Case Nos. 2302834/15,
2300533/16, 2403254/16

EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **Mr G Henderson**
Ms J Forecast

BETWEEN: **Mr T Wishart** **CLAIMANT**

AND

Peninsula Business Services Limited **RESPONDENT**

ON: **5-8 and 12-15th November 2018**

Appearances
For the Claimant: In person
For the Respondent: Mr Z Sammour, counsel

REASONS

Written reasons prepared at the request of the Claimant following oral Judgment with reasons delivered in Tribunal and a written Judgment sent to the parties on 5th December 2018.

Background and Issues.

1. The Respondent is an employment law consultancy providing employment advice, as well as assistance and representation to employers in tribunal cases. Its head office is in Manchester.

2. The Claimant is of mixed (African – Caribbean/white) heritage. He was employed by the Respondent as a legal services consultant from 7th September 2009 until his summary dismissal on 26 May 2016. His job was to conduct litigation in the Employment Tribunal on behalf of the Respondent's clients, including advocacy at hearings. Until the events leading to this claim, the Claimant had had no difficulties in his employment at, or his relationship with, the Respondent.

3. The Claimant has presented three separate claims, the first two being presented while the Claimant was still in employment. The claims have been combined for hearing and the combined claims are for:

a. Direct race discrimination
b. Harassment related to race
c. Victimisation.
d. Detriment on the ground that he had made protected disclosures.

Time issues arise in respect of some of those complaints. A claim of unfair dismissal had been dismissed at an earlier hearing as being out of time. The specific claims are as follows.

4. Direct Race discrimination. The Claimant complains that the Respondent treated him less favourably because of his race contrary to section 13 of the Equality Act 2010 by the following acts. He relies on a hypothetical comparator.

4.1. Terry Clarke sending the Claimant an email on 1 April 2015 notifying the Claimant of 10 client complaints;
4.2. James Potts' email to the Claimant on 15 April 2015 notifying him of a possible breach of IT protocols;
4.3. including the Claimant in the "at risk" pool during the 2015 redundancy process;
4.4. James Potts' grievance outcome letter;
4.5. failure to deal with the Claimant's appeal against the grievance outcome;
4.6. suspending the Claimant;
4.7. withdrawn
4.8. not sending the Claimant a new mobile phone at the same time as other employees; and
4.9. dismissing the Claimant

5. Harassment related to race. The Claimant complains that the Respondent harassed him, (as defined in section 26 of the Equality Act) by:

5.1 the tone and content of an email from Mr Clarke on 1 April 2015;
5.2 Mr Potts conducting what the Claimant perceived as a disciplinary matter; and
5.3 the tone and content of Mr Clarke's email notifying the Claimant of a client complaint on 7 July 2015.

6. Victimisation. The Claimant claims that the Respondent victimised him contrary to section 27 of the Equality Act 2010 because of an email which he sent to Terry Clark on 1 April 2015 (the protected act). The alleged acts of victimisation are:

6.1 Mr Potts conducting what the Claimant perceived as a disciplinary matter;
6.2 failure to deal with errors in the scoring process, allegedly communicated to the Respondent;
6.3 not appointing the Claimant to the post of Litigation Manager;
6.4 the tone and content of Mr Clarke's email notifying the Claimant of a client complaint on 7 July 2015;

6.5 Mr Potts not upholding the Claimant's grievances on 17 July 2015;
6.6 Withdrawn
6.7 suspension of the Claimant on 6 August 2015 pending the outcome of a disciplinary investigation;
6.8 failure to provide the Claimant with a replacement mobile phone at the same time as other employees;
6.9 lawfully deducting an overpayment paid whilst the Claimant was on jury service through one salary payment, instead of spreading the payment; and
6.10 the Claimant's dismissal.

Detriment on the grounds that the Claimant made a protected disclosure.

7. It is the Claimant's case that the Respondent subjected him to a detriment because of an email which he sent to Ms English at 18:24 on 10 December 2015 (the protected disclosure). He complains that the following acts were done because that email.

7.1 Mr Cater inviting the Claimant to a disciplinary hearing on 17 December 2015 by letter of 11 December 2015;
7.2 Mr Cater rearranging a disciplinary hearing for 22nd December by letter of 18th December with insufficient notice;
7.3 Ms Robertson allegedly refusing to provide replacement toner cartridges to the Claimant by letter of 12 January 2016;
7.4 Ms Robertson allegedly refusing to authorise the Claimant expenses claim by letter of 12 January 2016; and
7.5 Ms Robertson allegedly refusing to explain why the Claimant's chasing emails about expenses were ignored by letter of 12 January 2016.

8. At the start of the hearing EJ Spencer raised with the parties that she had been the Employment Judge at an earlier Preliminary Hearing in this case which took place on 10th December 2017. This hearing was of some relevance to the issues now before us. She asked the parties if there was any reason why either believed that she should not hear this case. Both parties confirmed that they had no objection and that, in any event, there was no dispute between the parties as to the discussion which took place or the Orders made at the Preliminary Hearing.

Evidence

9. The Tribunal had a bundle running to over 800 pages and a supplementary bundle. We heard evidence from the Claimant. For the Respondent we heard from the following:

a. Mr T Clarke, Joint Assistant Head of Legal Services at the Respondent (and now retired.)
b. Mr J Potts, In-House Solicitor.
c. Ms A Robertson, Joint Assistant Head of Legal Services.

d. Mr R Cater, Litigation Manager, and dismissing officer.
e. Mr B Stern-Gillet, Legal and Advisory Director who heard the Claimant's appeal against his dismissal.

Findings of Relevant Fact

10. The Claimant was a legal services consultant for the Respondent. He was home based, representing the Respondents' clients in the Employment Tribunals. He was provided with office equipment including a photocopier, PC and printers, and a Blackberry to assist with his work. The Claimant worked largely autonomously. Once he received the file, he would be responsible for all aspects of the claim including interlocutory matters, dealing with disclosure, bundling, the preparation of witness statements and for the advocacy in the tribunal itself. The Claimant complains that sometimes he would get cases at the last minute but essentially, once the file was handed over to him, he would be solely responsible for that claim and kept the files at home.

11. The Claimant explained that he had specialised in employment law for over 20 years and had represented employees or employers in hundreds of cases.

The proposed redundancy, Mr Clarke's email of 1st April 2015 and the subsequent grievances.

12. Following the introduction of tribunal fees, in January 2015 the Respondent proposed to reorganise its Legal Services Department. In particular it proposed to reduce the number of legal services consultants from 20 – 12. The Claimant was informed that he was at risk of redundancy on 29 January 2015 (175) and thereafter there was a period of collective consultation. The Respondent also invited applications for a newly proposed role of Litigation Manager to oversee the work of the advocates. The Claimant and his colleagues were consulted about the criteria to be used in the selection of individuals for redundancy.

