Case No: 2403165/17 & 1301581/17

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Ms C Dymond	Barclays Bank Plc

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 24, 25, 26, 27, 28 September 2019 and 26 and 27 November 2018.

EMPLOYMENT JUDGE Warren

Members – Mr D Wilson
Mrs SJ Ensell

Representation

Claimant: In person
Respondent: Ms R Snocken, Counsel

This case is subject to an Order dated 24 September 2018 made under rule 50 (3) (b) and (c) of the Employment Tribunal Rules of Procedure 2013 to prevent the identification of 3 named comparators in this case, whose evidence was not heard, but whose employment details were part of the evidence in the case.

RESERVED JUDGMENT

The unanimous judgement of the Tribunal is that:

1. The claim of direct sex discrimination is ill founded and dismissed.

2. The claim of constructive dismissal is ill founded and is dismissed.

3. The claim of detriment for making public interest disclosures is ill founded and is dismissed.

REASONS

Background

1. By an ET1 presented on the 23 June 2017 the claimant brought claims of unfair constructive dismissal, race and sex discrimination and public interest detriment. The respondent denied the claims.

The Issues

2. The issues are set out in an Order dated 27 November 2017 by Employment Judge Ross and were agreed with the parties at the time as follows:-

Constructive Dismissal:-

3. The claimant relied on the final straw which she described as occurring in the final grievance hearing on or around 28 March 2017. In particular Tracey Farleigh alleging that she had received a serious allegation about the claimant's failure to join a telephone conference call around February 2017.

4. **Breaches of trust and confidence** are alleged as :-

   4.1 The respondent's approach to dynamic working.

   4.2 The respondent's failure to uphold her grievance.

   4.3 The respondent accusing the claimant of `irrelevant behaviour'.

   4.4 The respondent's treatment of the claimant on the death of her mother in law.

Direct Sex Discrimination

5. The allegations are that:-

   5.1 The claimant was placed on a performance improvement plan ("PIP").

   5.2 Her ability to work dynamically was restricted.

   5.3 The respondent failed to uphold her grievance.

5.4 Her comparators are A, B and C – all male. A and B are identified employees of the respondent. C is a worker.

Direct race discrimination

6. The allegations are:-

6.1 That she was placed on a "PIP" her comparator is C.

6.2 Denied emergency and carer's leave – comparator is C.

6.3 Mr Cousill told her not to make her children Italian citizens around 6 February 2017 and a hypothetical comparator is relied upon.

Public Interest Disclosure

7. The claimant asserts that she made 2 disclosures – 1. an email on 1 October 2016 to Paul Hunnego asking for actions and an update in the recovery plan. 2. A disclosure about none compliance made in her end of year of review around 26/27 January 2017, after which she alleges she was placed on a PIP which prevented her from career progression.

8. This case was the subject of detailed case management by Employment Judge Ross on 27 November 2017 at which point the issues were agreed as above.

The Evidence

9. We had agreed bundles of documents and reference to page numbers in this judgement relate to those bundles. The claimant gave evidence in her own regard and called her husband Mr A Dalmoro and Mr S Boden (GMB regional organiser. The respondent called Ms T Farleigh, Mr D Coucill, Ms K Jessop. The case was decided on the evidential test 'the balance of probabilities. There was very little conflict in the evidence – for the most part it was the way in which the claimant interpreted the comments of the respondent witnesses which led to any conflict of facts between them. We did find Mr Coucill to be an honest witness, prepared to admit his mistakes as a manager. We preferred the evidence of the respondent witnesses generally as we found it to be measured, logical and thoughtful. We were concerned that the claimant, on occasion, jumped to conclusions based on her own opinion. As an example, she asserted that Mr Coucill had deliberately failed to help when she was supposed to log into a telephone conference, and deliberately failed to assist either her or Tracey Farleigh make contact, to the claimant's detriment. In fact, Mr Coucill was not involved that day at all – he believes he was away from the office, because otherwise he would have been involved in the conference itself.

The Facts

10. The claimant commenced work for the respondent in November 2014. Her role was as a Global Risk and Compliance Analyst and assistant Vice President. She resigned on 17 May 2017 and her last day was 14 June 2017.

11. The claimant is British. She is married to an Italian and her children are British of Italian heritage. Her parents in law lived in Italy.

