EMPLOYMENT TRIBUNALS

Claimants: Mr Dino Pistacchio

Respondent: National House Building Council

HEARD AT: Cambridge on 29-31 October 2018

BEFORE: Employment Judge Michell
Mrs A Carvell
Mr R Eyre

REPRESENTATION: For the Claimant: In person.
For the Respondent: Ms Victoria Brown (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The Claimant's claim that he was subjected to detriments contrary to Section 47B of the Employment Rights Act ("**ERA**") on the ground of making a protected disclosure is not well founded, and is dismissed.

2. The Claimant's claim of less favourable treatment contrary to Regulation 3 of the Fixed Term Employees (Prevention etc) Regulations 2002 ("**the 2002 Regulations**") is not well founded, and is dismissed.

REASONS

BACKGROUND

1. The Claimant commenced employment at the Respondent ("**NHBC**") on 22 August 2016 under a fixed term contract which was at inception due to expire on 31 March 2017, but which was extended in February 2017 to expire on 30 June 2017 ("**EDT**"). Following compliance with the Early Conciliation ("**EC**") procedure (for which 'Day A' was 28 July 2017 and 'Day B' 11 August 2017), on 29 September 2017 he presented a claim alleging detriment for making a protected disclosure contrary to s47B ERA, and

less favourable treatment as a fixed term worker contrary to the 2002 Regulations. The claims are denied by NHBC, which also asserts that most of his claims are out of time.

2. A preliminary hearing was fixed for 10 April 2018 at the NHBC's request to determine whether or not the claim should be struck out for lack of reasonable prospect of success, and/or whether or not a deposit order should be made. However, NHBC later decided not to proceed with that application.

EVIDENCE

3. We heard oral evidence from the Claimant. On behalf of NHBC, we heard from Louise Neilson (Senior Manager- Rewards and Operations), Teresa Parker (HR Team Leader), Andy Gorst (Head of Finance) and Rachel Colclough (Database Administrator). We were referred to a 350-odd page bundle of documents, to which a few pages were added during the course of the hearing. We were also given a document entitled Agreed Facts, which related to a presentation given by the Claimant in late January/early February 2017 and which the Claimant might have caused some ill feeling towards him[1]. We received helpful written submissions from both parties, to which the Claimant and Ms Brown spoke.

4. We found each of NHBC's witnesses to be reliable and credible historians. The Claimant was courteous and helpful throughout the hearing. However, he was somewhat less impressive as a factual witness. His recall appeared unreliable or flawed in respect of several of the matters put to him (such as the allegation that he had told a female colleague he wanted her 'on toast', of which he said he had no memory.) He chose not to challenge several of the matters in NHBC's evidence, in particular, concerning his own alleged conduct. He also made various concessions (recorded below) which had the effect of disposing of several aspects of his claim.

ISSUES

5. The issues were clarified and reduced following the preliminary hearing ("**PH**") on 6 February 2018, and compilation of an agreed list of issues. The issues still for us to determine were further refined and agreed at the start of the hearing, as follows:

Reg 3 of the 2002 Regulations

6. Was the Claimant treated less favourably by NHBC in comparison to a comparable permanent employee on the following respects:

   a. Being orally advised by Teresa Parker between January and April 2017 that he could not make decisions because he was 'only a contractor'?

   b. Being told by Ms Colclough to 'shut up' in early April 2017?

   c. Having his opportunity to apply for a permanent position as a Payroll Specialist 'adversely affected' in April/May 2017? (C accepts that he knew about the role but

[1] Even if this is right- which we doubted- it was not relied upon him as a protected disclosure.

says that he ought to have been told it was being advertised, on about 16 May 2017. He also says he was discouraged from applying for it, because Ms Neilson "continuously asked" him if he intended to apply for it, and because the £45,000 p.a. salary was less than his £50,000 p.a. fixed term salary.)

d. Being denied 11.5 days' accrued holiday pay when given his final pay package on 17 June 2017, despite allegedly being promised by Louise Neilsen such a payment at a meeting on 5 May 2017 when he was put on garden leave?