13. The scoring involved an objective element, based on length of service, disciplinary record and sickness absence. Part of that scoring involved an assessment of the complaints received about an employee's work (206.3). It also involved a subjective element which required an interview with each advocate to be scored by Ms Robertson and Mr Clarke.

14. It was Mr Clarke's evidence that as the scoring criteria included the advocate's disciplinary record, a moratorium was imposed on the internal investigation of client complaints during the period whilst the scoring was being undertaken. Although the advocate would be informed of the client complaint and asked for a response (in order that the Respondent could respond to the client), the internal decision as to whether any disciplinary or further action was required in respect of those complaints was put on hold. We accept that that is what happened, but it is unfortunate that the

Respondent did not inform any of the advocates that this was the approach that they were taking.

15. The advocates were all interviewed, and the scoring completed by 31 March 2015. The Claimant and the other advocates were not however informed of their scores until early June.

16. Once the scoring had been done, Mr Clarke reviewed the number of complaints which had been received during the consultation process. This identified that there were 10 client complaints about the Claimant. A number of other advocates had also had complaints against them, but the Claimant had the highest number by a significant margin, and no other advocate had had more than 4 complaints.

17. The Respondent's standard practice when dealing with client complaints was first to contact the advocate about whom the complaint had been made in order to get their initial feedback. At that stage this was merely an enquiry to establish if there was an explanation. If there was no easily satisfactory explanation it might be necessary to start a disciplinary investigation.

18. On 1st April Mr Clarke sent an email to the Claimant (257) which began the chain of events which led to this litigation. He told the Claimant that "*In order to be fair I have refrained from raising concerns that I might have with individual consultants during the redundancy consultations. Now that those had concluded I need to bring to your attention a number of issues of concern relating to the following cases."* He then listed 10 files and concluded "*As you can see, there are quite a few cases, and I confirm that I will be writing to formally upon your return to work in regard to these*."

19. The Claimant was on annual leave with his family and abroad when he received that email. He responded later that day as follows: -

> *"I am disturbed that you should have waited to raise these issues with me until I am on leave and cannot properly respond. I will tell you now Terry that there have been a number of concerns I have had over the previous months about your treatment of ethnic minority employees I have represented and their place in the organisation. The emails you send I consider nothing more than bullying and intimidation. As you have chosen to proceed in this manner as, I assume, the representative of Peninsula, I think I now need to deal with any concerns you purport to have via my union. I assume that each and every complaint you refer to you have relevant evidence because if you don't, I assure you I will pursue formally. I take your sending me the email you did whilst I am on leave as bullying! And to avoid you saying whether this email amounts to a grievance, it does as a start. I consider your email to me as amounting to a threat also. I expect my formal complaint about your behaviour towards me to be dealt with independently."*

This email is relied on as a protected act.

20. In 9 out of the 10 cases referred to in Mr Clarke's email the Claimant had been sent a copy of the client complaint in the usual way, so he was not unaware that complaints had been made on those files. It was therefore a rather surprising email to send in response to what appears to be a proper management email, especially in circumstances where there was no history of any prior animosity between the Claimant and Mr Clarke. In cross examination the Claimant accepted that it was usual for him to receive emails while he was on holiday and that he had not previously complained about this,

21. Some of these matters about which complaints had been made were fairly minor, such as a client's inability to get hold of the Claimant and/or his failure to return their calls. One of the complaints however was an allegation the Claimant had settled a case without reference to the client.

22. The Claimant's evidence was that he was shocked by this email because (1) he was on leave and Mr Clarke knew or ought to have known he was on leave, (2) he did not know what the "issues of concern" were, (3) he believed that he had responded to management regarding each of the client complaints and that they were now resolved. He said that some of the complaints went back to middle of January. (4) He was not aware that the consultation process had been concluded as he had not yet had the outcome of his assessment. He said (WS para 37) that he "was aware of the Respondent's treatment of my other 2 BME colleagues and the total absence of any senior BME staff within the organisation, and that BME staff seem to feature very significantly in disciplinary matters; 2 of whom I had represented. So, of course, it was not unreasonable to think that I was about to become the 3rd."

23. Mr Clarke told the Tribunal that the Claimant had represented two BME individuals, Ms O and Mr B, at disciplinary hearings before him. In his witness statement (paragraph 32) the Claimant's evidence is misleading in that he seeks to give the impression that these individuals were dismissed as a consequence of those disciplinaries.

24. It was Mr Clarke's unchallenged evidence that the Claimant had been extremely helpful at these disciplinary hearings and there had been no issues. In Ms O's case, the Claimant had asked Mr Clarke whether, if she admitted the charge but said it was a mistake, she would be sanctioned accordingly. Mr Clarke had accepted this submission and the sanction was a written warning which was the lowest possible sanction in the circumstances. (Although Ms O had eventually been dismissed that was unrelated to the matters dealt with the hearing at which she had been represented by the Claimant.) In respect of the other employee (Mr B) he had also been charged with gross misconduct and had been given the lowest possible sanction – a written warning. Although Mr B was dismissed, he was not dismissed by Mr Clarke. Neither employee had

been dismissed as at 1st April 2015 when the Claimant sent his email to Mr Clarke.

25. Mr Clarke's unchallenged evidence was said that between January 2014 and his retirement he had dealt with 5 issues of gross misconduct for against white employees and once against a black employee. 2 of the white employees had resigned and 2 he had dismissed. In 16 years he had only ever dismissed one black employee (Ms O), who had gone to Nigeria and who was dismissed in absentia.

26. The Tribunal asked why the Claimant believed that Mr Clarke had treated him differently to white staff. The Claimant said that he believed BME staff were disproportionately subject to disciplinary procedures and dismissed and were "part of a line of people who suffered this treatment". As far as he was aware the same treatment had not been meted out to white staff. However, when pressed, the Claimant accepted that he had no information as to how any other staff had been treated. (Surprisingly, for someone who is an experienced representative, he has not sought out this information during the litigation process.)

27. We have set out at some length the Claimant's evidence as to the basis of his belief because the Claimant relies on his 1st April email as a protected act for the purpose of his victimisation claim and because it is the Respondent's case that this was sent in bad faith.

28. Mr Clarke was furious when he received the Claimant's email. He immediately drafted a counter grievance against the Claimant, accusing the Claimant of making false, vindictive, mischievous and slanderous allegations and demanding that he be subjected to the disciplinary procedure. (259) He gave this to Ms English, the director, who persuaded Mr Clarke to calm down and withdraw it. The Claimant was unaware of this putative counter grievance until it was disclosed in the course of this litigation in September 2017 (CWS para 41).