12. The claimant was directly managed by David Coucill. The claimant was a Dynamic Working champion. Dynamic Working was a policy encouraged by the respondent to enable staff to work from wherever it suited employee and employer and at mutually agreed times. The example given was that of the Nordic Walker – an employee who chose to work from home early in the morning, finishing early afternoon to enable him to undertake his passion for Nordic walking. It was key that this arrangement was agreed between employer and employee, so that a line manager would know when someone was working from home or elsewhere, or different hours. There was no need for such arrangements to be made formally in writing if there was agreement between management and employee.

13. The claimant was expected to be in her office in Radbroke, Cheshire, 3 days a week and could work dynamically on the remaining 2, according to Mr Cousill. It was presumed she would work from home. This was Mr Cousill's working pattern and he had initially suggested she could do the same. In fact, the claimant did not agree this pattern and rarely visited the Cheshire base unless she had to. Her interpretation of Dynamic Working was that she could work wherever and whenever she chose, as long as the work got done. This included a period of working in Italy of which her line manager was completely unaware, until this hearing

14. There is no doubt that the claimant got her work done, wherever she did it. She was graded as 'strong' throughout her time with the respondent for the work.

15. In May 2016, the claimant's elderly father in law, had a serious accident whilst carrying his seriously ill wife between rooms, at their home in Italy. The claimant, who was on annual leave at the time, stayed to assist in Italy. The claimant was not offered carer's leave. Neither she nor Mr Cousill was aware of the existence of carer's leave, a formal policy of the respondent which would have enabled her to save her annual leave for holiday.

16. On 13 May 2016 the claimant had sought a day's leave to undertake a charity event. Mr Cousill had agreed and forgotten about it. When he remonstrated with the claimant about her unavailability, she pointed out that it was booked leave, and he apologised for the tone of his email.

17. On 19th May 2016 there was a conversation between them about the state of her mother in law's health. We find that it is more likely than not, that Mr Cousill asked if the doctors had given any indication of how long she was likely to live. He did not ask when she was likely to die, which we find to be the claimant's interpretation of the conversation.

18. This was the start of a deterioration of their relationship.

19. The claimant's mother in law died and the claimant flew to Italy for the funeral. She did not apply for compassionate leave in advance. She flew to Italy on 6 June 2016, notifying Mr Cousill as she went and telling him she would be in touch on the Friday. He did not offer her compassionate or emergency leave in the conversation, and asked her to notify him on the Wednesday, of her future plans. The claimant did not get in touch as requested on the Wednesday, and waited until the Friday.

20. Mr Cousill knew of the emergency and compassionate leave policy because earlier in the claimant's employment she had been given such leave when her daughter had been very ill. He granted the claimant compassionate leave for the funeral afterwards, and later gave her two further days paid leave to add onto a holiday for which she was short of leave.

21. On 1 November 2016 the claimant was involved in a compliance exercise involving the respondent's Monaco branch. She believed that action should be taken immediately, and sent emails which were persistent and directive. She was unaware that the person to whom she sent these was very senior in the organisation. He advised her that action could be taken the following day when a member of staff would deal with it, because it was a bank holiday that day in Monaco. The claimant refused to accept the explanation and pushed further. It later transpired that the policy had been mis-designated, and did not require compliance. Paul Hunnego is a director and line manager of the staff with whom she had been dealing. It is fair to say that the quality of her spelling and grammar in these emails left something to be desired. Paul Hunnego, commented on them saying that her tone was inappropriate and he would be concerned if she was communicating with other stakeholders like that. – in particular her style, syntax and grammar. The example that caused such a reaction read in part as follows '

> "*Rebbeca hi. Thank you for the updates.*
>
> *In terms of ownership/ accountability these systems are under Andrea s name in BCM tools .*
>
> *Therefore ultimately Andreas is accountable for the e2e BCM activities .*

Until I'm notified otherwise I will continue as is .

Ultimately responsibility fall s with one owner. That's why we identify roles and responsibilities/ names in system s, agree and support three is a team of support and sharing of the delivery of all services in all organisations , moving forward , if your accountable for Monaco , suggest changes of accountability is reflected correctly within the tool . Please confirm ."

And another example:-

"*Ref the DWB the business has requested , I'd reached out to the business asking for clarification on why?, Raising DWB does align Barclay s into a governance position, always the last option , this j increases our organisations overall risk.*

My objective is always to work towards a complaint organisation, reducing risks and dwb culture ."