7. As to the above:

a. The comparators the Claimant relies on are:

i. In relation to (a)-(c) above, Linda Parnham (Payroll Assistant).
ii. In relation to (d) above, Mike Quinton, former CEO.

b. NHBC asserts that all claims are out of time. (As regards the 'holiday pay allegation', NHBC asserts that -at the latest- time runs from the date the Clamant was told on 10 May 2017 he would be expected to take any accrued holiday during his garden leave.)

c. The Claimant accepts that as regards para 6(a)-(d) above, all but the last of those allegations is made out of time, unless (i) some or all of the earlier allegations can be said to be part of a series of "similar acts or failures" for Reg 7(2)(a) purposes, or (ii) the Claimant can show (the onus being on him) that it is just and equitable to extend time.

Section 47B ERA

8. As to this:

a. The Claimant asserts he made a protected disclosure by way of an email dated 27 January 2017 to Louise Neilson, Kate Bradshaw and Linda Parnham (not Mr Gorst, as specified in the list of issues) ("**the 27.1.17 email**"). He asserts that he reasonably believed the 7.1.17 email tended to show a criminal offence was being committed, namely false accounting by way of a manipulation of payroll data between NHBC and HMRC dishonestly to ensure consistency[2].

b. NHBC denies any allegation of material misconduct was made until about 20 June 2018. NHBC claims that at that time, the Claimant raised various concerns he had about deficiencies in NHBC's payroll system -which, it asserts in the ET3, "were already known and had previously been reviewed[3]", and which deficiencies it was part of the Claimant's job to identify and resolve.

9. The Claimant asserts that as a result of the 27.1.17 email, he was:

[2] So, C relies on s43B(1)(a) ERA and s.17(1) of the Theft Act 1968 (false accounting).
[3] Of course, we acknowledge the mere fact that the information in a disclosure is already known to the employer does not prevent it from being a 'protected disclosure'.

a. "excluded from applying for the role of Payroll Specialist in the run up to May 2017";

b. placed "abruptly" on "an isolating form of garden leave" on 5 May 2017; and

c. denied "accrued holiday pay in his final pay".

Again, NHBC denies any form of causally related detrimental treatment, and says that in any event, all his complaints are out of time.

10. So, we must consider:

a. Were some or all of the matters set out at para 8 above (if otherwise out of time) "part of a series of similar acts or failures"? Was it reasonably practicable for the Claimant to bring his s.47B ERA claim in time?

b. Did the 27.1.17 email constitute a protected disclosure?

c. If so, did it cause him to be treated in any of the respects set out at para 9 above, on grounds that he had made any such disclosure?

FACTUAL FINDINGS

11. NHBC is an independent standard-setting body and provider of warranties and insurance for new homes. It has about 200 employees, some 15% of which (according to the Clamant) are fixed term employees.

12. The Claimant joined NHBC on a fixed term employment contract on 22 August 2016. His contract -which he signed- was in NHBC's standard form. It provided that once notice had been given, he could be put on garden leave and asked not to attend work/have contact with co-workers etc. Clause 8.6 provided that any accrued but untaken holiday "shall be regarded as taken during any period of Garden Leave".

13. Mrs Parker (who had joined NHBC in 2014 on a fixed term contract) from time to time discussed with the Claimant various changes to work practises etc which he proposed. We accept her evidence that, though she may have told him that some changes suggested by him would need board approval before they could be actioned, she at no point told the Claimant (nor did she consider) that he could not make various decisions because he was "only a contractor" or "not a member of full-time staff".

14. On 27 January 2017, the Claimant sent the 27.1.17 email, the background to which was an overpayment of about £30,000 made by NHBC to HMRC. This was an issue about which NHBC was already aware. Indeed, the 27.1.17 email itself acknowledges that the matter was "due to be discussed" with HMRC the following week.

15. As the Claimant accepted in his evidence, nothing in the 27.1.17 email suggests that NHBC had or might have been guilty of the criminal offence of false accounting. Rather, the 27.1.17 email points out the fact that NHBC's reporting system was still not

working as it should (as a result of which manual changes regrettably needed to be made from time to time, and NHBC was at that time out of pocket by about £30,000- albeit in relation to accounts totalling nearly £19m).

