had upon them. It is apparent from the email communications, that Mrs Roy knew far more than Mr Bullivant. We are prepared to accept that the failure of Mr Bullivant to pass this matter on was a detriment. By his own admission he failed to take the appropriate action when the certificate had been issued, by notifying Mrs Roy of that fact and ensuring that the proceedings were issued within a month of the date of the certificate. This would not have happened had a competent and experienced union officer handled the matter. That said, in mitigation, Mr Bullivant did request an extension of the early conciliation period. We are prepared to accept the clarified description of this detriment.
80. The third detriment was to fail to inform the claimant that the certificate had been issued on 12 December 2017. Mrs Roy repeatedly chased Mr Bullivant for that information and he evaded the question. He only informed her on 16 January 2018 of the date the certificate had been issued, when he provided a copy of it. By this time an important window of time had expired, namely an extension of one month for any acts which had occurred within three months of the first date the claimant entered into the early conciliation process.

Did the detriment occur because the claimant had done the protected acts?

81. Mr Bullivant acknowledges the three detriments we have found and holds himself to blame. He has acknowledged that he failed to provide an adequate and proper service, as a union representative, in his handling of this matter, in particular by failing to recognise the significance of the ACAS early conciliation certificate and informing Mrs Roy that it had been issued. He also accepts he failed to pass on the case for legal advice. He failed to read the form. To compound this difficulty, he repeatedly asked Mrs Roy to provide further information, a better 'synopsis', when the information was already fully set out in the case form. This must have been very frustrating to Mrs Roy and wholly added to an unnecessary delay.
82. The reasons put forward by Mr Bullivant for these errors are that he was inexperienced in the process, had not received any detailed training in early conciliation or employment tribunal proceedings and time limits and, most particularly, he had ceased to work for the union on a regular basis from 9 November 2017. He produced copies of his electronic diary which illustrated the

dramatic change in his working time from the first week in November. Any union work had to be accommodated within his full working day. His new duties included a full clinical workload and the management of eight others, six of whom had adjustments to be accommodated.

83. We recognised that Mr Bullivant's admission that he had made a number of serious errors, was not an easy one to make. It was clear that his knowledge and experience in the early conciliation process was minimal, in that he was learning what to do the first time with Mrs Roy's case. We did not regard his evidence as disingenuous or lacking in credibility. He apologised a number of times to Mrs Roy, in evidence, for his errors.
84. The case put forward by Mrs Roy was that, far from being incompetent, Mr Bullivant was consciously seeking to assist his employer by frustrating her complaint. We reject this. Mrs Roy could not identify any obvious advantage to Mr Bullivant in doing this. It would be a serious breach of his duty to the union and to the members. If that is what he was about, there was no adequate explanation for why he had taken measures to assist her with her grievance and handle the process to move it forward in August, September and October. He expended significant effort and time in frequent correspondence with Mrs Roy, answering her queries to assist, not hampering, the points she wished to make. He chased her for completion of her case forms. He spent time talking to and then writing to the ACAS early conciliation officer. He sought and obtained an extension to the early conciliation period. He asked the early conciliation officer's advice on how to issue the claim. It is frankly inconceivable that Mr Bullivant would have taken these steps if he was wanting to ensure the time limit for bringing the claim expired and otherwise was attempting to undermine Mrs Roy's complaints.
85. Mrs Roy suggests that there were aspects to Mr Bullivant's behaviour which made her suspicious. She said he had been speaking to Mrs Axall in a friendly manner. She suggested he had falsified the case records to state that she had contacted the union on 21 July 2017, when she said this had not happened. These were not particularly helpful points for her. Being on polite terms with a human resources manager can hardly be regarded as the basis from which an inference can be drawn that Mr Bullivant was acting as some form of double agent purportedly representing union members when in fact serving the interests of his employer against them. There was simply no advantage to Mr Bullivant to falsify a record to suggest Mrs Roy had contacted the union on 21 July 2017. It was a baseless and pointless accusation.
86. Mrs Roy relies upon a reference in the record of the early conciliation officer to somebody in management wanting the claimant to leave that department and that being information which must have come to Mr Bullivant from her employer. We accepted Mr Bullivant's account in evidence that this information was likely to have come from the claimant herself and he was merely relaying his understanding of her concerns to the ACAS conciliator.
87. Mrs Roy was also suspicious that there may have been conflicts of interest because Mr Bullivant had been contacted by Mrs Axall with concerns about her

health after the 18 July meeting and he knew that a complaint was being considered by Mrs Wilkes against the claimant but he did not discuss it with her on 9 August. In respect of the first, it does not appear to us to be sinister for a human resources officer to contact a union member's representative if she has concerns about that employee's welfare. As to the second, it is not clear now, many months later, precisely how Mr Bullivant became aware that a manager was considering making a complaint, but we accepted his evidence that he did not know that the complaint would necessarily be taken forward. To raise that possibility, at a time he was listening to the claimant's deep-felt concerns, may well have been ill advised. It would have caused unnecessary and avoidable upset and alarm. None of this establishes there was any conflict whereby Mr Bullivant was knowingly compromising his integrity in acting as Mrs Roy's union representative.

88. In short, the claimant's suggestion that Mr Bullivant had subjected her to the detriments because she had done protected acts was far-fetched. He was a person who had committed himself, over a number of years, to devote his time to assist others with difficulties they encountered with their employer. With a change in duties, he rapidly became swamped with responsibilities to the Trust, which meant he failed to handle the early conciliation process and contact the claimant as he doubtless would have done, had he had more time. He recognised, with some degree of horror and humiliation, that he had failed to forward the certificate to the claimant in early January. That led to him obfuscating when Mrs Roy sought a simple answer as to what had happened, instead of confessing his error as early as he should have done.
89. It has not been necessary for us to have regard to the shifting burden in section 136 of the EqA, because we have accepted the reasons advanced by Mr Bullivant and they establish that the detriments had nothing whatsoever to do with the claimant having done protected acts. In those circumstances the claims must fail. Nor is it necessary, in those circumstances, to consider time limit issues.

Employment Judge D N Jones

14 December 2018

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