THE EMPLOYMENT TRIBUNAL

Claimant: **Mr Cyril Nicol**

Respondents: **Blackfriars Settlement and Others**

REASONS

(requested by the claimant and respondents)

1. These are the reasons for the tribunal's judgment, sent to the parties on 19 April 2018, dismissing all claims.

2. By two claim forms, presented on 5 April 2016 and 15 August 2016, the claimant brought complaints of ordinary and automatic unfair dismissal; whistleblowing detriment; direct race and direct age discrimination; victimisation; and racial harassment. A breach of contract complaint was earlier withdrawn. There were 4 Respondents; Blackfriars Settlement, (R1), was the claimant's employer and the other 3 are trustees and/or employees of R1.

3. Dismissal was admitted by R1 but it asserted that it was by reason of redundancy. The claimant contended that dismissal was by reason of him having made protected disclosures and/or having done protected acts.

4. The claimant gave evidence on his own account. On the first day of the hearing he applied for and was granted a witness order for an additional witness, Jenny Hinds, on the basis that she had potentially relevant evidence to give and would not attend voluntarily. An order was made for her to attend at 10.00am the following day (Tuesday). It was served by email and the claimant was instructed that it was his responsibility to secure his witness' attendance. For reasons which were not satisfactorily explained, the witness did not attend as ordered and the witness order was therefore discharged. However, Ms Hinds attended voluntarily the following morning (Wednesday) and at the start of the hearing, just before closing submissions, an application was made on behalf of the claimant for Ms Hinds to be allowed to give evidence and for a couple of supporting documents to be admitted in evidence from the disputed bundle. After considering the application and the respondents' objections and having weighed the balance of prejudice, the tribunal agreed, with some reluctance, to the application.

5. On behalf of respondents we heard from Baroness Margaret Wheeler (MW), Chair of the Trustees of the Settlement; Brian Chandler (BC), Treasurer and Trustee; Mark Beach (MB), Director, and Paul Callaghan (PC), Trustee. The first 3 are Respondents in their own right.

6. The parties presented an agreed bundle of documents. The claimant also

produced a separate bundle of disputed documents. The tribunal determined that the most practical way of dealing with the disputed documents was to consider their relevance as and when they were introduced into evidence.

The Issues

7. The issues in the case are set out in the case management order of Employment Judge Sage of 28 October 2016 and are more specifically referred to in our conclusions below [95-96].

Submissions

8. We received written submissions from the parties which were spoken to. We were also referred to a number of authorities and these have been taken into account.

Findings and conclusions

9. R1 is a registered charity whose objectives are to create and provide community services and support. The claimant was employed by R1 latterly as an Accountant until his dismissal on 17 February 2016.

Protected Disclosures

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

11. Section 47B(1) ERA provides that: "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

12. Section 43A defines "protected disclosure" as: "….a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

13. Section 43B(1) defines a qualifying disclosure as: "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 (for our purposes) the following:

(a) That a criminal offence has been committed, is being committed or is likely to be committed

(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

(f) that information tending to show any matter within any of the preceding paragraphs has been, or is likely to be deliberately concealed.

14. The claimant alleged that he was dismissed for raising a number of protected disclosures. The alleged disclosures are set out in tabular form at pages 46-47 of the bundle and we have considered these below:

Has there been a disclosure of information?

15. 30.11.15 email – This email was sent by the claimant to Susan Underhill (SU), Senior Services Manager, and copied to MB and others [263]. The case: Cavendish Munro Professional Risks management Ltd v Geduld [2010] ICR 325 establishes that the ordinary meaning of giving information is conveying facts. On a proper reading of that email, it does not disclose information, as envisaged by section 43B(1). There are no fact conveyed, all it amounts to is a request for information i.e. copies of SU's certificate of self-employment for 2011/12 and self-assessment returns covering July 2011-May 2012. The mere reference to "*a discrepancy in the information you provided on your starter details*" is in our view insufficient to bring the matter within section 43B(1).

