EMPLOYMENT TRIBUNALS

Claimant: Ms Y Ameyaw

Respondent: PriceWaterhouseCoopers Services Ltd

Heard at: London Central **On:** 16, 17, 18, 21, 22, 23 and 24 January 2019

Before: Employment Judge H Grewal
Mr D Kendall and Ms S Plummer

Representation

Claimant: Mr Ogilvy (21 & 22 January); in person (other days)

Respondent: Ms C Darwin, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded;

2 The complaint of having been subjected to detriments for having made a protected disclosure is not well-founded;

3 The complaints of victimisation under section 27 of the Equality Act 2010 are not well-founded; and

4 The complaints of direct discrimination and harassment (race and sex) under the Equality Act 2010 are not well-founded.

REASONS

1 In a claim form presented on 1 May 2017 the Claimant complained of race and sex discrimination. On 16 February 2018 the Claimant was given leave to amend her claim to add claims of having been subjected to detriments for having made protected disclosures and unfair dismissal.

The Issues

2 The list of issues to be determined at this hearing was drawn up by the Respondent on 19 September 2018 on the basis of what had been agreed and decided at the preliminary hearing on 17 September 2018. It was amended slightly at the start of this hearing when the Claimant indicated that she was no longer relying on three of her protected acts. The issues that we had to determine were as follows.

Victimisation

2.1 It was admitted by the Respondent that at a meeting on 29 June 2015, in an email on 30 June 2015, in her grievance of 25 August 2015, in her claim forms of 15 October 2015, 9 August 2016, 11 November 2016 and 1 May 2017 the Claimant did "protected acts" within the meaning of section 27 of the Equality Act 2010. It was in dispute whether the Claimant did a protected act in her grievance on 25 January 2017.

2.2 If so, whether the Claimant was subjected to the following detriments because she had done the above protected act(s):

(a) Her suspension on 3 February 2017;

(b) The disciplinary investigation into allegations about her from 6 February 2017;

(c) The Respondent's decision to rate her as "Not Assessed" for the 2016/2017 performance year, as communicated to the Claimant on 30 March 2017.

Protected Disclosure Detriments/Automatic unfair dismissal

2.3 Whether the Claimant's emails to the Evening Standard on 16.28 and 16.37 on 31 January 2017 were protected disclosures. In particular,

(a) Whether they were "qualifying disclosures" within section 43B ERA 1996; and

(b) If so, whether the were made by the Claimant in accordance with sections 43C to 43H ERA 1996.

2.4 If so, whether the reason or principal reason for the Claimant's dismissal was that she made those protected disclosures.

2.5 Whether the Claimant was subjected to the following detriments:

(a) Not informing her in July 2017 whether she was entitled to a salary increase or performance bonus for the year 2017/2018;

(b) Not inviting the Claimant to make an annual Choices selection in September 2017;

(c) Conduct of the dismissal appeal investigation as particularised at paragraph 23B of the Claimant's amended particulars of claim dated 5 January 2018;

(d) Issuing the Claimant with multiple copies of the disciplinary investigation report and appendices on 15 November 2017, including couriering a copy to the Claimant's home address.

2.6 If so, whether the Claimant was subjected to any of those detriments because she had made the protected disclosures to the Evening Standard.

Harassment and Direct Discrimination

2.7 Whether any of the following acts amounted to harassment related to race and/or sex or, in the alternative, acts of direct race or sex discrimination:

(a) The Claimant's suspension on 3 February 2017;

(b) Hand delivering the letter of 3 February 2017 to the Claimant's home address and through her apartment door;

(c) Contacting the Claimant on 6 February 2017 about attending an investigation meeting.

Unfair Dismissal

2.8 What was the reason or principal reason for the dismissal? The Respondent contends that it was related to conduct.

2.9 Whether the Claimant's dismissal was fair.

Time Limits

2.10 Whether the Tribunal has jurisdiction to consider any complaints about acts that occurred before 8 November 2016.

Applications made at the start of the hearing

3 Notwithstanding the fact that there had been a number of preliminary hearings in this case, the Claimant made a number of applications at the outset of the hearing. The Tribunal gave its decisions and reasons orally at the time. The Claimant was informed that the written reasons would be in the Tribunal's decision at the end of the case. We set out below our reasons on the Claimant's various applications.

Application for Employment Judge to recuse herself

4 The Claimant initially applied for the EJ Grewal to recuse herself on the following two grounds. She said that EJ Grewal had said at the preliminary hearing on 20 December 2018 that if she looked at the evidence which had been redacted she would not be able to sit on the substantive hearing. As she had looked at some of the redacted evidence, she could not do the hearing. Secondly, she complained about the way in which EJ Grewal had dealt with her applications at that hearing and said that she had portrayed the Claimant in her note of the hearing as being overly paranoid. In her reply, she added a third ground. She said that at the first preliminary hearing on 1 December 2017, in respect of her complaint about the Respondent delivering the suspension letter to her home address, the EJ Grewal had said "They wanted to make sure that you received the letter". That comment before the Judge had heard the evidence showed that she was prejudiced.

5 The application was refused for the following reasons. EJ Grewal had not said what the Claimant alleged she had said at the hearing on 20 December 2018. She had said that it was probable that she would be hearing the substantive hearing and questioned whether, in those circumstances, she should look at evidence that was said to be covered by litigation or legal advice privilege to determine whether it was in fact covered by such privilege. Having heard the submissions of both parties, she decided, for the reasons set out in paragraphs 1 and 2 of her note of the hearing, that she could determine that issue without having to look at redacted evidence. She looked at two or three documents to confirm that the redacted part was, as the Respondent's solicitor claimed, related to the holder of the email sending it to lawyers for disclosure. She also looked at a page in the solicitor's notebook to see whether the words that had appeared in a copy provided to the Claimant were written on the top of that page. This is dealt with in paragraph 3 of the note of the hearing. Having looked at those three or four documents in no way compromised her ability to hear the case. There was nothing in the very limited evidence she saw that could in any way influence her judgment on the issues in the case.

6 EJ Grewal's note of the hearing simply record the matters on which she had to make a determination and her decisions and reasons for reaching those decisions. It is clear from reading the note that the Claimant is not portrayed as being overly paranoid. The Claimant was not able to point to any conduct on the part of the Employment Judge at the hearing which would have led an impartial observer to conclude that she was biased. The Claimant simply relied on the fact that the majority of her applications had not succeeded. The fact that a Judge decide an issue against a party is not per se an indication of bias.

7 Prior to the preliminary hearing on 1 December 2017 the Respondent had sent a draft list of issues which included a complaint about an employee of the Respondent personally delivering the suspension letter to the Claimant's home address. It appears form the note of the hearing that there wasn't any discussion about the list of issues because a number of other matters were raised and discussed. The Employment Judge has no recollection of saying what the Claimant alleges that she said. What the note does show, at paragraph 5, is that the Claimant said that she did not want any communication in respect of this litigation to be physically sent to her home address and that the Employment Judge accommodated that request. In the thirteen months that have lapsed since that hearing the Claimant never raised any issue about anything that the Employment judge said at that hearing as indicating

any prejudicial view of her claims. She did not raise it or ask the Judge to recuse herself at the preliminary hearing in December 2018.

8 Having considered all the above matters the Tribunal concluded that the Claimant had not made out any grounds on which the EJ Grewal needed to recuse herself. Nothing that she had said or done at either of the preliminary hearings would lead a fair minded and informed observer to conclude that there was a real possibility that the Employment Judge was biased. The application was refused.

Rule 50 application

9 The Claimant applied under rule 50 of the Employment Tribunal Rules of Procedure 2013 for an order that either her identity should be anonymised permanently or that the contents of the reasons given by EJ Hall-Smith for the order of 31 January 2017 and of the Judgment and Reasons of EJ Morton on 10 March should not be disclosed to the public. She argued that it was necessary to make one of those orders in order to protect her Article 6 and Article 8 rights.

10 This hearing is dealing with the Claimant's complaints of sex and race discrimination and unfairness in respect of the Respondent's decision to suspend her, institute the disciplinary process against her and to dismiss her. The Respondent's case is that one of the two reasons for it taking those actions was the Claimant's conduct at a preliminary hearing on 31 January 2017 at the Employment Tribunal in Croydon. That hearing related to claims which the Claimant had brought against the Respondent. The Respondent had and relied upon several accounts of what transpired at that hearing, one of which was the account set out in the reasons given by EJ Hall-Smith. It attached considerable importance to that account. The Claimant had in the course of the internal process the opportunity to challenge any of the accounts upon which the Respondent relied. Both parties in this case give evidence about the various accounts that were given and what weight was and should or should not have been placed on those accounts. The events of 31 January 2017 feature very largely in this case.

11 Rule 50(2) provides that in considering whether to make an order under that rule the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

12 Article 6(1) of the European Convention on Human Rights provides,

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

Article 8(1) provides,

> "*Everyone has the right to respect for his private and family life, his home and his correspondence."*

13 The principles to be derived from the authorities are as follows:

(a) The principle of open justice is of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice. Open justice requires that hearings are held in public, journalists can report proceedings fully and contemporaneously, the identities of the parties and witnesses are not concealed and that the judgment of the court is public.

(b) An order under rule 50 interferes both with the principle of open justice and the right to freedom of expression.

(c)The burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the Convention rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice.

(d) The balancing exercise to be conducted in a case involving conflicting Convention rights was described by Lord Steyn in **In re S (a Child) (Identification: Restrictions on Publication) [2004] 3 WLR 1129** as follows:

> "*What does clearly emerge from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account*. *Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test."*

(d) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, courts and tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, courts and tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation.