22. This feedback formed part of the claimant's end of year review.

23. At the end of year review on 26 January 2017 the claimant, as every year, was assessed against the 'what' and the 'how'

24. It was clear from Mr Cousill's notes (page 416) that the claimant had made good progress against her objectives, but so far as the 'how' was concerned, she was doing less well.

25. She was found to be easy to work with by some stakeholders, but her communications were difficult to understand. Mr Cousill had received emails from others showing that they were not clearly articulated and were not grammatically correct. He used the phrase' Key aspects of behavioural expectations have appeared to be irrelevant on occasions'. He noted that she had failed to draft and upload her own objectives as was required of her, until November 2016 when she had been reminded. She confirmed that she had agreed objectives with Mr Coucill in January 2016 (page 448). Because of her adoption of her version of Dynamic Working, she had low visibility with the workspace leadership team, which was inconsistent with her role. She needed to consider how she could engage more proactively with wider members to increase her profile.

26. Mr Coucill only had the claimant to manage in his team. The evidence shows infrequent meetings, and little direct' hands on' engagement with her, until the complaint from Paul Hunnego.

27. The end of year review marking was taken by Mr Coucill to a meeting of the senior leadership team involved in the Workspace teams, and Kate Jessop

(amongst others) persuaded him that the claimant's 'how' marking should not be 'strong', but 'needs improvement', in part because of the lack of visibility to the leadership team and also because of the perceived poor quality of her written communications. It was important for this global enterprise to have confidence in written skills because e - mails were often sent to people for whom English may not be their first language.

28. Mr Coucill explained this to the claimant in her end of year performance review– that there were issues around the quality of her written work, quoting her email to Paul Hunnego as an example, and that there were concerns about her lack of visibility to the senior management team. She had initially been attending the office regularly, but more recently had been working away more and more. The upshot of a 'needs improving' marking was a requirement to create and work through a PIP. The claimant took grave offence at this suggestion.

29. On 30 January 2017 the claimant indicated that she would seek an informal grievance process. Mr Coucill made it clear that he would not change his mind about the grading. The claimant then chose to lodge a formal grievance on 7 February 2017. She made it clear that she would not proceed with her grievance if the marking for 'how' returned to 'strong' She did not consider a PIP to be appropriate (any marking other than 'strong' would lead to a PIP.

30. Around the 6 February 2017 the claimant was in discussion with Mr Coucill when she alleges that during a discussion about Brexit he suggested that she should not take steps to make her children Italian citizens, in some way (and she did not remember the words used when she gave evidence), expressing distaste or concern at the idea. It is agreed that there was a discussion. We preferred the account of Mr Coucill which was that in discussion about Brexit, he stated the view that he did not think that the claimant would need to get Italian passports for her children because he understood that they were of English heritage and both lived and worked in England at that time.

31. The claimant lodged her grievance on 7 February 2017. Ironically it is difficult to understand. The key issue appears to be the refusal to amend her 'how' grading from 'needs improvement' to 'strong'.

32. Other issues included – the need to place her on a PIP, the lack of offer of compassionate/ carers/ emergency leave, and the failure to comply with the respondent's own policies in this regard. Finally, the claimant alleged that she had been discriminated against for being a Dynamic Worker. We noted that she did not grieve about the comments she alleges were made about her children's citizenship just the day before.

33. Tracey Farleigh was appointed to handle the grievance. She began her investigation by a meeting with the claimant on 3 March 2017. She then interviewed Mr Coucill, Ms Jessop (senior leadership team member who led the move to reduce the claimant's 'how' marking from 'strong' to 'needs improvement' and Mr Coucill's line manager) and Mr Whales (the claimant's actual line manager, (who did not work with her, did not direct day to day issues, and only dealt with signing off her end of year reviews) and Diane Massey (also a member of the leadership team).

34. On 2 March 2017 the claimant was to attend a telephone meeting of the senior leadership team to present a paper. She dialled in at the appropriate time and was unsuccessful. She was successfully connected within 4 minutes. However, later, Mr Coucill was told that the meeting had been looking for the claimant and she was late dialling in. Ms Jessop said the same, and added that the presentation had been disappointing.

35. The claimant believed that Mr Coucill knew that the team were trying to find her, and that he withheld that from her at the time, to make her look bad.