29. On 7th April Mr Potts wrote to the Claimant to arrange a meeting to consider his grievance against Mr Clarke (261). In the same letter he told the Claimant that at the same meeting he "*would also like to investigate the issues of concern identified by Terry Clarke within his email to you on 1 April 2015". C*orrespondence followed about finding a suitable date for the meeting, the Claimant being initially hard to pin down.

30. On 10th April an audit of email correspondence identified that the Claimant had emailed documents and information from his work email address to his personal email address. This was contrary to the Respondent's policies.

31. On 15 April Mr Potts wrote to the Claimant stating that the grievance meeting would take place on 24th April 2015 and that "*in addition to the concerns expressed in Terry Clark email to you on 1 April 2015*", he wanted to discuss the Claimant's alleged breach of the Respondent's IT

policy and stating that he would also require the Claimant's explanation on that issue.

32. The Respondent has an IT Policy which prohibits emails to be sent from an employee's work email to his home email. Audits are routinely undertaken by the IT department who had picked up this email traffic from the Claimant on a routine audit. If the breach was minor and did not contain confidential information employees would be sent a letter of concern reminding them of the Policy ((156-160).

33. The Claimant responded with a lengthy email which inter alia said this:

"and what you have done in your latest email is so obviously an act of victimisation and probably direct discrimination than you that you cannot possibly act impartially. This way of operating within the organisation of seeing some employees who complain or raise issues as troublemakers to be got rid of is all too familiar" and that *"this is clear victimisation and should this matter proceed to what you seem determined to try and engineer, then I will hold you amongst others, personally liable for the discrimination… I would wish you to take what I have said above very seriously as I consider your attempted bullying and victimisation of me wholly unacceptable." (299)*

At the time that he wrote this email the Claimant had never met or spoken to Mr Potts.

34. Mr Potts responded to the Claimant on 16th April apologising if he felt aggrieved at the tone or content of his email but that the Respondent had addressed the IT policy issue with other employees in the same way and that he had not acted in a discriminatory manner.

35. On 23 April the Claimant telephoned Mr Potts. The call was recorded. The Claimant wanted to do a deal. He would drop his grievance if the Respondent dropped the disciplinary matters against him. The Claimant said that he was *"not particularly concerned about or enthusiastic*" about the grievance that there would be no winners. *"I am more than content to forget any grievance and move on if whoever is also prepared to forget about this ...slap me over the wrist or whatever they want to do... and move on rather than spending days and days and days you know having hearings here and that this and the other and getting other people involved who need be involved"….."It just seems that things have got out of hand here, maybe on both sides, on my side as well and I was very upset and this is all very unnecessary it is taking up a lot of time and a lot of people are going to be involved that don't need to be involved and I think both party should move on including me."*

36. Mr Potts was non-committal during the call and said that he would get back to the Claimant. Having discussed the proposal with the senior management he wrote to the Claimant on 29th April rejecting the proposed deal and proposing that they move on to arrange the meeting.

37. The Claimant met with Mr Potts on 14th May to discuss his grievance.

38. Following that meeting the Claimant emailed Mr Potts asking for:

    a. confirmation that his email of 15th April 2015 (alleging that Mr Potts had victimised him) would be treated as a further formal complaint;
    b. raising an additional formal complaint that Mr Potts had not removed himself from dealing with his grievance
    c. raising a further grievance about the suspicious manner in which the alleged breach of IT policy had arisen.

39. Mr Potts confirmed that the grievances against him would be passed to Mr Cater to investigate separately. A meeting was arranged for 1st July. The Claimant was informed that his first grievance would be stayed pending the outcome of the 2nd grievance. It then transpired that there were no meeting rooms available at Peninsula's office on 1st July and Mr Cater wrote to the Claimant on 15 June proposing an alternative date. The Claimant's response was to accuse Mr Cater of victimisation in seeking to rearrange the date for the grievance hearing. He said that grievance should be "cancelled", and he would "now proceed in a manner that I was trying my best to avoid but should give me no alternative."

40. Since the Claimant had cancelled his grievance against Mr Potts, Mr Cater proposed that Mr Potts should now deal with the grievance. The Claimant made no objection.

Redundancy process

41. In the meantime, and concurrent with these events, the redundancy process continued. The Claimant was sent his scores on 5 June 2015 (351). He had been placed number 16 out of the 20 consultants. He was informed that he remained at risk pending further consultation with individuals who remain at risk. The individual who had been placed at number 15 in the pool (N) was also sent a letter stating that she remained at risk. We have no information as to the ethnic origin of that individual.

42. In the same letter Ms English informed the Claimant that the Respondent had reconsidered the number of advocates to be retained and had decided to retain 14 consultants, rather than only 12 as initially envisaged.

43. On 6 June 2015 the Claimant wrote to Ms English to make two discrete points. The first point was that some sickness absence following a work place injury should not have been counted in the scoring. The 2nd point was that if 14 consultants were now to be retained, and discounting 3 higher scoring individuals who had or would be leaving, he should not be at risk.

44. The Claimant had no response to that letter until he chased in September when he was then told that he was no longer at risk.

45. What in fact occurred, unknown to the Claimant at that time, was that Ms English had passed his query on to Ms Robertson. Ms Robertson responded to Ms English by acknowledging that he had been wrongly scored in respect of sickness and should in fact have scored an additional 2 points. This would have moved him up to number 14 in the matrix, and above one employee (N). However, Ms Robertson notes that on that basis he would remain at risk until the Respondent had dealt with the appeal of the employee who had been notified of his dismissal by way of redundancy.

46. Unfortunately, having done that analysis the Respondent did not pass that information on to the Claimant.

Mr Clarke's email of 7th July

47. On 7th July Mr Clarke received a further complaint about the Claimant from another client. Mr Clarke emailed the Claimant (375) asking for his explanation regarding the allegations made by the client. He also raised the fact that the Claimant's email account was still sending an out of date "out of office" message.

48. This email prompted a furious response from the Claimant (377) "*yet another accusatory and aggressive email from you Terry whilst I am on jury service. You are directly interfering with my service by sending me this email which in fact is wholly without foundation. I am so angry that you should semi-this I will raise it with the judge this morning."* Mr Clarke responded that (a) had not been aware that the Claimant was on jury duty and (b) did not see how his enquiry was accusatory or aggressive. (It was not.) He said he would wait for a response when the Claimant returned from jury duty. The Claimant responded that that it was clear beyond any dispute that Mr Clarke had an issue with him and he wanted this matter treated as a formal complaint against him.

49. The same day Mr Potts wrote to the Claimant saying that he would deal with this complaint as part of his overall consideration of the first grievance.