(e) In general, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which is inherent in being involved in litigation. However, they are not all in the same position when applying for such an order. It is not unreasonable to regard the person who initiates proceedings as having accepted the normal incidence of the public nature of court proceedings. The person defending the proceedings has an interest equal to that of the claimant in the outcome of the proceedings, but he has not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity since the courts and parties depend on their co-operation.

14 The Claimant has not explained how revealing her identity or disclosing to the public the contents of the two decisions will interfere with her right to have a fair

hearing in the determination of her civil rights, either in this case or in any other proceedings. It is also difficult to see how Article 8 is engaged. The evidence that the Claimant wants to keep out of the public domain is what is said by an Employment Judge about her conduct at a hearing in an Employment Tribunal. We think that it matters not whether the hearing was a private hearing, in the sense of a preliminary hearing to discuss case management issues and not open to the public, or a preliminary hearing that was open to the public. It was a hearing at an Employment Tribunal and involved her employers, lawyers and an Employment Judge. What the evidence relates to is the Claimant's conduct in a public forum and not in a private place. It is difficult to see how the publishing of that evidence interferes with her right to respect for her private life.

15 In case we are wrong and the Claimant's rights under Article 8 are engaged because publication would cause harm to her reputation, we considered whether her interests in the protection of those rights outweighs the broader interests arising from the principle of open justice and the protection of the rights afforded by Articles 6 and 10. The orders that the Claimant wants us to make – permanent anonymity or an order concealing from the public a crucial piece of evidence – amount to a serious and significant restriction of the principle of open justice. The interference, if there is any, with the Claimant's Article 8 rights is limited. There is evidence in this case from a number of other sources about the Claimant's behaviour on 31 January. She has not sought any orders in respect of that. That evidence is equally critical of her conduct. If the evidence about her behaviour is going to damage her reputation, it is already there. EJ Hall-Smith's record is unlikely to cause any additional damage. Furthermore, we would make it clear that EJ Hall-Smith's account was his account and record and we will deal in our decision with any argument advanced as to why it should have bn rejected by the Respondent. In any case of misconduct dismissal it can be said that publishing the allegations of misconduct can cause damage to the reputation of the individual. That in itself is not a good enough reason to restrict open justice. We also took into account that EJ Morton's decision has been in the public domain for a long time and that the Claimant has only recently, nearly two years after it was promulgated, applied for reconsideration. The fact that the Claimant is belatedly challenging those decisions does not, in our view, change the position.

16 Having done the balancing exercise, we concluded that the restriction to the principle of open justice by making either of the orders sought by the Claimant was not justified or necessary to protect the Claimant's Article 6 or 8 rights.

Application to add new issues to list

17 The Claimant wanted to add the following three issues to the list of issues:

(a) Whether the failure to investigate her grievance of 25 January 2015 was an act of victimisation;

(b) Whether her dismissal was an act of victimisation;

(c) Whether disseminating the Claimant's medical records without her consent was harassment related to race or sex.

18 We agree that in principle the Tribunal can always amend a list of issues to include a complaint made in the claim form which has been omitted from the list of

issues. There are, however, two caveats to that. The first is that if an Employment Judge has already adjudicated on a dispute as to whether a particular complaint had been made in the original claim, that issue will not be considered again by another Employment Judge unless there has been change in circumstances since the previous adjudication. There is a good reason for that rule. If there was no such rule a party could make the same application again and again before different judges in an attempt to find one whom he could persuade to reach a different conclusion. It would lead to an enormous amount of time being wasted and unnecessary costs being incurred. Only a higher court can decide whether an Employment Judge erred in law in coming to conclusion that he did, another Employment Judge cannot do so. The second is that a party who has abandoned a claim or a defence, which was in its original pleadings, cannot resurrect it without an application to amend.

19 The issue of whether the Claimant had made the complaints at paragraph 17(a) and (b) in her original or amended claim was considered by EJ Pearl at a preliminary hearing on 17 Sept 2018. He concluded that she had not. The Claimant has not pointed to any change in circumstances that entitles us to reopen and revisit issues that have bn raised, argued and adjudicated upon. At the same hearing, where the Claimant was represented by counsel, she abandoned the claim at paragraph 17(c) above. Therefore, the Claimant's application to add those three matters to the list of issues was refused.

Application to amend

20 The Claimant applied to amend her claim to include a complaint of breach of her privacy and harassment (unrelated to any protected characteristic) in respect of the Respondent delivering the suspension letter to her home on 3 February 2017. The application was refused because the Tribunal does not have jurisdiction to consider those claims. There is already a complaint of direct sex and race discrimination and harassment related to race and sex in respect of that act.

21 The Claimant also applied to add Christine McGoldrick as a second respondent. The reason that she gave for making that application was that documents disclosed to her on 10 January 2019 showed that Ms McGoldrick had attended at her home address with a security guard to deliver the suspension letter, and that she had gained entry into the house where the Claimant's flat is situated and had taken photographs both inside and outside the building.

22 The Claimant complained about the delivery of the suspension letter to her home address in her claim form. She has always known that Ms McGoldick delivered that letter. The Claimant indicated at the preliminary hearing on 1 December 2017 that she wished to add respondents. She was told that she should submit her application together with a draft amended claim in writing. She did not do so. It is true that the Claimant did not know that Ms McGoldrick had been accompanied by a security guard, how she had gained access to the house and that she took photographs until she received the late disclosure. That, however, does not change anything. The Claimant always believed the delivery of the suspension letter to her home to have been unlawful discrimination and harassment under the Equality Act 2010 and she has always known that Ms McGoldrick was the perpetrator of that act. There is no reason why she could not have been added as a respondent earlier. The Respondent accepts vicarious liability for her acts. If we allowed the application, we

would have to give Ms McGoldrick an opportunity to file a defence. The hearing would have to be adjourned. It would lead to delay in the hearing of this case. The case is already very stale. It would lead to additional costs being incurred by the Respondent. There is no prejudice to the Claimant if the amendment is not allowed. She has a remedy against the Respondent in respect of Ms McGoldrick's actions. There would be prejudice to the Respondent if it was allowed. The application was refused.

Other disputes

23 There were a number of other disputes between the parties which we resolved as follows. Both parties wanted to give evidence first. We decided that the Claimant could give her evidence first, subject to one of the Respondent's witnesses giving evidence on Friday. That was Ms Love who was on maternity leave and was due to give evidence by video link on Friday. The Claimant was permitted to file a supplementary statement to deal with the late disclosure. She wanted until Monday to do so and we permitted that. The Claimant's evidence would start on Monday.

22 As the judgment given in the Claimant's earlier claims is the subject of an appeal, we decided that we would not read it. The only part of it that we needed to see was the part setting out the complaints that had been made and the outcome of those complaints. We would not take any findings of fact from it.

Applications made in the course of the hearing

23 The first day of the hearing (16 January) was taken up with the Claimant's various applications. The Tribunal read the statements and relevant documents on 17 January. On 18 January the Claimant cross-examined Ms A Love. She gave evidence by video link. On 21 January 2019 the Respondent began cross-examination of the Claimant. It was not concluded on that day. There were no indications of the Claimant having a sore throat or any difficulties in speaking. In the course of that morning Mr Ogilvy appeared to represent the Claimant. He asked at 2 p.m. to make an application for the Employment Judge to recuse herself. He was told that any application he wished to make would be heard at the end of the Claimant's evidence.

24 On 22 January the Claimant applied to adjourn the hearing as she said that she had lost her voice. The Tribunal decided that her evidence would not continue at that stage, but that the case could continue as her representative could cross-examine the Respondent's witnesses. She was permitted to communicate with her representative for the purpose of giving him instructions during his cross-examination. She was able to do that by passing him notes and, if necessary, whispering to him.

25 Mr Ogilvy then applied for the Tribunal to recuse itself. The application was made on two grounds. The first related to the EJ Grewal's's conduct of the preliminary hearing on 20 December 2018. The Tribunal refused to hear the application on that ground as it had already done so, and nothing had changed since we had given our decision on that on 18 January. The second ground related to what the Claimant had happened on 18 January 2019. She said that shortly before 2 pm on that date she had seen the Respondent's solicitors enter the Tribunal hearing room on two

occasions. On the first occasion she had seen one of the panel members leaving via the door at the rear of the hearing room.

26 The Tribunal found that what had had happened was as follows. The case had started in a different hearing room. The parties had been advised on 16 January that we would move to room 509 for the video link evidence. On the morning of 18 January we informed them that we would remain in that room for the rest of the hearing. During the lunch break, when there was no one in the hearing room, the Respondent's solicitors moved their documents from the other hearing room to room 509. Ms Plummer, one of the members, returned to the Tribunal to retrieve something that she had left there. As she was leaving through the door at the rear, the Respondent's solicitors entered the Tribunal. She was not in the hearing room with the solicitors. We concluded that there was nothing in those circumstances that would lead a fair minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. The application was refused.

27 Mr Ogilvy cross-examined one of the Respondent's witnesses that morning. It was clear that he was not well prepared and that the Claimant was not pleased with his performance.

28 At 2 p.m. that afternoon Mr Ogilvy applied to adjourn the case because of an email that the Respondent had sent the Claimant at 10.51 that day. In that email the Respondent had informed the Claimant that they had done a Google search on Mr Ogilvy and seen reports that said that he had a criminal conviction for falsely representing that he was a barrister. They said that they did not know whether the reports were accurate or not but felt that it was only fair to draw the matter to her attention. They provided her with the link to the reports. It was not in dispute that Mr Ogilvy does have the criminal conviction as claimed in the report. The Claimant also said that he had given her a different name – he had told he that he had another name but that he preferred to use Leonard Roberts because it was easier. Mr Ogilvy said that he could no longer act for the Claimant and that she wanted to take legal advice. He also said that the case could not continue if the Claimant was not represented because she had lost her voice.