36. In fact Mr Coucill would normally have been in the meeting, but on this occasion wasn't there, and he believes that he may not therefore have been in the office that day. He denied that anyone had attempted to contact him to find the claimant and absolutely denied deliberately not contacting her.

37. Ms Jessop, who was in leadership team meeting raised it with Ms Farleigh when she was being interviewed as part of the claimant's grievance investigation. She alleged the claimant either did not attend or was late attending the telephone meeting. It would seem Ms Jessop had little time for the claimant, having, on her own description, had only negative experiences.

38. This was raised in the second grievance meeting with the claimant. She denied being late for the meeting and explained what had happened. There was no further action by Ms Farleigh, who appears to have accepted her explanation.

39. The outcome of the grievance was sent to the claimant on 18 April 2017.

40. The claimant had alleged that Mr Coucill had failed to follow policy and that he had a duty of care which he failed to observe, causing harassment, trauma and making her feel intimidated, with regard to the respondent's Time Away from Work policy, ACAS managing bereavement guidance and ACAS flexible working guidance.

41. This point was partially upheld as Ms Farleigh found that Mr Coucill was unaware of the Carer's Policy which could have given the claimant up to 5 days leave to resolve the situation with her parents in law. It was noted that the Carers

Leave Policy was unknown to the claimant before August 2016, which explains why she did not apply for it. It was noted that Mr Coucill had made a mistake about the believed unauthorised absence on 13 May, for which he had subsequently admitted his mistake and apologised.

42. It was noted that throughout this period the claimant had worked dynamically and made use, on the death of her mother in law, of compassionate leave.

43. This did not affect the 'How' rating.

44. She alleged that Mr Coucill did not follow the policy with regard to the claimant's objectives in 2016. This issue related to his comments that some of her behaviours were irrelevant.

45. The investigation found that it was the claimant's job to place the objectives on the system, and that she had done so in 2015 and 2017, but not 2016. Mr Coucill was unaware that was the case, and he was reminded to check in future. Tracey Fairleigh considered that once the objectives were uploaded, the assessment was accurate, and consistent after checking by the leadership team, when compared with her peers.

46. The claimant alleged that she had been discriminated against because she worked dynamically. This was not upheld because several members of the team worked dynamically as it fitted with the business needs, but it was noted that she was not always ready to pick up jobs in the office, and had a low profile. There was evidence that it was difficult communicating with her, and her line manager needed to know where she was. Tracey Fairly recommended that there was a weekly discussion to establish the whereabouts of the claimant.

47. As part of her grievance the claimant required 'investigation into clear communication during the period in scope looking to prevent the surprise culture at review time'.

48. Tracey Fairleigh found evidence that there had been earlier feedback over the year at 1: 1s and at other times about the quality of the claimant's emails. She was aware that some of her emails were confusing. Ms Fairleigh had examples of emails to that effect which had been sent to her personally as well.

49. She did recommend that future 1:1s were documented and development points noted.

50. The outcome was a conclusion that there should be no change to the 'needs improving' for 'How'

51. Ms Fairleigh did recommend that Mr Coucill should apologise for not offering Carer's leave, and that he should do what he could to refund the 5 days annual leave, recognising that it would be difficult with the respondent's policies and processes, to do so.

52. On receipt of the outcome of the grievance, the claimant was signed unfit to work by her GP. Whilst she was on sick leave for stress and anxiety, Mr Cousill met with Ms Farleigh to discuss learning points (page 636B). He fully intended to implement the changes suggested, which ranged from ensuring that he knew all of the policies in relation to line management, handover meetings before leave, ensuring that the claimant had documented feedback, and managing her expectations with regard to dynamic working.

53. The claimant expressed her intent to appeal, but then resigned on 17 May 2018 after an appeal officer had been appointed. Her resignation was accepted and she left on 14 June 2017.

54. The claimant alleges that three male comparators were treated differently to her. Comparator A and B worked in different teams to the claimant and each other. A was placed on a PIP at an end of year review because he had a 'needs improvement' marking. The Tribunal saw evidence of this, and also of his successful completion of the PIP. B, at the end of year review achieved 'strong' for 'how' and a 'strong' for 'what' and did not therefore need to be placed on a PIP. To be clear both men had different managers to each other and the claimant.