50. Mr Potts sent his grievance outcome to the Claimant (410) on 17 July 2015. It dealt with (a) the Claimant's complaint about Mr Clarke's treatment of him and other BME employees in terms of discipline and recruitment into managerial positions (b) the complaint about Mr Clarke's email of 1 April 2015 sent to him while he was on annual leave and (c) the complaint about Mr Clarke's email of 7th July 2015. It is on its face a thorough report. The grievance was rejected save only that there was an acknowledgement that Mr Clarke should not have sent him the 1st April email while he was on annual leave. Mr Potts also recommended mediation with Mr Clarke as the way forward. The Claimant did not appeal

that outcome. Mediation did not take place as the Claimant was suspended and then went on sick leave in early August.

Complaint about pay

51. The Respondent does not pay employees for jury service and pays only SSP when employees are ill.

52. The Claimant was on jury service for 11 days during July 2015. A deduction £1,903.80 was made in the Claimant's August pay. The Claimant queried this deduction with Ms Robertson on 1 September 2015 (485). He also asked for the deduction to be made over a period of 6 months as the deduction was causing him hardship.

53. Ms Robertson investigated with payroll (490). On 2 September Ms Robertson responded to the Claimant to explain that £494 was a deduction for jury service and the rest related to sickness absence. (The Claimant had begun a period of sick leave on 10th August.) She declined to spread the deduction over a number of months as requested, as she saw no reason to depart from the Respondent's standard practice.

Litigation manager

54. As part of the re-organisation being undertaken by the Respondent, a new post of Litigation Manager was created. Unlike previous management roles this new post was open to field-based staff who wished to apply. The Claimant had initially decided not to apply (227) but after an email from Ms English in which she pointed out to him that the role was open to field-based consultants he decided to apply (229). He was interviewed for the role on 13 April 2015 by Mr Clarke, Ms Robertson and Ms English.

55. Candidates were scored against competences administrative competence, line management, technical competence and strategic overview. Mr Cater, who was then employed as a Team Leader (a more senior role to that of the Claimant), also applied. On 7th May the Claimant was informed that his application had been unsuccessful. Mr Cater had scored highest at the interviews and was appointed to the role with effect from 1 June 2015.

56. The Claimant is aggrieved that Mr Clarke was on the interviewing panel at a time when the Claimant had a live grievance against him.

57. Comments on the interviewing score forms show that Ms Robertson commented in relation to the Claimant's "strategic overview" that he didn't "walk the walk". Mr Clarke, in marking the Claimant for "administrative competence" commented that the Claimant "talks the talk but…". The Claimant believes that this was material from which the tribunal should infer that Ms Robertson and Mr Clarke were colluding and that their marks were tainted by knowledge of the grievance. Despite this the Claimant

does not seek to challenge the scores which he received nor those of Mr Cater.

58. The Tribunal accepts the evidence of Mr Clarke and Ms Robinson that Mr Cater was head and shoulders above the other candidates and the obvious person to appoint. Both of those witnesses came across well in evidence and contemporaneous documentation in the bundle supports that evidence. Each candidate was scored independently by each of the 3 members of the interviewing panel. Their decision-making was supported by detailed contemporaneous notes which were not challenged. There was a significant difference in the score achieved by Mr Cater and the score achieved by any of the other candidates. The Claimant came 6th out of the 7 candidates. While we might understand why the Claimant was concerned that Mr Clarke was on the panel, the evidence in the bundle suggests that Mr Cater was appointed on merit and the Claimant had not objected to Mr Clarke's presence on the interviewing panel.

59. Suspending the Claimant In the meantime Ms Singer had been asked to investigate the Client complaints against the Claimant. She was asked to look at the 10 matters which had been the subject of Mr Clarke's 1st April email and 2 subsequent complaints. Those investigations took place between 7th July and 3rd August.

60. On 6th August Mr Cater wrote to the Claimant enclosing a copy of Ms Singer's report and informing him that three of those allegations could amount to gross misconduct if he was unable to provide a satisfactory explanation and that his employment was at risk. He was required to attend a disciplinary hearing on 14th August 2015. In the meantime, the Claimant was suspended and instructed not to contact anyone connected with the investigation or to discuss the matter with any other employee or client. If he wished to bring a colleague to the disciplinary hearing the Claimant should contact Mr Cater who would approach them on his behalf.

61. Mr Cater required the return of all the Claimant's files and arranged for their collection the next day.

62. In the event the disciplinary hearing did not go ahead on 14th August as on 10th August the Claimant commenced a period of sick leave.

Mobile phone

63. The Respondent intended to replace the mobile phone of all its employees. The Claimant was sent an email on 21st July notifying him that he was due an upgrade, to be delivered to his home on 14 August 2015. The Claimant did not receive a phone on the 14th. The Claimant complained to Ms English (476) who responded (477) that she had understood that his replacement phone was to have been handed to him at the meeting scheduled to take place on 14th August (and then postponed) and that the fact it had not been sent out to him was an

oversight. A new phone was sent to the Claimant by special delivery on 25 August 2015

The protected disclosure.

64. The Claimant issued his first claim on 22nd September 2015. A preliminary hearing in that claim took place on 10th December 2015. The Claimant was at that time still employed by the Respondent but on extended sick leave.

65. At the Preliminary Hearing the Respondent applied for a stay of the proceedings pending the conclusion of the disciplinary hearing. No disciplinary hearing had taken place because of the Claimant's continuing ill-health. EJ Spencer enquired whether the Respondent had investigated whether the Claimant might be fit to attend a disciplinary hearing (as opposed to being fit to attend work) and the Respondent said that they would make enquiries. The Respondent then said that they anticipated that the disciplinary process would have completed by the end of February and, with the Claimant's consent, the proceedings were stayed on that basis.

66. Immediately before that hearing the Claimant had been given a letter (518) from Ms Robertson. The Claimant had by then been on sick leave since 10th August and was signed off until 15 January 2016. The letter asked the Claimant to attend an occupational health appointment with a view to assessing his fitness for work. It then continues "in addition to this I have to advise you that the judge in a case for which you had conduct (Grzegorczyk v Nifty Lift) has ordered that we provide a medical report of your fitness and this is another factor that has prompted me to write to you at this stage."

67. Later that day at 18.24 the Claimant wrote to Ms English, copied to Ms Robertson. (This letter is relied on as the protected disclosure.) He asked why a judge in the Huntingdon ET had required a medical report about his health in circumstances where the Claimant had not had conduct of the file since they had been returned to Mr Cater on 7 August 2015. He continued "until I receive such information, I reserve my position as to any action I am entitled to take including but not limited to any report of professional misconduct to the appropriate authorities". The Claimant requested a response by 18th December and said that if he did not have a response he would "take whatever action I deem appropriate without further correspondence". The clear implication of the letter was that the Claimant believed that the Respondent had sought a postponement of a hearing on the false ground that the Claimant was the representative with conduct of the hearing.