29 The Tribunal ruled that the sending of that email by the Respondent was not a reason to adjourn the case. There was nothing in the email to suggest that the Claimant had acted improperly in engaging the services of Mr Ogilvy. If Mr Ogilvy wished to withdraw from the case, he could do so. It was not clear about what the Claimant wished to seek legal advice, but she was free to do so. Neither of those matters required the case to be adjourned. The Claimant had started the case representing herself and had done so more ably than Mr Ogilvy. She could continue to represent herself.

30 However, we could clearly not continue that afternoon if the Claimant could only speak in a whisper. We adjourned the case to 10 a.m. the following morning. We directed that if the Claimant wished to apply for a longer adjournment the following morning, she should produce a medical report setting out the diagnosis, its impact on her ability to continue with the hearing, the treatment required and the prognosis. If the Claimant was delayed in the morning in order to get that evidence, she should let the Tribunal know and the application would be heard when she got to the Tribunal. The Tribunal would also consider whether it could make any adjustments that would enable the Claimant to participate in proceedings even if she were unable to speak.

The Respondent had said that it might be able to provide technology that would enable that.

31 At 9.10 the following morning the Claimant sent an email to the Tribunal and attached to that a medical report dated 22 January and an application to adjourn the case. She said that she had almost lost all use of her voice and had a fever. The medical report was from her GP and stated,

> "*I have assessed the above patient today. She has laryngitis, probably of viral origin and exacerbated by talking a lot during her current court case.*
>
> *As part of the treatment I have advised 7 days of voice rest. If she is not better at this time then we can review her again. I hope that you are able to facilitate this."*

The Respondent had in an email the previous day drawn the Claimant's attention to rule 30A of the Tribunal's Rules of Procedure 2013 if she wanted to make an application to adjourn. In the application attached to her email the Claimant said that this was the first time that she was making an application to adjourn on medical grounds. The medical evidence supported the need for an adjournment. It clearly described that the Claimant was unfit and why and also advised a rest period for a week. Therefore, the Claimant was unable to attend the hearing and the hearing needed to be adjourned. Her ill-health was sudden and outside her control and, therefore, was "exceptional" within the meaning of rule 30A(4((b).

32 The Respondent opposed the application. It had brought technology that would enable to the Claimant to continue cross-examination even if she was not able to speak. It would involve the Claimant typing her questions on a lap top and the questions being projected simultaneously on to a wall in the Tribunal as she typed them. The Respondent carried out a demonstration and it worked perfectly.

33 Rule 29 of the Employment Tribunals Rules of Procedure 2013 "the 2013 Procedure Rules") gives the Tribunal the power to make any case management order at any stage of the proceedings. Rule 30A provides.

> *"…*
>
> *(3) Where a tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the same party and that party makes an application for a further postponement, the Tribunal may only order a postponement on that application where –*
> *… or*
> *(c) there are exceptional circumstances.*
>
> *(4) For the purposes of this rule –*
> *(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;*
> *(b) "exceptional circumstances" may include ill health relating to an existing long term health or condition or disability."*

34 In this case, the Tribunal had already ordered two postponements on the application of the Claimant. On 11 May 2018 she had applied for a postponement of

a preliminary hearing listed for 30 May 2018. That application had been granted on 24 May 2018. On 6 June 2018, the second day of an eight-day full merits hearing, the Claimant applied for an adjournment on medical grounds. The medical evidence supplied in support of that application stated that the Claimant had suffered from depression and anxiety and had been treated for that with medication and counselling since 2016. She was experiencing more severe symptoms at that time and had changed her medication. She was aware of the need to attend court but felt that it was impossible at the time. She and her GP felt that a postponement of two months would be a reasonable timeframe to allow her treatment to take effect. In granting the postponement EJ Snelson noted,

> "*For reasons given orally today, the Tribunal was just persuaded that a valid medical ground for postponing this eight-day hearing was made out and that that was the proper course to take in all the circumstances. Accordingly the case has been re-listed for 16 January 2019… It was explained to the parties that, were the Claimant to seek a further substantial postponement beyond the re-set date (for any reason), the Tribunal might well find that the balance of prejudice had shifted in the Respondents' favour and refuse the application."*

35 Therefore, rule 30A(3) applied in this case. Rule 30A(3) (a) and (b) did not apply in this case. We considered first whether the Claimant's medical conditions amounted to "exceptional circumstances." The Claimant's medical condition was that she had laryngitis which impacted on her ability to speak. That did not prevent her from attending the Tribunal or being able to participate in the hearing; she had done so the previous day when she had not been able to speak. The medical report did not say that she could not attend the Tribunal and take part in the proceedings. It simply said that she had been advised to rest her voice. The Respondent had provided technology that would enable the Claimant to continue with the hearing without her having to speak. In all those circumstances, the Tribunal concluded that the Claimant's medical condition did not amount to exceptional circumstances and, therefore, we could not order a third postponement.

36 In case we were wrong in that conclusion, we considered what we would have concluded under rule 29. We would have come to the same conclusion for the reasons set out above together with the following reasons:

(a) All the evidence indicated that the Claimant wanted to delay and put off the conclusion of her claims against the Respondent. The previous full merits hearing of this case had been postponed on the second day on the basis of not very compelling medical evidence and the Judge had made it clear that a further application to postpone may well not succeed. The Claimant had made six applications to postpone during the hearing of her first three claims in the London South Employment Tribunal in April and May 2017. The Claimant had made numerous applications since this case started, which if granted, would have led to the case being postponed;

(b) If the hearing were adjourned today, there would be a delay of several months before the hearing could be listed to continue. This case is already very stale. It relates to events that took place nearly two years ago.

(c) Article 6 of the ECHR provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.

That applies as much to the Respondent as it does to the Claimant. The Claimant has made many serious allegations against the Respondent's employees. They are entitled to have those claims determined within a reasonable time.

(d) The Respondent has incurred significant costs in dealing with the Claimant's case. A further adjournment of several months would lead to additional costs being incurred. It has also made a number of senior partners available to attend the hearing twice already. Any adjournment would mean that they would need to do so for a third time.

The hearing was adjourned until 2 p.m.

37 At 11.40 the Tribunal sent the Claimant an email which said,

> "*The case has been adjourned to 2 p.m. The Tribunal will make adjustments for the Claimant to participate in the hearing without having to speak (she will be able to type her questions which will be projected on to a wall). If the Claimant does not attend, the case will proceed in her absence."*

38 At 1.57 p.m. the Claimant sent the Tribunal a further letter seeking a postponement. She said that attending at 2 p.m. would be to ignore or go against the medical advice which she was not prepared to do. Typing her questions was unorthodox and not known to fair procedure. Such a procedure would be too onerous for her. She wanted Mr Ogilvy to help her as a McKenzie Friend and thus needed to be able to speak to him.

39 The Tribunal considered that letter and concluded that there was nothing in it that caused them to change the decision that they had reached earlier. It proceeded with the case in the Claimant's absence. The Respondent called its witnesses. The case was adjourned to the following day for closing submissions.

40 At 3.10 the Tribunal sent the Claimant an email informing her of its decision. It advised her that the Tribunal would be hearing closing submissions the following day and that if she wanted to submit written submission she should do so by 12 noon. The Claimant did not submit any written submissions.

The Evidence

41 The Claimant gave evidence in support of her claim. The Tribunal read her original witness statement (86 pages, 312 paragraphs) and her two supplementary statements (one of which comprised 9 pages and the other one 6 pages. The Claimant was cross-examined for almost a whole day. The following witnesses gave evidence for the Respondent – Anna Love (Manager, Employee Relations, Policy and Advice), Sarah Henry (Director, Human Capital Lead for Consulting), Andrea Stokes (Partner), Isabelle Jenkins (Partner, Consulting), James Thorley (Manager, Employee Relations, Policy and Advice) and Sunil Patel (Partner). The first two witnesses were cross-examined by or on behalf of the Claimant. The other four gave evidence after the Claimant's application to adjourn was refused and in her absence. The documents in the case (excluding witness statements) comprised about 2,350 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

42 The Claimant is a woman who describes her race as black and of African origin. On 7 April 2014 she commenced employment with the Respondent as a Senior Manager (Consulting) in its UK Risk Consulting practice.

43 On 26 May 2015 the Claimant was informed that she had been given a performance rating of "3" for the year 2014-2015. The Respondent's performance ratings range from "1" which denotes "truly distinctive" to "4" which denotes "concern." "2" denotes "high performing" and "3" "valued".

44 It was admitted that at a meeting with Mark Gossington (who was a People Partner at the time) on 29 June 2015 the Claimant said something that amounted to a protected act under section 27 of the Equality Act 2010. The Tribunal did not have evidence of what was said. On 30 June 2015 the Claimant sent Mr Gossington an email which she concluded by saying,

> "*I would also like to bring to your attention the fact that not being taken seriously at work, being ignored, bullied and discriminated against on grounds of sex or race is detrimental to my health and well-being."*

It was admitted that that amounted to a protected act.