55. For completeness Comparator C was a man working under the control of Mr Coucill. He was not an employee but a subcontractor working on short term contracts, and not subject to the same performance review procedures as the claimant, A and B.

The Law

56. Section 95 Employment Rights Act 1996 provides:

> "(i) For the purposes of this Part an employee is dismissed by his employer if
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

57. That situation has been referred to in numerous decisions as "constructive dismissal". The authorities demonstrate that for an employee to be able to claim constructive dismissal, four conditions must be met, namely:

(i) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;

(ii) The breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify him leaving;

(iii) The employee must leave in response to the breach and not for some other unconnected reason;

(iv) The employee must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.

58. The breach relied upon by the employee may be a breach of either an express or an implied term. The implied term relied upon most frequently by an employee is the implied term of trust and confidence. There is a helpful review of the law relating to the breach of this implied term contained in the decision of the Employment Appeal Tribunal in the case of Safeway Stores Plc –v Morrow 2002 IRLR 9. That decision traces the progress of the implied term from the decision in Western Excavating Ltd –v- Sharp [1978] IRLR 27 to Mahmud –v- BCCI [1997 ICR 606. In the latter decision the House of Lords expressed the term as an obligation that:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

59. The term was revisited by The House of Lords in Johnson –v- Unisys [2001] IRLR 279, where Lord Millett referred to the obligation thus: "This is usually expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them".

60. Further, Safeway Stores Plc –v- Morrow 2002 IRLR 9 is authority for the contention that in general terms a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract.

61. The question in every case is whether, objectively speaking, the employer has conducted himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. Furthermore, an employer can breach the implied term of trust and confidence by one act alone or by a series of acts which cumulatively amount to a repudiatory breach of contract, even if the last event in that series is not actually a breach of contract at all. The question to be asked is whether the cumulative series of acts taken together amount to a breach of the implied term.

62. The application of the law has been summarised by the Court of Appeal in London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 in the judgment of Dyson LJ:

> "14. The following basic propositions of law can be derived from the authorities:
>
> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.
>
> 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Mahmud v Bank of Credit and Commerce International SA [1997 ICR 606 I shall refer to this as "the implied term of trust and confidence".
>
> 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.
>
> 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer"
>
> 5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of

incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

> "Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

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64. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> "(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See Woods v W. M. Car Services (Peterborough) Ltd. [1981] ICR 666.) This is the "last straw" situation."
>
> 16. Although the final straw may be relatively insignificant, it must not be utterly trivial..... An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence. "

Race and Sex Discrimination

65. Section 13 Equality Act 2010 "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 (direct discrimination).

66. Section 4 Equality Act 2010 "the following characteristics are protected characteristics –

> Age;
> Disability;
> Gender reassignment;
> Marriage and civil partnership;
> Pregnancy and maternity;

Race;
Religion or belief;
Sex;
Sexual orientation."

67. Section 9 Equality Act 2010 Race includes colour, nationality, ethnic or national origins.

68. Section 136(2) Equality Act 2010 provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person A contravened a provision of the Equality Act 2010, the tribunal must hold that the contravention occurred.

69. If the claimant establishes a prima facie case of unlawful discrimination, his claim will succeed unless the employer can prove that there was a non-discriminatory reason for the treatment in question.

70. In Igen Ltd V Wong 2005 EWCA Civ 142 the Court of Appeal considered and amended the guidance contained in Barton v Henderson Crosthwaite Securities Ltd 2003 IRLR 332 on how to apply Section 54A, namely:

(1) It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful. These are referred to as " such facts"

(2) If the claimant does not prove such facts the claim fails

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

(4) In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the tribunal.

(5) It is important to notice the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts proved by the claimant to see

what inferences of secondary fact could be drawn from them and must assume that there is no adequate explanation for those facts. These inferences can include any inferences that may be drawn from any failure to reply to a questionnaire or to comply with any relevant code of practice. It is also necessary for the tribunal at this stage to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

(6) Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit, or as the case may be, is not to be treated as having committed that act.

(7) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in no sense whatsoever on the proscribed ground. This requires a tribunal to assess not merely whether the respondent has proved an explanation for such facts, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.

(8) Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a tribunal will normally expect cogent evidence to discharge that burden of proof. In particular a tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any relevant code of practice.