16. In late January/early February 2017, the Claimant gave a presentation at Mr Gorst's request, in the course of which he apparently was critical of HR. He (accurately) opined that the Agresso system implementation had only partially been successful, necessitating "a lot of manual intervention"; also, that there had been negativity shown towards the system upgrade/changes.

17. On 1 February 2017, Andy Gorst told the Claimant by email that he was extending his contract to the end of June 2017 in order to "progress the Agresso project and support the BAU activities". That extension was confirmed on 16 February 2017.

18. Some issues arose in respect of the Claimant's behaviour at work, particularly when the payroll function was moved from Finance to HR in late March 2017. We accept what Ms Colclough and Neilsen said (for the most part, without challenge) about this in their evidence. In particular, the Claimant (though generally well-meaning) was occasionally inappropriate, as well as irritating and noisy to work near. He told HR Team Leader Teresa Parker he would like her "on toast". He regularly sprayed his aftershave (which he kept on his desk) at Mrs Parker, which annoyed her. He pulled faces at Ms Colclough. Once, he prompted Ms Colclough to tell him to "shut up" when he persisted in singing close by to her desk.

19. The Claimant accepted in cross examination that, although he could not recall anyone else being told to "shut up", his upbraiding by Ms Colclough had nothing to do with his fixed term status (or any 'protected disclosures' on his part). Rather (he said, and she partially accepted), it was because she was irritated about other unrelated matters. We agree that fixed term status was irrelevant. The Claimant was being irritating, when Ms Colclough had other things on her mind.

20. In April 2017, Ms Neilsen started to prepare a job description for a new role of Payroll Specialist. It was to be Grade 12 (i.e. the same as the Claimant's role), with a salary of £45,000 p.a.

21. We find that the level at which the proposed salary was set had nothing to do with the Claimant- still less, any protected disclosure by him or his fixed term status.

22. Ms Neilsen also explained to us, and we accept that -as would have been known to the Claimant- NHBC allows a 10% 'negotiation leeway' when setting the salary for a role. Hence, in fact, the role could have attracted a total salary of £49,500 p.a.

23. Ms Neilsen made the Claimant aware of the role. She also (by an email on 3 May 2017, to which he did not respond) shared the job description with him. She made it clear to him during 1-2-1s that he was welcome to apply for it. She thereby, we find, gave him reasonable notification of the vacancy for Reg 3(7) purposes.

24. At no point did she "discourage" him from making an application. (Even if -which we reject on the facts- Ms Neilsen "repeatedly asked" the Claimant if he was going to apply for the job, we do not accept such requests could sensibly be said to amount to "discouragement" on her part.)

25. In fact, though the Claimant did ask her if he could do the job on a 4-day week basis for £45,000 p.a.- he was told that was not possible- he did not apply for the full-time role at any time. This, despite the fact that he was fully aware the job was to be advertised, and knew that such adverts appear externally on the NHBC's website

26. In fact, by a message sent on 12 April 2017, the Claimant made it clear to a colleague that although "his job" was to be "advertised shortly", he was not going to apply for it.

27. We unhesitatingly reject the Claimant's assertion that he remained interested in the job, and was simply waiting to be told that it was being advertised. If he had wanted the job, he would and should have asked (for example) Louise Neilson, with whom he exchanged texts after he had been put on garden leave, for an update.

28. On 5 May 2017, the Claimant was placed on garden leave, during a meeting with Carol Davies and Ms Neilsen and in anticipation of the expiry of his contact on 30 June 2017. This was in part because the final stages of the Agresso upgrade were coming to a close (as was his fixed term) meaning there was less need for his Payroll Manager function, and in part because of difficulties there had been with co-workers, as described above, which were causing some tension.

29. The 5 May 2017 meeting was reasonably cordial. The Claimant said he "hated" working at NHBC. He agreed with being put on garden leave. He asked for confirmation that he would be paid what was due to him, and was answered by Carol Davies in the affirmative.