45 On 25 August 2015 the Claimant raised a formal grievance about her performance rating which had resulted in her not receiving any bonus or salary increase. In her grievance she said that she had good reason to believe that her rating was based on "*personal opinions and hearsay, racial stereotypes and prejudice".* She said that the process leading to that rating amounted to "*acts of discrimination and victimisation on grounds of sex and/or race."* It was accepted that the allegations of race and sex discrimination were a protected act. The grievance was investigated. It was not upheld.

46 On 6 October 2015 the Claimant presented her first claim to London South Employment Tribunal. In that claim the Claimant complained of acts of race and sex discrimination that she claimed took place between July 2014 and 6 October 2015. They related to the allocation of work to her, unjustified negative feedback and unsubstantiated criticisms of her performance, her rating and the handling and outcome of her grievance. It was accepted that that claim amounted to a protected act.

47 The Claimant received a performance rating of "4" for the performance year 2015-2016. In May 2016 Isabelle Jenkins, a partner within Consulting, was asked to chair a Performance Improvement Plan ("PIP") for the Claimant because she had received the lowest possible performance rating. The Claimant did not engage with the process and Ms Jenkins never met with the Claimant to discuss it.

48 On 20 June 2016 the Claimant submitted a formal grievance in which she complained about the feedback that she had been given on her work, the discussions that had taken place and the manner of communicating her performance rating. She said that she had presented a claim to the Employment tribunal in October 2015 and believed that she was being victimised because of the pending case.

49 On 9 August 2016 the Claimant presented a second claim to the London South Employment Tribunal. In that claim she complained of race and sex discrimination in respect of a number of matters, including those which had been the subject matter of her grievance of June 2016, the allocation of work since February 2016 and Ms Jenkins inviting her to a meeting to discuss the PIP.

50 In September 2016 Isabelle Jenkins became the Claimant's line manager ("People Manager").

51 On 12 October 2016, following a disciplinary investigation, Stephen Stocks, invited the Claimant to a disciplinary hearing. The hearing took place on 26 October but it did not conclude on that day and was adjourned to 17 November 2016.

52 On 11 November 2016 the Claimant presented a third claim to the London South Employment Tribunal. In that claim she complained of race and sex discrimination in respect of the disciplinary process that had been instigated against her.

53 The disciplinary hearing was reconvened on 17 November 2016. On 29 November the Claimant was given a Final Written Warning and was warned that if she committed any further misconduct within 12 months of 17 November 2016 the Respondent might take further disciplinary action. Mr Stocks upheld the following allegations. From February 2016 the volume of client work had been restricted and Symon Dawson, the Claimant's People Manager, had given a reasonable instruction that all those not on chargeable work or equivalent were to check in and be present in the office so that they could best be supported to find work. Between February and August 2017 the Claimant had been absent for significant periods which had meant that she could not contribute fully and effectively. There were 27 days which could not be accounted for. There were another 38 days where the Claimant had only been registered in the office for part of the day. During that period the Claimant had booked 200+ hours to BD but the business recognised limited BD input from her. She had also booked 400+ hours to "Other" but had not elaborated on what activities that covered. During that period her performance had unsurprisingly become an increasing concern. The fact that she had not engaged with the PIP process meant that the Respondent had not been able to support her effectively. He said that the Claimant had not fulfilled the basic expectation of an employee to be at work and to proactively seek to add value. He considered that to be a serious matter. She was advised of her right of appeal and that such a right had to be exercised within seven working days.

54 When Isabelle Jenkins became the Claimant's line manager she realised that she had not been set objectives for that year. She met with the Claimant on 22 November. They agreed that the Claimant would have one objective for the remainder of the year, which was to obtain chargeable work.

55 On 30 November the Claimant produced a medical certificate that she had depression and anxiety and could attend work over the next two months if she was moved to a different team. Ms Jenkins met with the Claimant on 1 December to discuss the medical certificate. Ms Jenkins spoke to the Partner who was Head of the Operations Competency and it was agreed that from 1 January 2017 the Claimant could move from Risk Consulting to Operations. The Claimant agreed to that move.

56 On 7 December 2016 the Claimant's solicitors informed the Respondent that she would not appeal against the Final Written Warning as she had lost all faith and confidence in the Respondent's grievance and disciplinary process and I did not believe that she would have a fair hearing.

57 On 22 December 2016 the Claimant was giving the outcome of the grievance that she had raised in June 2016. It was not upheld.

58 On 1 January 2017 the Claimant moved to Operations.

59 On 24 January 2017 the Claimant sent an email to Ms Jenkins and copied it to Sarah Henry. She said that as a result of certain information she had received as part of disclosure in her Employment Tribunal claims, she did not believe that she could meet the objective that she had agreed with Ms Jenkins on 22 November. She also informed Ms Henry that in light of the new information she wished to appeal the Final Written Warning but did not feel able to do so immediately.

60 Ms Jenkins responded the following day that she was interested in helping her obtain chargeable work and that she saw no issue with them working to meet the objective that they had agreed. She offered to meet her to discuss it further if the Claimant wished. Ms Henry informed her that the time for appealing the Final written Warning had lapsed. She also said that concerns that arose as a result of disclosure in the Tribunal process were probably better dealt with in that forum. However, if she wished to raise issues that related to her day to day employment she could use the grievance process to raise those.

61 On 26 January 2107 the Claimant submitted a formal grievance. She said that the Consulting leadership had colluded to deny her chargeable work in the performance years ending in 2016 and 2017 and that managers had misled the firm by raising conduct concerns against her which had resulted in disciplinary action being taken against her. That was reference to the matters that had led to her being given a Final Written Warning. As an outcome she sought a reconsideration of the disciplinary investigation and a proper and fair review of the conduct disciplinary investigation and outcome i.e. the Final written Warning. There was no reference to any protected act in that grievance.

62 Ms Henry wrote to the Claimant on 31 January. She said that the outcome that she wanted in respect of the disciplinary matter were related to the issues that were going to be considered as part of her Tribunal claim and that Ms Jenkins was liaising directly with her in respect of her objectives for the year ending 2017. As the issues about the disciplinary were going to be addressed by the Tribunal in April 2017 she asked whether the best course of action might be to put the grievance process on hold until the Tribunal had given its decision on the same issues. The Claimant responded that she wanted the grievance investigated in the normal way.

63 There was a preliminary hearing of the Claimant's claims at the London South Employment Tribunal on 31 January 2017. On 27 January 2017 solicitors acting for the Claimant wrote to the Tribunal indicating that the Claimant would not be pursuing the applications to amend her claims which she had previously made. The Claimant made it clear to her solicitors that she was not happy that the letter had been sent as she wished to pursue her application. She wrote to the Tribunal that the letter had

been sent without her approval and that the contents of the letter had not been agreed. That letter was not copied to the Respondent.

64 At the preliminary hearing the Claimant was represented by counsel. She was accompanied by her mother and friend. Employment Judge Hall-Smith ruled that as it was a private case management hearing only one of them could remain. The Claimant's mother shouted at the judge but ultimately left. The Respondent was also represented by counsel. Also in attendance were Louise Coyne and Christina McGoldrick (solicitors working for the Respondent) and Denise Lake (from the Employee Relations Policy and Advice team ("ERAP"). All three of them made notes at the hearing.

65 According to their notes the Claimant's counsel said that she wished to pursue the application to amend but that he would have to withdraw due to conflict between his instructing solicitors and his lay client. The Respondent's counsel objected to the application being heard on the grounds that she was not prepared to deal with it. There was a lengthy discussion on the issue, at the end of which the Employment Judge said that he was not allowing the amendments. The Claimant then engaged in a heated exchange with the judge. She said that her lawyers had not had her approval to withdraw her application to amend and that her application to amend was as stated in her previous solicitor's letters. She continued arguing with the Judge and he eventually said that he had made his ruling. The Claimant said that her case had been purposely sabotaged by the Respondents and that she had professionals submitting applications to the Tribunal without her approval. She said that there had been a travesty of justice. The Claimant's counsel said that he had ceased to act for her fifteen minutes ago and he withdrew. The Claimant continued shouting at the Judge and he repeated that he had made his ruling. The Claimant said that she had been prejudiced and needed to make an emergency application. She continued arguing with the judge and he tried to placate her. The Claimant then shouted that she could not continue and that this was not the way the justice system worked. She then gathered her things and stormed out of the room. The Respondent's counsel said that she felt that she should apologise for the Claimant's conduct. The Claimant's mother then came to the door of the Tribunal and shouted at the Judge and the Respondents. The Claimant was beside her mother. Security staff were called and were present at some stages of the hearing. Finally, the Claimant and her mother left and the Judge dictated his reasons for refusing the Claimant's application.

66 Later that afternoon the Claimant sent two emails to the Tribunal which were copied to her solicitors and counsel, the Respondent's solicitors and the Evening Standard. In the first email she said that her solicitors had submitted a defective application without her approval and had refused to withdraw it despite her request to them to do so. She attached emails between her solicitors in support of what she said. The attached emails referred to her dispute with the Respondent and made some negative comments about the Respondent. They referred to an attempt to resolve matters through mediation and referred to "without prejudice" discussions. She said that the solicitors had ceased to act for her in the middle of the hearing and had thus "sabotaged" her claim. She asked for the claim to be stayed while she found alternative representation. In the second email she attached an email chain which she said explained why she was pursuing her amendment.

67 That evening Denise Lake informed Sarah Henry (Director of Human Capital for Counselling) in a telephone call about what had happened at the preliminary hearing

that day. Louise Coyne, the Respondent's solicitor, also spoke to Ms Henry that evening. The content of that conversation was legally privileged. Ms Henry was also made aware of the two emails that the Claimant had sent to the Evening Standard.