71. The Tribunal has applied the guidance offered by the Employment Appeal Tribunal in Laing v Manchester City Council 2006 IRLR 748 and Network Rail Infrastructure v Griffiths-Henry 2006 IRLR865. The reasoning in the former decision has now been approved by the Court of Appeal in Madarassy v Normura 2007 IRLR 246 CA.

Detriment for Public Interest Disclosure

72. The Employment Rights Act 1996 (“ERA”) as amended by the Public Interest Disclosure Act 1998 (“PIDA”) and further amended, most recently by the Enterprise and Regulatory Reform Act 2013 (“ERRA”) provides so far as relevant as follows:

s. 47B (1): 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 he has made a protected disclosure.

s. 43 A: In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance of any of sections 43C to 43H.

s. 43 B (1): In this part 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 one or more of the following:…..

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

s. 43C: A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer …

The claimant's state of mind

73. The three requirements are (a) an actual (subjective) belief by the claimant; (b) that the belief is objectively reasonable; and (c) that the disclosure is made in good faith (see below): Babula v Waltham Forest College [2007] IRLR 346 (CA).

74. For the purpose of point (b) above, it must have been reasonable for the claimant to believe that the factual basis of what was disclosed was true, and that it tends to show a relevant failure. Reasonable belief must be based on the facts as understood by the worker at the relevant time**,** and it is possible for a person reasonably to believe something which is in fact untrue, though the factual accuracy of the allegation may be an important tool in determining whether the worker held the necessary reasonable belief: Darnton v University of Surrey [2003] IRLR 133. While belief is centred on a subjective consideration of what was in the mind of the discloser, reasonable belief involves an objective standard, and its application to the personal circumstances of the discloser, which are likely to include his knowledge of the employer's organisation as a well-informed insider: Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.

75. Where the claimant relies upon breach of a legal obligation, the obligation in question should, save in obvious cases, be identified and capable of verification: Blackbay Ventures Limited v Gahir [2014] UKEAT/044912.

"A protected disclosure"

76. A qualifying disclosure is only a protected disclosure which attracts the protection of the Act if made in one or other of the circumstances set out in ERA ss. 43C to 43 H. Protection may arise if disclosure is made to the employer (or a person authorised for the purpose under the employer's procedure) or other responsible person (s. 43 C).

The protected act

77. The protected act, by reference to which the claimant may allege unfair dismissal or detriment, is limited to the disclosure itself, and does not extend to related conduct designed to demonstrate that the claimant's belief was reasonable.

78. It is important to define the protected act clearly since otherwise it is not possible to determine the ground on which it was done; one should not elide the act and the detriment which is the consequence of it: London Borough of Harrow v Knight [2003] IRLR 140; cited in Unilever UK Plc v Hickinson and Sodexo Limited UKEAT/0192/09.[1]

The detriment

79. ERA contains no definition of the term "detriment," though of course it is used in the discrimination legislation, and the concept is familiar from that context. The discrimination authorities on the meaning of the term are applicable to public interest disclosure cases. Accordingly, there is no requirement for physical or economic consequence flowing from the relevant treatment, provided that a reasonable worker would or might consider as being to his detriment: Shamoon v Chief Constable of Royal Ulster Constabulary (NI) [2003] ICR 337.

Burden of proof in detriment cases

ERA provides so far as relevant as follows:

80. S.48(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section … 47B …

81. S.48(2) On such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

82. In Fecitt v NHS Manchester [2012] IRLR 64 the Court of Appeal has held that the test under s. 47B is whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's action or deliberate failure to act. Though Igen v Wong has an EU context, and is therefore not strictly applicable to PID cases,

83. Without a finding of fact that any of those said to have subjected the claimant to detriment had knowledge of the PID, there was no basis for an inference that the PID had materially affected the treatment: Western Union Payment Services v Anastasiou UKEAT/0135/13.

Submissions

84. Both parties presented written submission and spoke to them. Due account been taken of everything we have read and listened to

The Conclusions

Breaches of the implied term of trust and confidence.

The respondent's approach to Dynamic Working.