68. Ms Robertson forwarded that email to Mr Potts the next day marked high importance (11th December) at 9.01 without any explanation or comment. We infer therefore that there must have been some sort of prior discussion about it.

69. It was Mr Potts's evidence that on his return to the office after the preliminary hearing he instructed Mr Cater to arrange a disciplinary hearing. His evidence as to exactly what he instructed was however wholly unclear. In his witness statement he notes that the judge in Croydon had suggested that they should now enquire whether the Claimant was fit to attend a disciplinary hearing. The Claimant did not confirm one way or the other at the hearing whether he was fit to attend a disciplinary hearing and so it was left for the Respondent to write to the Claimant so that a firm position could be ascertained. Mr Potts says that he then instructed Mr Cater "to do just that". However, the letter that was sent to the Claimant on 11th December did not do "just that". It did not enquire about the Claimant's fitness to attend a disciplinary hearing, nor did it repeat Ms Robertson's earlier suggestion that a medical report should be obtained. Instead it instructed him to attend a disciplinary hearing 6 days later on 17 December and stated that if he did not attend the hearing without giving advance notification or good reason for his non-attendance this would be treated as a separate issue of misconduct.

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70. Mr Potts accepted in cross examination that the instruction to Mr Cater was that the Claimant should be invited to attend a disciplinary hearing., He said that we (i.e. the Respondent) "thought we should invite him to attend" as they had asked the Claimant at the preliminary hearing whether he was fit to attend and he had not said yes or no. This was inconsistent with his witness statement.

71. Mr Cater said he was unaware of the content of the Claimant's letter of 10th December when he invited the Claimant to a disciplinary hearing. We accept that but we find that Mr Potts was so aware when he gave his instruction.

72. Mr Potts sent the Claimant a copy of the Huntingdon order on 16th December saying that he would endeavor to establish why was made. Mr. Potts emailed the Claimant again on 18th (531) with his explanation. *"I believe that the postponement application was based on a number of relevant issues including but not limited to the timing of your conduct of the case and your absence from work. As far as I know the postponement application did not name you specifically but the request for a postponement was granted with an order that a medical report be provided."* This is no explanation at all. A subsequent letter from Ms Robertson (550) also contains no clear explanation of why the Huntington tribunal had ordered a medical report to be produced about the Claimant's health.

73. In this Tribunal Mr Potts remained unable to explain why a medical report about the Claimant had been ordered. Despite telling the Tribunal he had investigated he was unable to give any clear account of what enquiries he had made or what conclusions he had reached. This was surprising. The Claimant had made an allegation that a Tribunal in Huntingdon had been misled about the extent of the Claimant's involvement in the case and this

should have been of serious concern to the Respondent, and to Mr Potts, who is a solicitor and would be aware of the obligation to be honest in the conduct of litigation.

74. The disciplinary process. The Claimant was, as we have said, invited to a disciplinary hearing on 17th December. He was asked to confirm his attendance by 16 December but did not do so. He did not respond to phone messages. Consequently, by letter dated 17th December (530), Mr Cater rearranged the meeting for 22 December in London. The Claimant said that he would not attend without a medical report confirming that he was fit to attend.

75. Eventually, following medical advice, the Claimant and the Respondent agreed that disciplinary matters should be dealt with in writing without a hearing and that the Claimant would be sent a list of questions arising from Mr Cater's review of Ms Singer's investigation report. (577)

76. Mr Cater reviewed the 12 files to which the client complaints related and on which Ms Singer had prepared her report. He then sent the Claimant his questions on 7 April 2016. He provided his responses on 25th April. There was some correspondence between the Claimant and the Respondent alleging that the Claimant had insufficient information to respond, as he did not have access to the full files, but eventually all relevant files were provided to him before he was required to put in his response.

77. Mr Cater considered the Claimant's response and concluded that the Claimant should be dismissed. He wrote to Mr Wishart on 24th May 2016 dismissing him with immediate effect. He attached his report into the disciplinary allegations. That report is lengthy and detailed (693-705). 11 of the allegations were dismissed but 12 were upheld.

78. Of the allegations which were upheld Mr Cater categorised 4 allegations as "failures to comply with case management orders", 6 allegations as "failures to communicate". Two of the allegations were that he Claimant had settled cases without the authority or knowledge of the client. He concluded that the failures to communicate amounted to serious misconduct which would warrant a final written warning, that each instance of failure to comply with case management order amounted to misconduct, but that the persistent nature of those failures constituted gross misconduct and that the 2 cases of settling cases without the authority or knowledge of the client amounted to gross misconduct, for which dismissal was the appropriate sanction.

79. The Claimant appealed on 7th June. The Claimant attended a hearing before Mr Stern Gillet on 1 July 2016. On 3rd August Mr Stern Gillet notified the Claimant confirming the decision to dismiss. In a lengthy and detailed report (638) he overturned Mr. Cater's finding in relation to one of

the allegations but ultimately upheld Mr. Cater's decision to dismiss the Claimant.

80. The Claimant made no detailed complaints in his witness statement or in cross examination about either Mr Cater or Mr Stern Gillett's findings. In cross examination he said he made no complaint about Ms Singer's report. In his closing submissions the Claimant acknowledged that Mr Stern Gillett was "reasonably independent in his assessment of the facts and matters put before him".

81. Expenses. On 4th December 2015 the Claimant queried why his November expenses had not been approved. Not having had a reply, on 9th December the Claimant emailed Ms Armitt in the payroll department that he would treat this as a further act of victimisation.

82. On 23 December 2015 the Claimant emailed Ms McSteel requesting a replacement toner for his printer and chasing his November expenses claim. Ms Robertson wrote to the Claimant on 12th January asking him why he required a replacement toner for printing and/or had incurred expenses as he was on a period of sick leave and suspension. The Claimant responded the failure to authorise his replacement cartridge and expenses was a further act of victimisation. However, he did explain that he needed the replacement toner to print correspondence from the Respondent and legal updates from Lexis and that expenses were for phone rental to allow him Internet access.

83. Once the Claimant had provided his explanation Ms Robertson authorised those expenses to be paid.

The law

84. Section 39 of the Equality Act 2010 prohibits an employer discriminating against or victimising its employees by dismissing them or subjecting them to any other detriment. Section 40 prohibits an employer from harassing its employees.

85. Section 13 defines direct discrimination as follows:-

86. "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.