68 On 1 February 2017 the Claimant sent Ms Jenkins a medical certificate stating that she was unfit to work for six weeks because of "*stress at work.*"

69 On 3 February 2017 Ms Henry took the decision to suspend the Claimant whilst an investigation was carried out into her conduct at the preliminary hearing on 31 January and the sending of the two emails to the Evening Standard. Her preliminary view on the basis of what she had been told was that the Claimant's conduct, if substantiated, was not consistent with the expectations that they had of their employees and was likely to bring the Respondent into disrepute. The latter is given as an example of gross misconduct in the Respondent's disciplinary procedure. Her view was that the matter needed to be investigated and that in light of the concerns about the Claimant's conduct it was appropriate to suspend her. She ahd serious concerns that the Claimant might have been minded to harm the Respondent via her access to its computer systems and premises. The Respondent's disciplinary procedure provides that suspension will be used if the shortcomings in an employee's conduct are more than trivial. It provides,

> "*Where appropriate, our first step when considering disciplinary action will be an investigation to establish the facts. This may include investigatory (fact-finding) meeting(s) with you and/or others who may have relevant information. You are required to co-operate with our disciplinary investigations. During an investigation into your actions, or pending a meeting under this procedure, we may suspend you with pay."*

70 The Respondent's usual process for suspending an employee is for a partner to hand the suspension letter in person to the employee. However, that could not be done in the Claimant's case as she was absent sick at the time. Ms Henry telephoned the Claimant on 3 February to inform her of her decision to suspend her but got the Claimant's answerphone. She left a message informing her that she had been suspended with immediate effect pending a disciplinary investigation. She also sent the Claimant a copy of the suspension letter and the Respondent's disciplinary procedure by email to both her work and her personal email addresses.

71 In the suspension letter Ms Henry informed her that an investigation had commenced into her behaviour at the preliminary hearing on 31 January and her subsequent communications with the press, and that during the investigation she was suspended. She said that normally a suspended employee would be expected to return their laptop, iphone and security pass. However, as the Claimant was not at work, they would arrange for her access to her computer, iphone and the Respondent's offices to be suspended remotely. If she required access to any emails or information in respect of her litigation, she should write to her setting out what she required and she would ensure, so far as was reasonable, that she had access to the information.

72 the Respondent's norma practice is also to send a hard copy of the suspension letter in the post. There had, however, been problems in the past when the Claimant had not received documents sent to her by post or delivered by courier. In order to ensure that the Claimant received the letter and that the Respondent could prove

that, Ms Henry decided that it should be personally delivered to the Claimant's address by someone who knew her. She instructed Ms McGoldrick to deliver the letter. On 3 February Ms McGoldrick attended at the Claimant's address with a woman from the Respondent's security team. The Respondent did not know who else would be at the Claimant's premises and, in light of what had transpired on 31 January, it was felt that it was advisable for Ms McGoldrick not to attend alone. There were three flats in the building. She rang the bells for all three flats. A woman answered the door. She asked her whether the Claimant lived in the house and she confirmed that she did. She said that she wanted to deliver a letter to the Claimant and asked the woman where the Claimant's flat was. The woman told her and Ms McGoldrick tried to slip the letter under the door. While at the premises Ms McGoldrick took a number of photographs to show that the letter had been delivered to the Claimant's home address.

73 Ms Henry instructed Jacqueline Essuman in her team to conduct an investigation into the disciplinary allegations against the Claimant. On 6 February she sent her a copy of the suspension letter. a typed note of the preliminary hearing that had been prepared by Ms McGoldrick and had been approved by Louise Coyne, Denise Lake and Laura Bell and the two emails sent by the Claimant. She also advised her that she could contact any of them if she thought it necessary and that they would at some stage receive the written reasons from the Employment Judge.

74 On 6 February the Respondent applied to the Tribunal to strike out the Claimant's claims on the grounds of her scandalous and vexatious conduct at the preliminary hearing. It attached Ms McGoldrick's note to its application in support of it.

75 On 7 February Ms Essuman sent the Claimant an email saying that she would like to interview her as part of the investigation process. She said that she would conduct the interview by telephone and that she envisaged that it would take between one and one and a half hours. She gave the Claimant times when she was free to conduct the interview on 9 and 10 February and asked her to confirm what day and time suited her. Ms Essuman did not hear from the Claimant and she sent her a further email on 9 February asking her to contact her to arrange the time for a telephone interview.

76 The Claimant responded to Ms Essuman on 10 February. She said that she was not fit enough to attend an investigatory interview and that the meeting was pre-determined to facilitate the application to dismiss her Tribunal claims. She said that delivering the suspension letter to her home address was a gross invasion of her privacy and an act of race and sex-related harassment. She accepted that her mother had become distressed at the hearing but denied that she had done anything that could amount to a breach of the Respondent's Code of Conduct. She said that she would not subject herself "*to the indignity of an investigation which will be pre-determined as to my guilt and is designed as a deliberate act of vicitmisation."* She also said, "*All my claims are in the public domain and I am at liberty to contact the media about my claims if I choose to do so."* She concluded by saying that if she received any further communication from the Respondent she would take all necessary and appropriate action to protect her health and well-being.

77 On 16 February Ms Henry advised the Claimant that the Respondent's normal practice was to suspend grievance investigations while employees were absent from work either because of illness or suspension pending a disciplinary investigation. She

would, therefore, arrange for the Claimant's grievance to be investigated when she returned to work.

78 As part of her disciplinary investigation Ms Essuman interviewed Christina McGoldrick and Denise Lake on 8 February 2017, Louise Coyne on 9 February 2017 and Laura Bell, counsel for the Respondent at the preliminary hearing on 17 February. Laura Bell confirmed the account given by the Respondent's witness and provided further details in response to the questions that she was asked. She said that the judge had been visibly upset by the Claimant's mother's outburst at the start of the hearing. She said that a security guard had entered the room and someone must have asked him to attend because it was not normal for them to be present in Tribunal hearings. The Claimant had been continuously shouting and not listening to anyone. Although it is not unusual for claimants to get upset, she had not witnessed a litigant in person behave like the Claimant. She had apologised for the claimant's behaviour because she had been shocked at what the judge had had to endure. As she had been an employee of the Respondent, her actions had been embarrassing. When the Claimant and her mother had returned to the door and shouted at them, the Judge had had a look of panic on his fase and had continuously pressed the alarm button for security. She had not been prepared to leave the room. Ms Bell had stood in the doorway of the Tribunal to prevent them entering. The Claimant and her mother had been shouting and the environment felt tense and threatening. Finally, they had left and gone to the claimants' waiting room. A security guard had escorted her and the Respondent's lawyers to a rear exit from the building. She had never had to do this before. They had all walked to the train station together and she had made sure that the Respondent's employees got on a train before she caught her train.

79 Employment Judge hall-Smith provided his written reasons on 3 March 2017. He set out his reasons for refusing the Claimant's application to amend. He then set out what happened after he gave his ruling. He said,

> "*26 Having announced my ruling, the Claimant interrupted me and alleged that the Respondent had had knowledge of the allegations since April 2016, which appeared to be inconsistent with the letter of application from her then Solicitors that the matters had only come to light over the Summer. Ms Bell endeavoured to address me but she was shouted over by the Claimant.*
>
> *27 I noted that Mr Milsom was clearly in difficulty about the Claimant's conduct and I asked whether the Claimant was representing herself or whether Mr Milsom was representing her. The claimant continued to interrupt and allege that her claims were being ambushed and sabotaged. I informed the Claimant that I appreciated that she held strong views, but that I would not allow the Tribunal proceedings to turn into an argument. Ms Bell added that the letter from Bindmans amounted to an effective withdrawal of the application to amend the claim.*
>
> *28 I pointed out to the Claimant that I have made my ruling. The claimant stated that her case had been purposely sabotaged by her Solicitors and by the Respondent. The Claimant shouted that justice had not been done. Mr Milsom informed me that he had ceased to act for the claimant for about 15 minutes and stated that he had no option but to withdraw from the case.*

29 The Claimant continued to address me. Again I pointed out that I had made my ruling and the claimant said that she had been prejudiced and was threatening to appeal. I pointed out to the Claimant that it was open to the Claimant to appeal my ruling.

30 The claimant continued to dispute my ruling. The Claimant stated that she was nor represented and had been prejudiced. I found it increasingly difficult to manage the proceedings in circumstances where the Claimant continued to interrupt me. I endeavoured to point out that many Claimants before the Tribunal were unrepresented. In any event the Claimant had been represented by two firms of Solicitors and had been represented by Counsel for part of the hearing before me.

31 I pointed out again that I had refused the Claimant's application to amend and the Claimant shouted that she could not continue and would leave. She made some reference to the justice system not working and she left the room.

32 Because of the continued disruptive behaviour of the Claimant, a security guard had been alerted by the disruptive conduct in the Tribunal room and had remained at the back of the Tribunal. After the Claimant had left the room, I informed the guard that he could leave, in circumstances where I then believed that there would be no more disruption following the withdrawal of the Claimant form the Tribunal.

33 A minute later both the Claimant and her mother flung open the door to the Tribunal room and entered the Tribunal. The Claimant's mother was shouting aggressively waving her arms and shouting. "you have not heard the end of this stop smiling you have not heard then end of this something will happen you will not get away with this."