85. We find that Mr Coucill believed that the claimant's working arrangement was three days in the office and two days elsewhere. We also found that the claimant was rarely in the office anywhere near as much as that and Mr Coucill appeared, for most of the time, to allow her to work from Italy and from home to suit herself. He was completely unaware that she was in Italy for so long in early Spring 2016, until she gave evidence in this tribunal. He attempted to bring her into the office to make her more visible was as a result of criticism by the senior leadership team, some of whom worked out of the Cheshire office. We heard and saw no evidence that anyone else worked as dynamically as she did, and was in the office as infrequently as her. There was no comparator who worked as flexibly and invisibly as she did. Mr Coucill's somewhat gentle managerial style led to the claimant believing she could dictate her own work pattern, which was not the case. When he attempted to enforce some structure to her visibility, he was met with resistance and ultimately a grievance.

The respondent's failure to uphold her grievance.

86. Firstly, part of her grievance was upheld. Further, even the parts that were not upheld led to lessons to be learned for both the claimant and Mr Coucill, and

had the claimant not resigned there was a clear set of recommendations for both of them. The claimant alleged that her stakeholders would have supported her case for a 'strong' finding on 'How'. However, even if they had, it would not have answered the 2 sets of criticism made of her, about lack of presence in the office (for the senior leadership team members who worked there) and her spelling and grammar, which she accepted in her evidence was weak. That being the case, not upholding the grievance after an investigation with 9 witnesses providing the evidence, cannot be said to be a breach of the fundamental term of trust and confidence.

Accusing her of irrelevant behaviour.

87. The Tribunal really struggled to comprehend what irrelevant behaviour really meant. It seemed to us that the claimant was not the only person for whom communication could be an issue. We surmised eventually that irrelevant behaviour really meant not doing what was required when it was required i.e. not completing her objectives on the online facility. We concluded that Mr Coucill was saying that the claimant's agenda was not the respondent's agenda, and that there was a mismatch between what the claimant was doing and what the respondent thought she should be doing, exacerbated by the failure to regularly discuss progress against objectives. The phrase' irrelevant behaviour' however, in the English language, is meaningless. We can understand how the claimant was baffled by it, until the behaviours were actually described to her.

88. We noted that nothing appeared to happen because of this allegation, and what needed to change under 'How' was the visibility of the claimant to the senior management team, and the quality of her written communications (in a global organisation where her emails would be read by colleagues whose first language may not be English).

89. We concluded though that this was a minor issue, not sufficiently major to have any real impact on the day to day relationship between Mr Coucill and the claimant, particularly as she was in a senior role which required a level of resilience and self-governance.

90. The respondent, through Mr Coucill was justified in criticising the claimant for leaving the country before obtaining approval for compassionate leave to attend her mother in law's funeral. She gave Mr Coucill no opportunity to permit her to go. It may be little more than a social nicety in such circumstances, but compassionate leave under the policy requires that a manager use their discretion to award it. Mr Coucill did not get that opportunity, as the claimant went regardless. She did not advise him of how long she expected to be away, and appeared not to understand

that as her manager Mr Coucill was entitled to recognition of his authority. He asked that she ring him on the Wednesday to indicate her plans – she did not do so, but rang on the Friday when she had said she would. She was actually given compassionate leave, and therefore this was not a breach of the implied term of trust and confidence.

Sex Discrimination

91. The claimant asserted that because she was female she was placed on a PIP. As a matter of fact, we find that she was never actually placed on a PIP even though it would at some point have followed from her failed end of year review. It was put on hold because of her grievance and sick leave. Her comparators in this regard were A and B. One of them was placed on a PIP for a 'needs improvement' marking which he successfully completed. The other was marked 'strong' for 'how' and 'strong' for 'what' and therefore was not placed on a PIP. She was therefore treated in an entirely consistent manner to her comparators.

92. There was in fact no restriction on the claimant's ability to work dynamically. Dynamic working always involved a dialogue between employee and manager to agree the level of dynamism. The claimant worked to the satisfaction of her manager until after her daughter's recovery at the end of 2015. Only at this stage did Mr Coucill note that he saw less and less of the claimant. He encouraged her to visit the office more often, she resisted, and did not do so. The outcome was the inevitable criticism by the senior leadership team, that she was invisible to them. The claimant did not appear to understand that it was totally appropriate, even within dynamic working, for the respondent to have requirements of her, through Mr Coucill, and that she was required to comply. Her failure to do so led in part to the 'needs improvement' measure applied to her. She was unable to explain how the 2 comparators A and B were dynamic working in the same way as she did, and were not sanctioned. The reality is that they were not were not, and were working to the satisfaction of their managers.