16. 23.12.15 email – This was an email sent by the claimant to MW headed: "Whistleblowing complaint". [300] It contains a number of allegations, some of which are not directly related to the SU issue. Whilst we are mindful of the dichotomy between information and allegation as illustrated in the Cavendish Monroe case, we treat this with some caution in light of the subsequent case of Kilraine v London Borough of Wandsworth, [2016] UKEAT 0260, in which Langstaff J makes an important point that the dichotomy between "information and allegation is not one that appears in the ERA and that the question to be asked is whether there has been a disclosure of information. If it is an allegation, that is nothing to the point. It could be both.

17. In the email, there are some allegations that convey facts. For example, that SU had deliberately made a false declaration on her starter form in order to avoid paying tax and NI on invoiced earnings, was an allegation but there is information referenced relating to the SU's invoiced earnings in 2011/12 and 2012/13. We therefore find, on balance, that the email does disclose information, as envisaged by the ERA.

Did the Claimant reasonably believe that the disclosure was in the public interest?

18. The information disclosed is essentially about SU's personal tax affairs, which is generally a matter between her and HMRC on the one hand and her and the R1 on the other. On the face of it, it is difficult to see what the wider public interest is. However, the test is not whether the disclosure was in the public interest, but whether the claimant reasonably believed it to be so. It was submitted on behalf of the claimant that the disclosure that any person or organisation is failing to pay correct taxes is clearly in the public interest and that that was his reasonable belief. It is difficult to see why the general public would be remotely interested in, what was essentially an individual's personal tax affairs. SU did not hold public office, she was not an office holder or public face of the settlement or otherwise in the public eye. The claimant's belief that the disclosure was in the public interest was not in our view a reasonable one to hold.

Did the claimant have a reasonable belief that the disclosure tended to show the matters at sub paragraphs a) b) and f) of 43B(1)

19. If we are wrong about the claimant's reasonable belief in the public interest of his disclosure, we go on to find that his belief that SU's completed P46 showed that she had committed a criminal offence and breached a legal obligation by making a false declaration in order to evade tax was not a reasonable belief for the following reasons:

    a. It is difficult to see how the claimant could conclude, without more, that a so-called discrepancy was a deliberate falsehood designed to evade tax. There is simply no evidence before us justifying that conclusion. The claimant will no doubt suggest that SU's failure to provide him with her tax returns as requested supported his conclusion. It does not. MB told us that it was no part of the claimant's role to request such personal information from SU and he was not entitled to do so. That was made clear to him before he made the disclosure.

    b. In assessing the reasonableness of the claimant's belief, his personality and individual circumstances are to be taken into account. Those with professional or insider knowledge are generally held to a higher standard than lay persons when it comes to assessing reasonable belief. The claimant had worked within finance for many years and was at great pains to tell us that, contrary to R1's assertion, he was a fully qualified accountant. He should therefore have appreciated that a discrepancy on a tax document fell far short of proof of a crime or other legal breach.

    c. The overall tone of the disclosure document is emotive and antagonistic and it read as a personal attack on SU which appears lacking in all objectivity. He refers to her as a person of questionable character and makes the assertion that "*Susan Underhill deliberately falsified the form"* with no evidence at all to support this. He does not even entertain the possibility that she has mistakenly ticked the wrong box but jumps straight to the conclusion that she is evading tax. We can't escape the possibility that the claimant's objectivity was clouded by personal antipathy and past and present grievances. SU was the subject matter of the claimant's previous unsuccessful ET claim and his grievances arising from that remained unresolved in his mind. SU had also recently raised a complaint of bullying and harassment against him in relation to his emails.

    d. It is noted in R1's record of the whistleblowing investigation meeting that the claimant gave no rational explanation for raising the issue of SU's P46, 4 years after the event.

20. For these reasons, we consider that the claimant do not have a reasonable belief that the disclosures tended to show commission of a criminal offence or breach of legal obligation.

21. In all the circumstances, we conclude that the claimant did not make any qualifying disclosures.

Detriments

22. Given our findings above, the detriment claims under s.47B and the dismissal claim under section 103A fail. However, if we are wrong about the status of the

disclosures, we have considered whether the alleged detriments were because of the disclosures. We will address the automatic unfair dismissal allegation further on.