34 The conduct of the Claimant's mother was both aggressive and threatening. I repeatedly pressed the alarm bell behind my chair and to summon the security to return to the Tribunal room. Security did not respond to my frequent alarm calls. In an endeavour to defuse the situation I said that I was rising and that the Respondent should leave the room. Ms bell on behalf of the Respondent said that she was not happy to leave the room because she felt threatened. By this time the Claimant had pulled her mother out of the room but she remained in the corridor outside the door of the Tribunal. Understandably Ms Bell and her instructing solicitor were fearful about the presence of the Claimant and her mother who remained in the Tribunal building near the Tribunal room.

…

35 It was clear to me that Ms Bell and her solicitor Ms Coyne had been very shaken and alarmed by the continued disruptive conduct of the Claimant and the aggressive and threatening behaviour of the Claimant's mother.

36 I appreciate that parties can become upset at Tribunal rulings but there was no justification for the conduct of both the Claimant and the Claimant's mother... The Tribunal's refusal to grant an amendment to an existing very substantive Tribunal claim should not have triggered what, on any view, was disgraceful conduct on the part of the Claimant and her mother during the course of a legal hearing."

80 At a preliminary hearing on 10 March 2017 Employment Judge Morton considered the Respondent's application to strike out the claim on the grounds of the Claimant's conduct at the preliminary hearing on 31 January 2017. At that hearing the Claimant's counsel sought to admit the statements of the Claimant and a Mr Read who had attended the hearing on 31 January 2017. The Judge refused to admit witness evidence from either side and indicted that she would make her decision on what was set out in the written reasons of EJ Hall-Smith. Having considered all the material before her she concluded,

> "…*the Claimant undoubtedly lost her cool at times during the hearing and behave reprehensively but did not do so without justification. Something had broken down in her communication with her solicitors and she found herself at a hearing with matters not proceeding in accordance with her instructions. Her mother's intervention was plainly disgraceful and singularly unhelpful … However, all are agreed that the Claimant's mother's conduct cannot be attributed to the Claimant. The Claimant's conduct on its own, although at times uncontrolled and unacceptable, does not in my view on those particular facts amount to conduct that is so exceptional that I need not consider whether a fair trial is still possible."*[sic]

She refused the application to strike out the claim.

81 On 9 March 2017 the Claimant submitted a medical certificate that she was unfit to work because of stress at work for a period of four weeks. Ms Henry informed her on 15 March that no disciplinary meeting would be convened with her until her certificate expired on 6 April and that, unless she heard otherwise from the Claimant, she would assume that she was in agreement with that. The Claimant responded on 16 March that her position remained unchanged from what she had said in her letter of 10 February. On 20 March a solicitor acting for the Claimant queried whether the disciplinary was still at the investigation stage or a decision had been made to progress to a disciplinary hearing. Ms Henry responded to the solicitor on 21 March. She said that they had not concluded their investigation but had simply postponed any action until the expiry of the Claimant's medical certificate.

82 The Respondent's performance year runs from 1 April 20 31 March each year. It is the responsibility of the individual to collate feedback on their performance from other colleagues and clients that they have worked with throughout the performance year. Feedback cam be on both chargeable and non-chargeable contribution. At the end of the performance year approaches, the role of a People Manager (line manager) is to assess the individual's performance over the year against the objectives set earlier in the performance year and to suggest an appropriate 'pre-moderated' performance rating for the individual.

83 As end of March approached Isabelle Jenkins was unsure of how to rate the Claimant for the performance year ending in March 2017 given the following factors. The Claimant was questioning the performance objective which she had agreed with Ms Jenkins on 22 November 2016, but as she was absent sick Ms Jenkins had not been able to discuss that with her. The Claimant had not obtained any feedback in relation to her contribution over the performance year. As a Senior Manager the Claimant was expected to have done about 1,165 chargeable hours. She had done only 15 chargeable hours. The Claimant felt that she was not being given chargeable

work by the business. She had had been distracted in the previous year by the disciplinary proceedings and her employment tribunal claims. She had been absent sick since 1 February 2017. Ms Jenkins sought advice from Sarah Henry and Denise Lake (a Senior Manager in ERPA) about how to approach the Claimant's performance assessment.

84 The Respondent's Performance, Talent and Reward Review provides that a "N/A" ("Not Assessed") rating is "*Assigned to an individual where special circumstances dictate it is not practical or appropriate to rate an individual in this performance year. This rating should only be used after consultation with your ERPA relationship manager."* On 27 March 2017 Sarah Henry advised Isabelle Jenkins that it would be appropriate to rate the Claimant as "N/A".

85 On 30 March Ms Jenkins advised the Claimant that she and Ms Henry had taken the view that it was not practical to assess her contribution for the previous year and that she proposed that the Claimant be rated as "N/A". She indicated that she was willing to discuss it with the Claimant if she so wanted. Ms Jenkins did not subsequently inform the Claimant that she would not receive a pay rise or a bonus because she thought it would have been obvious to the Claimant that, having been rated as "N/A" she would not receive a pay rise or a bonus.

86 The Claimant's three claims at the London South tribunal were heard from 18 April to 12 May 2017. On 8 May the Claimant sent to the Tribunal, and copied to the Respondent, a medical certificate that she was unfit to work until 22 May because of "stress related problem." On 12 May the Claimant sent the Tribunal a medical report dated 10 May in support of her application to adjourn the case. She also said that she had been left with no choice but to appeal the Tribunal's refusal to grant her applications to adjourn made on 7 April, 18 April and 4 May. She said that she did not want the medical report to be shared with the Respondent. The medical report was from her GP who aid that the Claimant had been under the care of the surgery since August 2016 suffering from anxiety and depression provoked by stress at work. She was receiving treatment but continued to feel very low and had, on occasions, felt suicidal. Attendance at the Tribunal, especially as she had no legal representation, had aggravated her pre-existing depression and had led to panic attacks in court where felt unable to function at all. The doctor's view was that she was medically unfit to attend court and that her case should be adjourned.

87 On 1 May the Claimant presented this claim to the Employment Tribunal.

88 On 26 May Ms Henry inquired of the Claimant whether she was still unwell and said that if she was they would require a medical certificate in the normal way. The Claimant queried whether under the Respondent's policy she was required to submit medical certificates while she was suspended. Ms Henry responded that as an employee the Claimant was obliged to inform the firm when she was not fit for work and that her being suspended pending investigation of allegations of misconduct did not change that. She said that in the absence of a further medical certificate they would consider whether it was appropriate to resume the disciplinary investigation process.

89 The Tribunal communicated with the Claimant about sharing the medical report with the Respondent and on 8 June the Claimant told the Tribunal that the report could be communicate to the Respondent's nominated legal representative if

necessary and with agreement to keep it strictly confidential. On 22 June the Tribunal sent the Respondent the Claimant's emails of 12 May and 8 June and the medical report of 10 May. Louise Coyne, a solicitor in the Respondent's employment team, received it and forwarded it to other lawyers so that they could provide it, if necessary, and any required legal advice to Sarah Henry in respect of the disciplinary process that she was conducting. The lawyers passed the report to Sarah Henry and provided legal advice in connection with it.

90 On 25 July Ms Henry wrote to the Claimant and informed her that they had received further information about her health from correspondence with the Tribunal and that in light of that they considered that it would be appropriate to obtain further information about the Claimant's medical condition before commencing the disciplinary process. She asked the Claimant for dates when she would be available to meet with an occupational psychiatrist.

91 On 31 July Ms Henry advised Jacqeline Essuman that as the Tribunal hearing had concluded and the Claimant's last medical certificate had expired on 22 May, she thought it was time to recommence the disciplinary process. As a result of recent correspondence from the Claimant to the Tribunal about her health, they had thought it appropriate to engage a mental health specialist to report on the Claimant's fitness to continue with the disciplinary process. Ms Essuman left soon after that and James Thorley, a manager in ERPA took over the investigation.

92 On 2 August Ms Henry sent the Claimant another email as the Claimant had not responded to her previous email of 25 July. She reminded the Claimant that under her terms of employment that, where the Respondent believed that it was in her best interests, they could at any time refer her to occupational health and require her to undergo a medical examination and that she was obliged to co-operate fully and engaged with the medical specialists. She asked the Claimant to provide her by 7 August with dates when she could attend such an appointment. If she did not do so, they would be obliged to consider recommencing the disciplinary process.

93 On 25 August 2017 James Thorley sent the Claimant by email and hard copy a letter inviting her to attend a disciplinary hearing to be conducted by Claire Stokes (a partner) on 26 September 2017. He said that the purpose of the hearing was to consider an allegation of misconduct against her for her behaviour at the preliminary hearing at the London South Tribunal on 31 January 2017 and her subsequent conversations with the press. He attached to that the investigation report which contained notes of all the interviews conducted by Ms Essuman and other documents which were relevant. He warned her that the allegation, if substantiated, could be regarded as constituting gross misconduct and that as she was under a Final Written Warning a possible outcome could be her dismissal. She was advised of her right to be accompanied. He asked her to confirm that she would attend or alternatively that she would provide her with written submissions.

94 In September of every year the Respondent's employees are given the opportunity to vary the benefits that they receive. There is a central team within the Respondent that deal with the Choices election process and it sends out regular communications regarding the process to all employee between July and October. In September 2017 these communications were sent to the Claimant's work email but as she was suspended and did not have access to the Respondent's email systems, she did not receive them. The Claimant was aware that the process would take place

at that time and she could have raised the matter with the Respondent to make any changes if she so wished. She did not contact the Respondent.

95 The Claimant did not respond to that and on 13 September Mr Thorley sent her another email. He asked her to confirm by 15 September whether she would be attending the hearing and, if not, to provide any written submissions by that date. He said that if he did not hear from her by that date, the hearing would take place in her absence and Ms Stokes would make her decision based on the information provided in his report. There was no response from the Claimant.