93. The only other potential comparator was C, who was in fact within Mr Coucill's team, but was an independent contractor (worker) doing totally different work and to whom dynamic working did not apply as he was not an employee.

94. We have preferred the evidence of Tracey Fairleigh, who gave a clear account of the steps she followed in considering the claimant's grievance. The fact that she found in the claimant's favour for part of the grievance, and against her on the rest does not suggest any level of bias. The grievance was all against the same manager. Neither comparator lodged grievances (that we are aware of) and so cannot be considered against this allegation. We have created a hypothetical

comparator of a man, who was given a 'needs improving' rating, was not offered carer's leave and lodged a grievance. We find as a matter of fact that on the balance of probabilities that Tracey Fairleigh would have followed exactly the same logical process, and reached the same conclusions.

Race Discrimination

95. The claimant was not actually placed on a PIP – but we accept that that was a likely outcome on her return to work. We found no evidence to suggest that the PIP or lack of carer's leave was to do with race. There was a clear explanation for both the PIP, based on the evidence of Ms Jessop, that the claimant's performance was overrated by Mr Coucill, and that the carer's leave was simply a matter that neither party knew a policy existed at the time. It can argued that Mr Coucill should have known, but there is no evidence to support an argument that his lack of knowledge was in any way attributed to the claimant's race.

96. We did not find as a matter of fact that Mr Coucill made adverse comments about the claimant's children in February 2017, and are supported in this by the failure of the claimant to raise it as an issue in her grievance which was lodged the day after she alleges it was said. It is worthy of note that the claimant herself admitted she could not remember exactly what he had said.

Public Interest Disclosure

97. The first allegation related to an email dated 1 November in which the claimant asserts that she disclosed a failure to comply in relation to a particular banking process. It very quickly transpired that this is simply a misfile, and there is no breach. The claimant was unable to explain in her evidence why she believed this to be a legal obligation which had not been complied with. Her email related to the identity of the person who had advised her that it would wait to the following working day. We could not establish from the emails, that the disclosure tended to show a breach of a relevant legal obligation. We accept that the claimant may have thought it did, but the quality of the communications was so poor at the time that it did not tend to do so. We do note that whatever happened the claimant did not follow it up, or if she did, she did not provide evidence to explain the outcome.

98. The alleged protected disclosure above was revisited at the claimant's end of year review. She did not, in discussion with Mr Coucill suggest that she was making a public interest disclosure. She did mention non compliances, but not in terms to suggest she believed it in the public interest to do anything about them, nor to suggest that Mr Coucill should. Her comments were in defence of the accusation, which she now accepts, of the poor quality and tone of her communications with Paul Hunnego. The Tribunal has substituted the word 'inappropriate' for 'irrelevant',

and found that what happened then made sense. It would have been helpful if Mr Coucill had reflected in the same way before using the word' irrelevant' when referencing her behaviour.

99. Even if there were qualifying protected disclosures, we do not find that the claimant suffered any detriment as a direct result of her disclosures.

100. The detriments she allegedly suffered were because of the way in which her email was worded, in part because Paul Hunnego complained about the tone, syntax and grammar (not the content). We agree with the respondent that this is one of the rare cases where even if the claimant were found to have whistle blown, there is no causal link between that and the detriment.

101. In relation to the PIP we saw clear evidence of the reasons for the 'needs improving' rating, which had no reference to any protected disclosure. Ms Jessop was the impetus behind the marking of 'needs improving' and she was unaware of any potential whistle blowing.

The last straw.

102. The claimant alleges that Mr Coucill's behaviour in failing to warn her that the senior management team were looking for her on the day of the telephone presentation, and the fact that it was raised as a potential serious allegation in the second grievance meeting were described as the last straw. In fact Mr Coucill knew nothing of the event and was probably not even at work that day, the delay was accepted as a maximum of 4 minutes and Ms Farleigh made nothing of it. The claimant's speculation about Mr Coucill's behaviour was irrational. She created a storm from nothing, and resigned on the back of it

103. In conclusion we have not found any evidence of race or sex discrimination. Nor did we find evidence of detriment resulting from public interest disclosures. We do not find that there were any breaches of the fundamental term of trust and confidence such as to justify the claimant resigning.

104. We conclude by dismissing all claims as ill founded.

Employment Judge Warren

Signed on 04 March 2019

Judgment sent to Parties on
06 March 2019