Race is a protected characteristic

87. Section 40 prohibits an employer from harassing its employees. Section 26 defines harassment as follows

(1) A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

88. In *Richmond Pharmacology v Dhaliwal (2009 ICR 724*) the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment. Did the employer engage in unwanted conduct? Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her? Was that conduct on the grounds of the employee's protected characteristic?

89. As to victimisation section 27 provides that

"(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 proceedings under 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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

86. In Saad v Southampton University Hospitals Trust, the EAT said that in determining whether subsection (3) applies, a Tribunal should first find whether that evidence, information or allegation made by the Claimant is true or false. If it was false, it must then determine whether it was given or made by the employee in bad faith, i.e. whether the employee has given the evidence or information or made the allegation honestly. While the employee's motivation might be relevant to the question of honesty, it was not the focus of the question.

87. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be

conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination.

88. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

89. This approach to the burden of proof has recently been confirmed by the Court of Appeal in Ayodole v City Link and another 2107 EWCA Civ 1913

Whistleblowing detriment

90. Section 47B(1) gives an employee the right not to be subjected to a detriment on the ground that he has made a protected disclosure. Section 48(2) provides that in a case of detriment for making a protected disclosure it is for the employer to show the ground on which any act or deliberate failure to act was done.

91. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. It is not however a "but for" test.

92. A qualifying disclosure means "any disclosure of information which, in the reasonable belief of the worker making the disclosure *is made in the public interest and* tends to show ....that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject".

93. Section 43L specifically provides that a disclosure of information will take place where the information is passed to a person who is already aware of that information. On the other hand, a disclosure must involve the provision of information in the sense of conveying facts. In Kilraine v London Borough of Wandsworth 2018 EWCA civ 1436 the Court of Appeal said that "In order for a statement or disclosure to be a qualifying disclosure., it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

Conclusions

General observations

94. We set out below our conclusions. We have considered the allegations of direct race discrimination, harassment related to race and victimisation

both individually and collectively. The essential facts in this have largely not been in dispute. What has been in dispute is the reason why the Respondent did what it did and whether its actions were tainted with race discrimination or victimisation, or whether they amounted to unlawful harassment.

95. In his submissions Mr Sammour submits that the Claimant was notably reluctant in evidence to put his case on these matters to the witnesses, even when prompted to do so by the Tribunal. We agree with that observation. While this reluctance might be understandable in a lay person the Claimant is not an average litigant in person. He is an experienced practitioner in employment matters and has been an advocate in, as he says, "hundreds of cases". Despite this, the Claimant's witness statement contained much irrelevant information about what the Claimant believed to be poor practices/client care by the Respondent but omitted many matters which were directly relevant to the issues in dispute.

96. The Claimant has complained about the tone and content of various emails from the Respondent, but it is the case that the tone and content of his own email correspondence has been to respond to any request for an explanation of the Claimant's actions, or any failure to accept his position, with accusatory emails and grievances. We conclude that he has done so to head off what he feared would be justifiable disciplinary actions and that in doing so he was playing a game of tactics. That conclusion is reinforced by the Claimant's phone call to Mr Potts on 23rd April 2015.

Was the Claimant's email of 1 April a protected act.?

97. It is the Claimant's case that his email of 1 April 2015, (quoted above) to Terry Clarke was a protected act (as defined in section 27 of the Equality Act.) The Respondent submits that it is not. Mr Sammour submits that it was not an act of bringing or giving evidence or information in connection with proceedings brought under the Equality Act, nor was it done for the purposes or of or in connection with the Equality Act, nor did it actually make any allegation that there had been a breach of the Equality Act 2010. The Claimant himself made no submissions on this issue and did not respond to that point then invited.

98. In the 1st April email the Claimant (i) complains that Mr Clarke should not have raised the issues while the Claimant was on leave and could not properly respond, (ii) refers to concerns that he had had about Mr Clarke's treatment of ethnic minority employees that he had represented and (iii) complains that the email is bullying and intimidation. Putting all that together and reading the email as a whole it is clear that the Claimant is suggesting that Mr Clarke's email was less favourable treatment because of the Claimant's race and also that Mr. Clarke had treated other BME employees in a less favourable way. Mr Clarke himself understood the email to be an allegation of race discrimination, as his counter grievance and comments on the Claimant's email (259 and 260) clearly demonstrate. Section 27(2) refers to "making an allegation (whether or not express) that A or another person has contravened the Equality Act." We find that there

was an implied allegation of a breach of the Equality Act.

99. Mr Sammour also submits that this email is not a protected act because the allegation was made in bad faith. In *Saad v Southampton University Hospitals NHS Trust* Her Honour Judge Eady made it clear that in determining whether an allegation has been made in bad faith for the purposes of section 27(3) the ET is required to find whether that evidence, information or allegation is true or false. If false, the tribunal must then determine whether the information was given, or the allegation made by the employee in bad faith i.e. was the allegation made honestly. Motive is not the focus of the section although it may be relevant to the determination of honesty.

100. In this case the email did not provide any specific information but made an allegation. We are satisfied that that implied allegation (i.e. that Mr Clarke had discriminated against the Claimant and other BME staff that he had represented) was false. Was the allegation honestly held? The tribunal did not accept the Claimant held an honest belief that Mr Clarke discriminated against O and B (the 2 BME colleagues who he had represented). It was notable that neither in this email, in his grievance nor at any stage during the lengthy course of these proceedings did the Claimant ever clarify what particular concerns he had had about Mr Clarke's handling of the O and B disciplinary matters. Mr Clarke's explanation of how he had dealt with those employees was not challenged.

101. We considered whether the Claimant had held an honest belief that Mr Clarke's email was less favourable treatment of the Claimant because of his race. The Tribunal was divided on the answer to this question, although we were in agreement that the motive for the allegation was to deflect attention away from the client complaints. Given this lack of unanimity, and as the tribunal was unanimously of view that there was no causative link between this email and any detriment relied on, the issue is academic, and we have declined to make any finding.

<u>Was there a protected disclosure?</u>

102. It is the Claimant's case that some of the treatment he received was because he had made a protected disclosure in his email to Ms English on 10 December 2015.

103. Mr Sammour submits that the letter of 10th December does not meet the definition of a protected disclosure in section 43 of the Employment Rights Act 1996. In particular he submits that the letter did not disclose information which tended to show a breach of any legal duty. He submits that the Claimant has not spelt out the legal obligation upon which he relies for the purpose of the claim and his whistleblowing claim must fail for that reason alone. We disagree.