96 The disciplinary hearing took place on 26 September 2017. The Claimant did not attend. Ms Stokes and Mr Thorley attended. Ms Stokes decided that in light of the steps the Respondent had taken, it was fair to proceed with the hearing in the Claimant's absence. Ms Stokes noted that the Claimant had not provided a medical certificate that she remained unfit for work since her last certificate expired on 22 May 2017 and that she had not responded to Ms Henry's offer of a medical assessment. There was no evidence to suggest that the Claimant remained unfit for work and that it was reasonable for the disciplinary process to recommence. Ms Stokes then went through the evidence and expressed her views on it. She explained that in considering the evidence she excluded any reference to the Claimant's mother's behaviour because the Claimant was not responsible for the behaviour of her mother. She also took into account the Claimant's version which was set out in her claim form presented on 1 May. Having considered all the evidence Ms Stokes considered that the allegations were proven. She adjourned the hearing to consider her decision in relation to sanction.

97 The disciplinary hearing reconvened on 3 October 2017. Ms Stokes informed Mr Thorley that she had concluded that the first allegation (the Claimant's behaviour at the preliminary hearing) amounted to gross misconduct and explained why she had come to that conclusion. She concluded that the second allegation (the emails to the Evening Standard) amounted to misconduct and gave ger reasons for reaching that conclusion. Her decision was to dismiss the Claimant without notice.

98 On 6 October 2017 Ms Stokes wrote to the Claimant to notify her of the outcome of the disciplinary hearing. She informed the Claimant of her decision and the reasons for it. In respect of the first allegation she said that having reviewed the evidence she believed that the Claimant had behaved in an excessively aggressive manner which had included shouting and interrupting Judge Hall-Smith in the course of his duties on a number of occasions. She took into account that a hearing could be stressful but noted that the Claimant had continued to demonstrate unacceptable behaviour after an adjournment and after the Judge had warned her that he would not tolerate such disruptive conduct. She accepted that the Claimant could not be held accountable for her mother's conduct, but there was sufficient evidecne of the Claimant's unacceptable behaviour and how her conduct was received by the attending parties. She had particularly considered the views of Laura Bell (external counsel) and Judge Hall-Smith and the fact that they, having had many years of experience in the Employment Tribunal setting, referred to her conduct as being disgraceful and exceptional. A number of the individuals in the room had been affected by her actions, including Judge Hall-Smith who was said to have been visibly upset and shaken. It was reasonable to assume that her behaviour could have had a detrimental impact on people's perceptions of the Respondent and that her actions were likely to bring the Respondent into disrepute. She found that the

allegation was proven and her behaviour was tantamount to gross misconduct. She found that by sending of the emails to the evening Standard the Claimant breached her duty of confidence as an employee with the potential of it causing disrepute to the firm. She advised the Claimant of her right of appeal within seven working days.

99 On 16 October the Claimant wrote to Mr Thorley that she intended to appeal and sought an extension of time to do so. It was extended to 20 October. On 20 October the Claimant informed Mr Thorley that she was not in apposition to submit her appeal by that date. She was given until 27 October to submit her full grounds of appeal and was advised that if she did not do so the disciplinary process would be deemed to have been completed. On 25 October the Claimant informed Mr Thorley that she was seeking to get information from the London South Employment Tribunal under the Data Protection Act 1998 and asked for the time for submitting her grounds of appeal to be extended to 20 December 2017. That application was refused on 26 October and the Claimant was reminded that 27 October was the deadline. There were further emails from the Claimant challenging that decision. In one of them she said that she understood that the EAT had sent to the Respondent on 13 April 2017 witness statements supporting her account of what had happened at the preliminary hearing on 31 January and that they had not been include din the investigation report. On 30 October the Claimant was informed that her emails would be considered as part of her appeal.

100 On 15 November Anna Love, Manager in ERPA, informed the Claimant that her appeal would be heard by Sunil Patel, Partner, on 28 November 2017. She sent the Claimant a copy of the disciplinary appeal investigation report that she had prepared and the appendices thereto and the Claimant's emails of October 2017. The appendices to the investigation report comprised over 200 pages. Ms Love sent the documents by email and also sent hard copies by Royal Mail Special Delivery and by courier. She sent it by multiple methods to ensure that the Claimant received it. The Claimant had been given until 24 November to confirm whether she would be attending the hearing or alternatively to provide written submissions.

101 On 23 November the Claimant sent Ms Love and email with a number of attachments. Among the attachments were witness statement that she and Kareem Reid had prepared for the application to strike out her claims in March 2017. They related to what had happened at the preliminary hearing on 31 January. Anna Love informed the Claimant on 24 November that she would pass on those documents to Mr Patel and asked the Claimant to confirm whether she would be attending the appeal hearing. On 28 November Ms Love sent the claimant a document which she said would be passed to Mr Patel. It related to the documents that the EAT had sent to the Respondent's lawyers on 13 April 2017. She said that as the Claimant had not confirmed that she was attending the hearing it would take place in her absence later that day.

102 Mr Patel conducted the appeal hearing on 28 November. Anna Love was present. A full note was made of the hearing. On 19 December 2017 Mr Patel sent the Claimant the outcome of the appeal. He also sent her the notes of the meeting. He considered the points that had been made by the Claimant in her emails of 23 November, 28 November and 4 December 2017. He was satisfied that the letter inviting the Claimant to a disciplinary hearing and the disciplinary investigation report had made it clear what the allegations against her were and they could amount to gross misconduct. He concluded that the Claimant's communications with the press

appeared to have been made for her personal benefit and to intentionally bring the Respondent into disrepute and Ms Stokes had, therefore, been right to conclude that it was misconduct. In respect of the two witness statements that the Claimant had provided for the appeal he concluded that they did not alter the fact that a number of witnesses had a consistent view that that the Claimant's behaviour on that day had been unacceptable; they did not materially change the fact that there was sufficient evidence that her behaviour was likely to have brought the Respondent into disprute and he, therefore, agreed with Ns Stokes' decision that it was tantamount to gross misconduct. In any event, he was satisfied that the statements had not been given to the Respondent at the preliminary hearing on 10 March or sent to it by the Eat on 13 April 2017. There was, therefore, no evidence to support the Claimant's assertion that the Respondent had omitted certain relevant documents from the investigation report. In any event there was no reason why the Claimant could not have provided those statements to the disciplinary hearing. He rejected the Claimant's appeal.

103 In a decision sent to the parties on 7 March 2018 the London South Employment Tribunal dismissed all the complaints made in the Claimant's three claims.

The Law

104 Section 13 of the Equality Act 2010 ("EA 2010") provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race and sex are protected characteristics (section 4 EA 2010). On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case (section 23 EA 2010).

105 Section 26 EA 2010 provides that a person (A) harasses another (B) if A either engages in unwanted conduct related to a relevant protected characteristic or engages in unwanted conduct of a sexual nature and, in either case, that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

106 Section 27 EA 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. "A protected act" includes bringing proceedings under the Equality Act 2010 and making an allegation that (whether or not express) that A or another person has contravened the Equality Act 2010.

107 If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision (section 136 EA 2010).

108 Section 43B(1) of the Employment Rights act 1996 ("ERA 1996") provides,

> "*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 –*
> *(a) …*
> *(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

(c) That a miscarriage of justice has occurred, is occurring or is likely to occur, …"

Section 43C(1) ERA 1996 provides that a disclosure is made in accordance with that section if the worker makes the disclosure to his employer.

109 Section 43G ERA 1996 provides,

"(1) A qualifying disclosure is made in accordance with this section if –
(a) …
(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for the purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are –
(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
(b) that, in ac case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
(c) that the works has previously made a disclosure of substantially the same information –
(i) to his employer, or
(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection(1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to –
(a) the identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection(2)(c)(i) or (ii) , any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer."

110 Section 47B(1) ERA 1996 provides that a worker has a right not to be subjected to any detriment, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

111 In order to conclude that a worker was subjected to a detriment the court or tribunal must conclude that by reason of the acts or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount 'detriment' (**Shamoon v Chief Constable of the RUC [2003] ICR 337**). The EHRC Code of Practice provides at paragraph 9.8,

> "*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."*

112 Section 103A ERA 1996 provides that an employee is unfairly dismissed if the reason or principal reason for the dismissal is that the employee made a protected disclosure.

113 Under section 98 EAR 1996 the onus is on the Respondent to prove the reason or the principal reason for the dismissal. A reason relating to the conduct of the employee is a potentially fair reason. Once the employer establishes a potentially fair reason, the Tribunal then has to consider whether dismissal is fair within the meaning of Section 98(4) ERA 1996, in other words, whether the employer acted reasonably or unreasonably in all the circumstances of the case in treating the reason established as a sufficient reason for dismissing the employee.

114 The well-established authority of **British Home Stores Ltd v Burchell [1978] IRLR 379** provides that in a conduct dismissal case the Tribunal has to ask itself the following three questions:

(i) Did the employer believe that the employee was guilty of misconduct?

(ii) Did he have in his mind reasonable grounds upon which to sustain that belief? and

(iii) at the stage which he formed that belief on those grounds had he carried out as much investigation into the matter as was reasonable in the circumstances of the case?