30. As a result, the Claimant was duly paid a discretionary bonus on termination. However, Ms Neilsen confirmed in her evidence (and we fully accept), the Claimant was not promised that he would be paid the 11.5 days of accrued holiday in addition to salary paid whilst on garden leave. Neither his contract, nor common sense, required such an arrangement. Moreover, in so far as the Claimant may have misunderstood matters at the 5 May meeting, it was thereafter clearly explained to him in Teresa Parker's 10 May 2017 letter (without complaint at the time from the Claimant) that, in accordance with Clause 8.5 of his contract -and, we accept, common practise at NHBC- the Claimant was to be regarded as having taken any accrued leave during his Garden Leave. He was therefore, as promised by Ms Davies, paid what was due.

31. In fact, in the course of his cross examination the Claimant conceded that even though (on his case) Ms Davies had 'broken a promise' to pay him his accrued holiday on top of the Garden Leave salary, any such 'broken promise' was *not connected* in any way to his fixed-term status, or to any protected disclosure on his part.

32. Moreover, the Claimant also conceded that his 'comparator' Mike Quinton was doing a very different (far higher level) job, and was no longer with NHBC at the relevant time. (For what it is worth, the Claimant produced nothing to support his contention that Mr

Quinton was paid accrued holiday pay on top of monies paid whilst on garden leave, in the context of a settlement. But this would not have helped him in any event given para 31 above.)

33. The Claimant asserts that he was subjected to an "isolating" form of garden leave. We reject this assertion. Garden leave usually leaves an employee somewhat cut off. That is usually how it works, and is supposed to work. Moreover, we also note that (although he no longer had access to internal emails) there were several text messages and other communications between the Claimant and management during his garden leave. So, the Claimant was not as 'isolated' as he sought to suggest. In any event, we completely reject any suggestion that his garden leave or any "isolation" which accompanied it was somehow linked to the 21.1.17 email (and/or the fact that the Claimant had fixed term status).

34. On about 16 May 2017, Ms Neilsen notified staff via an internal email -which the Claimant would probably not have seen- that the Payroll Specialist job was being advertised. The job was then advertised, both internally and externally[4], that day.

35. The Claimant's contract came to an end on 30 June 2017.

36. On 5 June, the Claimant brought a grievance about various matters (which did not include several of the issues relied on in his tribunal claim). At a grievance hearing on 20 June 2017 he alleged, for the first time (and after all 'detriments'), that he had disclosed "a fraudulent process on the HMRC account amounting to £30,000" which NHBC had "covered up". (For the avoidance of doubt, we were not shown any evidence which suggested any such "cover-up", nor any basis for founding a reasonable belief in any such a 'cover-up', and we reject the allegation.) NHBC asked the Claimant asked to provide further details, which he duly set out (for the first time) in a letter dated 23 June 2017.

37. The Claimant's grievance was rejected. The grievance hearing notes were not verbatim. But they do not contain any assertion that the Claimant was treated less favourably as a result of the 27.1.17 email. His appeal against rejection of the grievance was not upheld.

38. In his tribunal claim, the Claimant did not request that his ET1 be forwarded to the relevant regulator. Nor does it appear that he made any assertion to HMRC either during or post-employment of 'fraud' etc by NHBC.

THE LAW

39. Ms Brown's written submissions helpfully set out the relevant legal principles. In particular:

    a. Section 48 of ERA applies a 3-month time limit to a s.47B ERA claim, save where the act or failure about which complaint is made is part of a series of similar acts or

[4] The Claimant thereby had reasonable opportunity of reading the advert, via NHBC's external website. However, he told us he did not look for it there -despite the fact that he had previously applied for other NHBC roles via the website, and knew the site would advertise such roles.

failures, or where the claim is brought within such further period as the tribunal considers reasonable, where the claimant shows it was not reasonably practicable to present the claim in time.

b. Reg 7 of the 2002 Regulations imposes a similar test, albeit subject to a 'just and equitable' (rather than 'reasonable practicability') exception.

c. Where a series of similar acts are alleged, the last one (at least) must be in time. See **Royal Mail Group Ltd v. Jhuti** UKEAT/0020/16.