Threat to investigate the claimant under the grievance procedure

23. On 3 December 2015, SU raised a complaint of bullying, harassment and intimidation against the claimant alleging that he made false statements about her honesty and integrity which he shared with other members of staff by email. [265]. The claimant was told of the complaint and that it would be investigated. That was to be expected as it was a normal part of the grievance process, as acknowledged by the claimant in evidence. The email sent to the claimant on 3 December 2015 confirming the investigation was pretty innocuous and nothing in it can reasonably be construed as a threat. [270] This is another example of the claimant's use of emotive and exaggerated language to describe events. There is no evidence whatsoever that this was connected to the disclosure. The fact that the "threat" was removed once the grievance was withdrawn clearly illustrates the point.

MB used restructure to threaten, intimidate and harass the claimant

24. This particular allegation did not develop beyond the bald assertion. No particulars were provided of what MB said or did or when they were done. At paragraph 48 of his witness statement, the claimant refers to a series of harassment, bullying and intimidation by my line manager but does not provide any particulars but instead relates it back to historic grievances from 2009 and 2010, which we are not concerned with. This factual allegation is not made out.

The claimant was issued with a notice of redundancy

25. In relation to the background to this, we find that, sometime between February and June 2015, the Trustees of R1 approved a review of its core functions, which comprised Finance, HR, IT and Management. [198A] This followed on from a review of the core services and was against a background of poor performance and an increasing deficit, which at the time was forecast at £91,211 for the financial year 2015/16. Added to that was the fact that core services were not fully funded by donations. R1 decided to start with the Finance department first as the Head of Finance, Jackie Wray (JW), had announced in early June that she would be retiring towards the end of the year. The claimant does not accept that this was the reason but we find the explanation credible and accept it.

26. An external consultant, Nigel Scott (NS), was appointed to carry out the review. The claimant challenged the independence of NS, claiming in the ET1 that NS' remit was to recommend the deletion of his post after being deliberately fed false information. This was an assertion with no evidence to back it up. MW told the tribunal that NS had been recommended by its auditor. His CV shows that he is a highly experienced consultant with 24 years in the charity sector and we are satisfied from the paperwork we have seen that he was eminently qualified to carry out the review. [196-197] We also consider it highly improbable that somebody of his pedigree and professional standing would abandon all independence and prepare a sham report.

27. On 20 July 2015, MB delivered a powerpoint presentation to staff, which informed them of the financial difficulties faced by R1 and the review of the core

services, starting with finance. The slides were sent to all, including the claimant.

28. NS' review of finance commenced in September 2015 and as part of that he spoke to the Finance team, including the claimant. The final report dated 11 November, was sent to MB on 13 November 2015. NS was critical about the inefficient way in which the department had been run and recommended a greater use of automation of the accounting processes. In terms of the structure, he recommended that the 3 existing posts be deleted and that they be replaced with 2 posts Head of Finance and Finance Assistant. The proposals were approved by the Finance Sub Group on 10 December 2015.

29. The claimant is critical of the report and suggests that it is based on misinformation. There is no basis for that assertion and it is noteworthy that much of the information was provided to NS by him. Regardless of the claimant's view, R1 was entitled to rely on the expertise of the consultant it had paid to carry out the restructure.

30. On 15 December 2015, "at risk" letters were sent to the claimant and Vinh Luong (VL), the Finance Assistant. There was no need for such a letter to be sent to JW as she was leaving anyway. The "at risk" letters enclosed a summary of the proposals, the process and the timescales. The consultation process was due to close on 8 January 2016. [283]. VL chose to take voluntary redundancy and left in December. The claimant was therefore the only member left in the department to whom the process would be applied.

31. On 17 February 2016, after several unsuccessful attempts to meet with the claimant to discuss his position, R1 issued him with 3 months' notice of redundancy, to expire on 16 May 2016. [378]

32. We are satisfied that the issuing of notice of redundancy to the claimant was a consequence of the review outcome and there is no evidence to support the claimant's assertion that it was to do with his disclosures.

R1 advertised externally for new Head of Finance post in contravention of its redeployment policy

33. R1's redundancy policy provides that if a person's role is redundant and a vacancy arises which R1 considers is suitable for them, they will normally be offered an interview if they express an interest in performing the available role [168]. The respondent contends that the claimant did not express an interest in either of the 2 new roles and did not apply for either despite being repeatedly encouraged to do so. The claimant accepted that he was not interested in the Finance Assistant role but claimed to have expressed interest in Head of Finance. On 27 January 16', the claimant sent an email to MB, copied to others, setting out his full response to the financial review report. In the final paragraph, he suggests that there be a gradual handover of JW's role to him and this is what he relies on this as his expression of interest [343-345]. The problem with that approach was that the claimant was expressing interest in a role that no longer existed, and he would have known that from the report. He did not actually express an interest in the new Head of Finance role and that was because he objected to having to apply for it through an external agency.