104. The letter of 10th December to Ms English disclosed information that an Employment Judge in Huntington had requested a medical report in respect of a representative who had not had conduct of the case for over 4 months. It is clear from the context of the letter read in its entirety that this was information which tended to show that a tribunal had been misled about who had had conduct of the case in the months leading up to the postponement application and the reasons for that application. As to the legal obligation which had been breached, the Respondent will be only too well aware that parties to litigation have a duty to comply with the overriding objective to deal with cases justly and avoiding delay. Misleading a tribunal is to fraudulently subvert the course of justice. The Claimant had a reasonable belief that this had happened, and the disclosure was plainly in the public interest.

Race discrimination, harassment related to race and victimisation.

Terry Clarke sending the Claimant an email on 1 April 2015 notifying the Claimant of 10 client complaints

105. It is not in dispute that the Respondent had received 10 separate client complaints in respect of the Claimant's conduct of clients' cases in the three-month period from January to March 2015. It is not in dispute that Mr Clarke emailed the Claimant on 1st April and that email is set out at paragraph 18.

106. The Claimant suggests that this was direct race discrimination because BME staff were more likely to be disciplined than white colleagues. There is no evidence before this tribunal that that was the case. The Claimant did not explain to the Tribunal what "concerns" he had had about Mr Clarke's treatment of BME staff he had represented, as referred to in his email response to Mr Clarke. Mr Clarke's evidence that he had disciplined more white staff than black staff and had only ever dismissed one black member of staff in 16 years was not challenged by the Claimant.

107. The Claimant accepted that it was usual for him to receive emails from the Respondent while on holiday. This email which hinted at disciplinary action may have been more distressing because he was on holiday, but the evidence does not suggest that race played any part in Mr Clarke's decision to send the email. It was the proper exercise of his management role in dealing with complaints.

108. The Claimant also contends that the tone and content of this email amounted to harassment related to race. We do not accept that. The email, which speaks for itself, was simply the exercise of management and was not even close to conduct which violates the Claimant's dignity, or otherwise meets the definition of harassment in section 26 of the Equality Act. There was nothing to suggest that it was related to race.

James Potts' email to the Claimant on 15 April 2015 notifying him of a possible breach of IT protocols

109. In his first ET1 the Claimant says that this email was an act of victimisation/direct discrimination/harassment. The Claimant's response to Mr Potts' email at the time was to accuse him of victimisation and direct discrimination. Despite this, and its inclusion in the agreed list of issues, the Claimant does not refer to this matter in his witness statement or deal with it in his closing submissions.

110. In cross examination the Claimant accepted that other employees at the Respondent had received warnings for sending emails from their work email to their personal email addresses and that it was legitimate for the Respondent to raise concerns regarding the breach of their IT policy. However, he raised a different point, namely that Mr Potts was in breach of the ACAS code of practice in co-mingling issues of discipline with his grievance. We accept that it was not sensible for Mr Potts to seek to address this issue in a grievance meeting, but that fact alone is not enough to suggest or to allow us to infer that Mr Potts' email was influenced by the Claimant's race.

111. The Claimant also says (see para 5.2 and 6.1 above) that Mr Potts harassed him contrary to section 26 and victimised him by "conducting what the Claimant perceived to be a disciplinary matter." He plainly did not conduct a disciplinary matter and no action was ever taken against the Claimant in relation to this. It was not in dispute that the Claimant had breached the Respondent' IT policy. The complaint was about Mr Potts' email. We do not accept that this was either harassment or victimisation.

Including the Claimant in the "at risk" pool during the 2015 redundancy process.

112. The Claimant clarified during the hearing that what he meant by this allegation was that the Respondent had "failed to address his complaint that he had been incorrectly scored in the redundancy matrix". He also relies on this as an act of victimisation. In fact, the Respondent *had* addressed the scoring error, as the contemporaneous documents show, but failed to tell the Claimant. While this is a failure of communication there was no evidence before the Tribunal that that failure was influenced in any way by the Claimant's race. Nor do the facts indicate that they chose not to tell the Claimant because of the email of 1st April**.** The Respondent had chosen to increase the number of consultants to be retained from 12 to 14 which was likely to take the Claimant out of the risk pool - a fact which is not suggestive of a Respondent who is victimising the Claimant.

James Potts outcome grievance letter.

113. In his claim form the Claimant complains that Mr Potts' decision to reject the Claimant's grievance was biased because Mr Potts had been the subject of an allegation of victimisation by the Claimant and the grievance

outcome was therefore not unbiased and amounted to a further act of victimisation and/or direct discrimination." (For the avoidance of doubt the Claimant has only relied on one protected act, the 1st April email).

114. Surprisingly there is nothing in the Claimant's witness statement about this. In his submissions the Claimant simply said that the grievance report was unreliable as it was not independent, as he had copied Terry Clarke in to an email from the Claimant. In cross examination the Claimant put to Mr Potts that he was not in fact the author of the grievance outcome report but had been pressurised into his conclusions by Ms English and Mr Clarke.

115. The Claimant submits that the outcome of the grievance report was an ongoing attempt to discriminate against him because of his race and to get him out of the organisation. Surprisingly, what the Claimant has not done is to challenge the factual basis of the content of the report. Mr Potts's conclusions about the recruitment of senior posts in the organisation, about treatment of BME staff in relation to discipline are not challenged. Nor does the Claimant challenge his conclusion that the Claimant had been made aware of each of the client complaints before receiving the email from Mr Clarke. Without any challenge to the conclusions, the allegation that the outcome was less favourable treatment because of his race and/or victimisation is no more than a bare assertion with no evidential basis to support it. There was no evidence to support an inference that Mr Potts was not the author of the report, and we are satisfied that he was.

Suspending the Claimant

116. The Claimant alleges that in suspending him the Respondent treated him less favourably because of his race and victimised him. The Claimant was suspended following Ms Singer's findings in her report into client complaints on 12 files. The Claimant has not sought to dispute that these were genuine client complaints that needed to be investigated nor does he deny that some of those complaints alleged matters which were serious. He does not complain about Ms Singer's report.

117. Mr Cater was a credible witness. We accept that he decided to suspend the Claimant because of the "potentially serious nature of the allegations" and because the Clamant should be isolated from clients during this period. It is common practice amongst many employers, where allegations of gross misconduct are in issue, for employees to be suspended pending the disciplinary hearing. There is no evidence which might suggest that when Mr Cater suspended the Claimant he was influenced by the Claimant's race or by the Claimant's email to Mr Clarke on 1st April. We do not accept that Mr. Cater suspended the Claimant because Ms English had directed him to do so.

Not sending the Claimant a new mobile phone at the same time as other employees.

118. This is a trivial point. The Claimant did not receive a mobile phone, complained and the matter was rectified, within days. The Claimant was due to be in the office on 14 August 2015 the date upon which the mobile phone was to have been sent to him and he would not therefore have been at home to receive it. When that meeting was rescheduled the Respondent did not reinstate delivery. There is nothing to suggest that the Respondent had not sent on the phone because of his race or as an act of victimisation.