d. A protected disclosure must (amongst other things) disclose facts, rather than mere concern or dissatisfaction. Sufficient specificity, and sufficient factual content, is required to allow it to be capable of tending (in the reasonable belief of the person making the disclosure) to show at least one of the matters listed in s.43B(1)(a)-(f). See further **Cavendish Munro Professional Risks Management Ltd v. Geduld** [2010] ICR at para 24, and **Kilraine v. LB Wandsworth** [2018] EWCA Civ 1463.

e. The burden passes to an employer to refute causation only once the claimant has proven on the balance of probabilities that he made a protected disclosure, and sustained detriments.

f. Reg 2 and 3 of the 2002 Regulations require actual comparators, who (amongst other things) are employed at the material time, and on "the same or broadly similar work" as the complainant.

g. Breach of the 2002 Regulations is capable of objective justification. See Reg 4.

APPLICATION TO THE FACTS

40. The claims all fail:

a. **Time.** The claims are all out of time. We therefore lack jurisdiction to hear them.

i. We think Ms Brown is right in saying that, in respect of the perhaps most recent matter about which complaint is made -i.e. the holiday pay allegation- time begins to run from the date the Claimant was expressly told (on 10 May 2017) he would not be paid 'extra' holiday pay, rather than from the date of the Claimant's final pay-out on 17 June 2017.

ii. However, even if we assume that 17 June 2017 is the material date for time purposes in respect of the holiday pay allegation, the Claimant (as explained above) conceded in cross examination that Ms Davies's 'broken promise' was *not connected* with his 'protected disclosure' or fixed term status.

iii. Hence the holiday pay issue cannot be relied upon as (and cannot anyway sensibly be characterised as being) the 'last in a series of similar acts'.

iv. The next closest-in-time alleged detriment was NHBC's alleged failure to tell the Claimant about the job advertisement. Ms Neilson explained that other employees were told about the advert on 16 May 2017. Following s.48(4)B ERA/Reg 7(2)(b) of the 2002 Regulations, even if it could be said that the Claimant ought to have reasonably been told at about the same time, and was not, the claim in respect of that allegation was brought about 1 month too late.

v. The Claimant did not persuade us that it was just and equitable to extend time (or that it was not reasonably practicable to bring the claim in time). He told us he did not have legal presentation for a while. That, with respect to him, is plainly not enough. We also reject any contention that the alleged detriments were a series of similar acts. In any event, see sub para (iii)&(iv) above.

b. Moreover, we consider the various claims would all bound to fail, even had they been brought in time.

i. **Protected disclosure:** We do not consider that the 27.1.17 email amounts to a protected disclosure. All it does is (not for the first time) remind its recipients of the obvious and known fact that NHBC needed to 'get its house in order' as regards discrepancies/inaccuracies. It does not satisfy the requirements of disclosure of information tending to show (in the Claimant's reasonable belief) the matters set out at s43B(1)(a) ERA.

ii. Even if we are somehow wrong about this, we cannot see how it can sensibly be said that the 27.1.17 email had any material bearing on any of the so-called 'detriments' relied upon by the Claimant, for the reasons explained above.

iii. The fact of the February contract extension, and temporal delay between 27.1.17 and any so-called 'detriment', further militates against the claim.

iv. **Fixed term status: As to this:**

1. Ms Colclough's telling the Claimant to 'shut up' and the holiday pay issue had no causal relation, as the Claimant accepted.

2. Ms Parker did not make the remarks relied upon. The Claimant's fixed term status had nothing to do with how he was treated in respect of the Payroll Specialist vacancy (which vacancy it seems obvious he did not want to fill, anyway).

3. The Claimant has failed to provide appropriate comparators.

4. It was therefore unnecessary to consider the issue of justification under Reg 4.

OTHER MATTERS

41. It follows that the TPH which was provisionally listed for 1 hour on **7 January 2019** may now be vacated.

_____

Employment Judge Michell, Cambridge

Date.....07/11/2018.....

.....

FOR THE SECRETARY TO THE TRIBUNAL