34. The claimant contended that he was being treated differently from others who did not have to apply externally but were just slotted into alternative role. He

relies on Eddie Arnavoudian (EA) and Jenny Hinds (JH) as examples of this. Having heard evidence from the respondent and indeed from JH herself, we are satisfied that their circumstances were materially different. In the case of EA, he was resuming duties that he had previously carried out and which had been passed to an employee that had TUPE'd to R1. JH's evidence was that she carried out a training position for year to see if she would be suitable to be a manager and thereafter was appointed a manager.

35. MB told us that because of the complexities of the Head of Finance role and the importance of making the new structure a success, it was imperative to appoint someone with the required skill and experience and it was therefore advertised externally to ensure that there was a competitive recruitment process. In our view, that was a decision within the reasonable managerial discretion of R1and not one that we can interfere with.

36. The claimant also claimed that the redundancy policy entitled him to an interview, as of right. We have looked at the relevant provision in the policy and it is clear that any interview is predicated on the employee being a suitable candidate and expressing interest. [168]

37. We do not accept that R1 breached its redundancy policy in its recruitment to the new Head of Finance role.

Placing the claimant on garden leave

38. On 7 March 2016, the claimant was put on garden leave. [386]. MB told us that this was done because after receiving his notice of redundancy, the claimant became very distracted and performed little substantive work. It was submitted on behalf of the claimant that this was a fictitious reason as it is not referred to in the garden leave letter. We were told that the letter was a standard one, that there is provision in the contract of employment for garden leave and that there was no reason to explain the decision beyond that given in the letter. We accept MB's evidence and find that the decision to place him on garden leave had nothing to do with his disclosures.

39. In light of the above, had we found qualifying disclosures, the detriment claims would have failed.

Victimisation

40. Section 27 EqA provides that 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. The protected acts in question are listed at section 27(2) EqA.

41. In determining whether treatment is by reason that the person has done a protected act, the test is what consciously or unconsciously was his reason? Chief Constable of West Yorkshire v Khan [2001] IRLR 830

42. It is common ground, and we accept, that the claimant's previous race discrimination complaint against R1 and others is a protected act. We consider the alleged detriments below:

MB subjected C to harassment and intimidation between Dec 15' to 7 March 16'

43. Again, this was a general assertion without any evidence to back it up. The allegation is not made out.

The claimant was placed on gardening leave

44. Our findings on this in relation to protected disclosure detriment apply here.

The claimant was issued with a notice of redundancy

45. Our findings on this in relation to protected disclosure detriment apply here.

R1 chose not to offer the claimant an opportunity to fill one of the new roles created through the restructure

46. Our findings on this in relation to protected disclosure detriment apply here.

47. Based on the above, we find that there is no evidence of a causal link between the above detriments and the claimant's protected act and we find that the victimisation claim is not made out.

Direct race and direct age discrimination

48. Section 13 EqA provides that a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat others.

49. Section 23 EqA provides that on a comparison of cases for the purposes section 13, there must be no material difference between the circumstances relating to each case.

50. The claimant alleged that R1 directly discriminated against him because of race and age by not promoting him. His comparator was EA, a Caucasian, Armenian, aged 69 at the relevant time. MB told the tribunal that EA was not promoted. He was employed as a Building Community Co-ordinator for one of the services and had originally been responsible for 2 buildings. However, when a member of staff was TUPE'd across from Lambeth council, it was necessary to find them a role and they took over one of EA's buildings. When the TUPE'd employee was later made redundant, EA took back the role. At page 417 of the bundle is a letter to EA appointing him as Head of Community Buildings. MB said that this was not a promotion but a change of job title to reflect the revised structure. The claimant disputes this account but has adduced no evidence to counter it. Even if the claimant is right, the circumstance of EA are not the same or similar to his and he is therefore not an appropriate comparator. Further, all that this shows, if the claimant is right, is a difference in treatment and a difference in race and age and it is clear from Madarassy v Nomura International PLC [2007] IRLR 246 that that is not

enough. We find that there are no primary facts from which the tribunal could conclude that there may have been race or age discrimination. The claims therefore fail at the first hurdle.