The Claimant's dismissal

119. It was a striking feature of this case, that the Claimant did not in his witness statement or in cross-examination seek to challenge any of the findings made by either Ms Singer or Mr Cater as a result of the disciplinary hearing. He accepted that the complaints had been made and that some of the allegations were serious. His complaints are largely about process. He has not said that a hypothetical white employee would not have been dismissed in similar circumstances or why that was the case. Although, in his closing submissions, the Claimant said that the disciplinary outcome "appeared to be based upon a flawed and/or incomplete investigation report from Ellen Singer" he provided no evidence or examples in support.

120. Mr Cater in his lengthy and detailed report ((693-705) upheld a significant number of allegations against the Claimant. He concluded that settling cases without authority and the numerous failures to comply with Tribunal orders were sufficiently serious to justify dismissal. That was open to him on the findings. There was simply no evidential material on which the tribunal could make a finding that Mr Cater was influenced by the Claimant's race of his email to Mr Clarke.

Mr Clarke's email notifying the Claimant of a client complaint on 7 July 2015

121. This is said to be harassment and victimisation. It was neither. A client complaint about the Claimant had been received. Mr Clarke asked for an explanation and commented correctly that his out of office was still on. This is proper management and no more. There was no detriment and no link to race or his email.

Litigation Manager.

122. The Claimant's case is that the failure to appoint him to this post was victimisation. We could not accept that the appointment of Mr Cater to that post was influenced by the Claimants email of 1st April. We have found that Mr Cater was appointed on merit. We accept that Mr Clarke was crucial to the interviewing panel because neither Ms English nor Ms Robertson had the same day to day knowledge of the work that the litigation manager would do. He could not absent himself from the Claimant's interview and not the others. The notes behind the scores

suggest a proper evaluation. Mr Cater was already in a more senior role to the Claimant. Mr. Clarke says that time had passed since the Claimant's email of 1st April and he as a professional and would put any such feelings aside. We accept that.

Salary deductions.

123. The Claimant also complains that Ms Robertson's refusal to spread the deductions from his August salary was an act of victimisation because of his protected act. Ms Robertson says that her response to the Claimant's request reflected the Respondent standard practice in dealing with individuals on jury service. The Claimant did not suggest to Ms Robertson that the approach that she had adopted to his pay in July was any different to the approach she would have adopted to any other individual in similar circumstances. We had no evidence that the Claimant had been treated any differently to any other employee in similar circumstances and there was no basis upon which we could infer a detriment, a link to race or any connection with the Claimant's email to Mr Clarke.

Whistleblowing

124. We accept that the Claimant made a protected disclosure on 10th December 2015. He says that he was subjected to 5 detriments because of that email.

125. Of those pleaded detriments we find that one is well founded: namely that he was sent an invitation to a disciplinary hearing on 11th December. (Although the issues record that the detriment is "Mr Cater sending him the invitation, it was accepted at the hearing that it was Mr Potts who instructed Mr. Cater to send the invitation and that the person who was responsible for the alleged victimisation was Mr Potts.

126. It had been the Respondent's intention in the morning of 10th December to invite the Claimant to an occupational health assessment to consider his fitness to work. (518) At the Employment Tribunal hearing that followed it was agreed that the Respondent would enquire about the Claimant's fitness to attend a disciplinary hearing. Yet the following day the Claimant was invited to a disciplinary hearing without further enquiry into his fitness to attend. It was common ground that at that time the Claimant remained signed off work until 15th and Mr Potts had understood the Croydon judge to say that the Respondent should ask about his fitness to attend a disciplinary hearing.

127. Why did the Respondent not do this? The Claimant says it is because of the disclosure in his letter of 10th December. The Respondent says it is because of the Judge's instructions at the Croydon Preliminary Hearing. The Respondent explanation's does not however make sense if, as he does, Mr Potts accepts that the next step was to make an enquiry as to the Claimant's fitness to attend a disciplinary hearing.

128. We accept that the Claimant would have understood from the Respondent's position at the preliminary hearing that it intended to restart and complete the disciplinary process by the end of February, but he also would have understood that there would be some preliminary enquiry as to his fitness to attend before that process began. The notice period given for a disciplinary hearing to be heard on 17th December, while not of itself unduly short, made no allowance for any enquiries as to the Claimant health.

129. Section 48(2) of the ERA provides that it a case of detriment for making a protected disclosure it is for the employer to show the ground on which any act or deliberate failure to act was done.

130. In *Fecitt v NHS Manchester 2012 IRLR 64* the Court of Appeal held that, for the purposes of a detriment claim, a Claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the employer's action. The test is the same as that which applies in discrimination law.

131. We find that the Respondent has not shown the ground on which the Claimant was invited to a disciplinary hearing without first enquiring about his fitness to attend. We find that the email send only hours before was a material influence in the decision not to do so.

132. The Claimant has also alleged that a number of other matters amounted to a detriment on the ground that he had sent his 10th December letter. He says that Mr Cater rearranged the disciplinary hearing (originally scheduled for 17 December) for 22 December and did so by letter received on 18th December which was insufficient notice.

133. We do not accept that. First rearranging the hearing was not a detriment. Secondly, although it was Mr Potts who had instructed Mr Cater to send 11 December letter, it was Mr Cater who took the decision to rearrange the disciplinary hearing for 22 December and we accept Mr Cater's evidence that at that time he was unaware of the Claimant's letter of 10th December or of the Huntington tribunal's request for a medical report in respect of the Claimant.

134. The Claimant also complains that Ms Robertson's refusal to provide the Claimant with a replacement toner, to authorise his expenses (relating to telephone line rental) or to explain why his chasing emails were ignored were detriments because of 10th December email. These complaints are not made out on the facts, Ms Robertson did not refuse to provide the Claimant with a replacement toner nor did she fail to authorise his expenses. The Claimant was not ignored. She simply asked the Claimant to provide an explanation as to why he needed both the toner and his expenses and on receipt of an explanation both were authorised without undue delay. We do not accept that there was a detriment arising from any delay in the provision of expenses or toner, nor do we find it was connected with the protected act.

135. We have found that the Claimant was subjected to one small detriment because of a protected disclosure. There were no particular consequences for the Claimant as, in the end, the disciplinary hearing, did not go ahead until a way forward as to the Claimant's heath had been agreed. The rest of the claim is not well founded.

136. The parties have indicated that they should be able to agree terms as to any remedy, but a provisional remedy hearing has been listed as set out in the Judgment.

Employment Judge F Spencer
Date 24th January 2019