Harassment on grounds of race

51. Section 26 EqA provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic, or engages in conduct of a sexual nature, and 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.

52. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

53. The unwanted conduct is described by the claimant as actions taken by the respondent during the redundancy process that led to his dismissal. He has not been specific. He uses the word harassment a lot in his correspondence. An example is at 283 of the bundle where, in his email of 4 March to MB, he refers to his attempts to engage him in the process as intrusive and harassing. [383] The claimant appears to use the phrase harassment colloquially rather than in its legal sense but in any event, there is no evidence of any unwanted conduct related to his race. That complaint is not made out.

Unfair Dismissal

54. The Respondent case is that dismissal was by reason of redundancy. The claimant's case, as set out in his claim form, is that the redundancy was a calculated and cynical ploy by MB, Brian Chandler and BW to unfairly dismiss him because of his protected acts and disclosures.

55. We have already found that there were no protected disclosures but if we are wrong, based on our findings at paragraphs 25-32 above, we are satisfied that there was a genuine redundancy situation and that the claimant's position was redundant as his role had been deleted in line with the independent recommendations of NS. The claimant's assertion that the redundancy was contrived was not supported by any evidence and it is clear that the decision to restructure was taken long before any disclosures. The automatic unfair dismissal claim would therefore not have succeeded. We also find that there was no causative link between the redundancy and the fact that the claimant had previously brought tribunal proceedings.

Fairness

56. Having satisfied ourselves as to the reason for dismissal, we have then gone on to consider whether it was in all the circumstances fair. In doing so, we have reminded ourselves that we must not substitute our view for that of the respondent but simply have to consider whether dismissal was within the range of reasonable responses open to it. That test applies to both the dismissal and the process followed.

57. In the context of a redundancy dismissal, the factors that are relevant to fairness are selection, consultation and steps taken to find suitable alternative employment.

58. Selection is not a live issue in this case as all of the roles in the Finance department were deleted.

Consultation

59. MB's email to the claimant of 4 January 2016 was the first of many attempts to meet with him to discuss his proposed redundancy. However, a meeting never took place. MB says that it was because the claimant would not engage in the process. The claimant on his part says that R1 failed to take into account his union's availability. However, we prefer the evidence of MB. The claimant's approach to consultation is exemplified in his response to a request by MB on 1 February 16' to meet to discuss the restructure of the Finance department. Below is an extract from the claimant's email of 4 February in reply:

"*You have asked for a meeting with me to discuss the proposed restructuring of the Finance department but have not stated the terms of reference for the discussion. I do not want to come into a meeting and be ambushed as I have made my position very clear in my response to your proposal and the review report.*

I would like to know what you are proposing so that I may discuss it with my union representative and if it falls short of my expectation not waste my representative's time, yours or mine"….. [357]

60. This does not convey to us somebody who was interested in consulting on his position. Indeed it was MB's evidence that during a conversation with the claimant in February, he said that he was not willing to meet to discuss the deletion of his role. We accept that evidence as it is referenced in the claimant's notice of redundancy [378-379]. The claimant's only active participation in the consultation process was his written response to the proposal set out in his email of 27 January 17' [343-345]. In the circumstances, we are satisfied that the respondent did all that it reasonably could to consult with the claimant.

Alternative employment

61. We are satisfied that the respondent took reasonable steps to assist the claimant in finding suitable alternative employment. He was encouraged to apply for the new roles in the department and, as already stated above, the claimant declined to do so. The notes of the dismissal appeal hearing record the claimant stating that he did not go for the Head of Finance role as he did not want to give them the satisfaction. [407] That suggests that he alone decided to rule himself out of contention for the role. It had nothing to do with R1. There were no other suitable roles available and in those circumstances, we are satisfied that the steps taken by R1 were reasonable.

62. In all the circumstances, we find that the dismissal was fair.

Judgment

63. All claims fail and are dismissed

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Employment Judge Balogun
Date: 6 November 2018