115 In determining the issue of fairness the Tribunal also has to see if there were any substantial flaws in the procedures which were such as to render the dismissal unfair, and, finally, whether dismissal was within the band of reasonable responses open to a reasonable employer in all the circumstances of the case. In judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; the function of the Tribunal is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439,** approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827**)

Conclusions

Protected act

116 Although the protected act was said in the agreed list of issue to be the grievance of 25 January 2017, the Claimant accepted in evidence that it should be

the grievance of 26 January. There was no express allegation in that grievance that the Respondent had contravened the Equality Act 2010 or that it had done acts which, if established, would have amounted to a breach of the Act. The Claimant's evidence was that it was implicit from the content and context of the grievance. In the grievance the Claimant complained about the allocation of work to her in the performance years ending in 2016 and 2017 (she said that she had discovered information which pointed to the fact that her managers had colluded to deny her chargeable work) and the instigation of the disciplinary process. She did not link what she said in the grievance to her claims to the Tribunal.

117 In her claims to the Employment Tribunal in October 2015 and August 2016 the Claimant complained of race and sex discrimination in relation to, among other things, the allocation of work, and in her claim of 11 November 2016 she complained about race and sex discrimination in respect of the instigation of the disciplinary process.

118 The issue was, whether in those circumstances, it would have been obvious that in her grievance the Claimant was complaining of race and sex discrimination although she had not said anything to indicate that she was. There could have been a variety of reasons why the Claimant was not pursuing those complaints as acts of discrimination in her grievance. In the absence of something to make it clear that she was, it would have been wrong for the Respondent to treat and investigate them as complaints of race and sex discrimination. We concluded that the Claimant had not, expressly or implicitly, made any allegations in her grievance which, if upheld, would have amounted to race or sex discrimination. We concluded that the Claimant had not done a protected act in that grievance.

Victimisation

119 It is not in dispute that between June 2015 and November 2016 the Claimant made allegations of race and sex discrimination and victimisation against the Respondent on six occasions (the protected acts relied upon by the Claimant). These included complaints, formal grievances and three cases in the Employment Tribunal. We ignored the Tribunal claim of 1 May 2017 because that post-dates the detriments relied upon by the Claimant. The issue that we had to consider as whether the Respondent suspended her on 3 February 2017 and commenced a disciplinary investigation into her conduct shortly thereafter and decided to give her a performance rating of "Not Assessed" at the end of March 2017 because she had done those six protected acts.

120 We considered the suspension and the instigation of the disciplinary investigation together. We accepted Ms Henry's evidence that, on the basis of the reports she had received, her preliminary view was that the Claimant's conduct on 31 January 2017 at the preliminary hearing and in sending the emails afterwards was serious and could potentially amount to gross misconduct. The Claimant was a senior employee of the Respondent and the alleged misconduct had taken place in a public forum. It was clearly not a minor or trivial matter and it cannot be said that this was a case of an employer using a flimsy reason to suspend an employee and start a disciplinary process because it had an ulterior motive. Ms Henry took the view that the matter clearly needed to be investigated and, having regard to the nature of the misconduct alleged, she had genuine concerns about the Claimant having access to the Respondent's systems and premises while the matter was investigated. There

was no evidence before us from which we could infer that a senior manager of the Respondent, who had behaved in the same way as the Claimant but had not done any of the protected acts, would have been treated any differently. Having considered all the evidence, we concluded that the Respondent had not suspended the Claimant or started the disciplinary process against her because she had done any of the protected acts.

121 We considered whether by giving the Claimant a rating of "Not Assessed" for the year ending 2017 the Respondent subjected her to a detriment. A "detriment" is something which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. In the circumstances of this case the Claimant could not reasonably come to such a conclusion. In light of the fact that she had not met the single objective that she had agreed, had not obtained any feedback on her contribution and had done only 15 hours' chargeable work, the only rating that she could have been given was a "4" which would have led to her being put on a Performance Improvement Plan. That would have been a negative rating critical of her performance. In contrast a "Not Assessed" rating did not reflect negatively on her at all. It simply indicated that, due to unusual circumstances, it had not been practical or appropriate to rate her. By giving the Claimant a rating of "Not Assessed" as opposed to a rating of "4" the Respondent put the Claimant in a more advantageous position and did not subject her to a detriment.

122 In case we are wrong in that conclusion, we considered whether there was any causal link between that rating and the Claimant's six protected acts, and we concluded that there was not. We were satisfied that the Claimant was give that rating because of the reasons set out at paragraphs 83 and 84 (above).

Protected Disclosures

123 The Claimant's case on protected disclosures has shifted in the course of the proceedings. Her original case, as pleaded in her Amended Particulars of Claim, was that on 31 January 2017 she had made protected disclosures to the Evening Standard by giving information which tended to show that there had been a breach of a legal obligation – a failure to deal with her grievance fairly and promptly.

124 In her witness statement she said that the first email had been sent to the Tribunal and copied to the Respondent and to the Evening Standard. She said that her focus was the position in which she found herself as a result of her solicitors' failure to act in accordance with her instructions, which she saw as a breach of a legal obligation. She said that the email and the attachments to it showed that there had been a miscarriage of justice that related to her solicitors and the Respondent. She said that she also gave information about the failure to deal fairly and promptly with her grievance. There was no such reference in the email or its attachments She said that she very disturbed by the position in which her solicitors had put her and she saw it as being in the public interest to give information about those failures to her employer and the press. The Claimant said that the situation in which she found herself "*triggered a need to protect myself and I did so by making a public disclosure as I understood what had happened was wrong and that the outcome was a miscarriage of justice."* In cross-examination she said that her case was that she had made a protected disclosure to the Respondent and had copied it to the Evening Standard.

125 The Claimant sent those emails to the Tribunal to request a stay of the proceedings because of the conduct of her solicitors and Employment Judge Hall-Smith on 31 January 2017. Whatever she said in those emails was to support that application. She copied them to the Respondent because any application by her to the Tribunal has to be copied to the Respondent. She copied it to the Evening Standard to make it clear to the Tribunal that the matter was in the public glare. The Claimant did not allege in those emails any breach of legal obligations or miscarriage of justice by the Respondent. The focus of her complaint was the conduct of her solicitors which she considered to be a breach of their legal obligation to her and which had resulted in a miscarriage of justice.

126 As far as the Claimant is alleging that she made a protected disclosure to the Evening Standard, that claim cannot succeed because it does not comply with the requirements of section 43G ERA 1996, regardless of whether or not it was "a qualifying disclosure". The Claimant made the disclosure for purposes of personal gain and the conditions set out in subsection (2) and (3) are not met.

127 The question then arises as to whether the Claimant made a protected disclosure to the Respondent. The Claimant made an application to the Tribunal for a reconsideration of its decision. As the Respondent was the other party to the proceedings, she copied that application to the Respondent. In support of her application she claimed that her solicitors had acted contrary to her instructions as a result of which she had been prejudiced. Her sole purpose in giving that information was to persuade the Tribunal to reach a different conclusion on her application to amend. It was purely in the Claimant's personal interest to do so. It helped to advance her claim in the Tribunal. She could not have reasonably believed that giving that information to the Tribunal was in the public interest. We, therefore, concluded that by sending those two emails the Claimant did not make a protected disclosure to the Respondent.

128 In case we were wrong in reaching that conclusion, we considered whether the Claimant had been subjected to the detriments of which she complained and whether there was any causal link between that and her giving information tending to show a breach of legal obligation by her solicitors which had resulted in a miscarriage of justice.

Protected Disclosure Detriments

129 It is not in dispute that the Claimant was not advised in July 2017 that she was not going to a salary increase or bonus. Ms Jenkins did not make a conscious or deliberate decision not to inform the Claimant of that. She reasonably assumed that it would be apparent to the Claimant that the impact of her "Not Assessed" rating was that she would not get a performance bonus or a salary increase. The Claimant had by that stage been working for the Respondent for a number of years. The fact that it was reasonable for Ms Jenkins to make that assumption that she did is supported by the Claimant stating in her claim form of 1 May 2017 that the decision to give her a N/A rating affected her "*reward"* and her not raising it with anyone at the time. The Claimant knew, or must have known, in July 2017 that she was not going to get a salary increase or a bonus, not only because of her "N/A" rating but also because she had not met her objective, had not get any feedback on her performance, had done 15 hours' chargeable work and had been given a Final Written Warning in November 2016 for not being at work and proactively seeking to add value. We,

therefore, concluded that there was not any deliberate failure by the Respondent to impart this information to her and the failure to do so did not disadvantage her in any way. The Respondent did not subject her to a detriment by a deliberate failure to act. In any event, Ms Jenkins' failure to inform her had nothing to do with the fact that the Claimant giving information about her solicitors being in breach of their legal obligations to her leading to a miscarriage of justice. There is no reason why the Respondent should wish to subject the Claimant to detriments because she was raising issues about the conduct of her solicitors.

130 The Respondent's Choices Team did not know that the Claimant had been suspended and could, therefore, not access her work emails. It sent her the emails alerting her to the need to update her Choices election. The Claimant did not receive those emails. There was no conscious or deliberate decision not to send that information to the Claimant. There was, therefore, no deliberate failure to do something. In any event, the Claimant was aware that the Choices renewal period was in September each year and could have contacted the Respondent if she wished to make any changes. Her evidence was that she made a conscious decision not contact the Respondent in relation to this. We, therefore, concluded that the Claimant was not subjected to a detriment by a failure to act in respect of this matter. In any event, it had nothing to do with the two emails that she sent on 31 January 2017. The Claimant did not receive the emails about Choices selection because those sending them did not know that she could not access her work emails.

131 That Claimant also complained that she had been subjected to a number of detriments in the dismissal process. We deal with each of them in turn below (setting out the alleged detriment by the Claimant first) –

(i) The letter inviting her to the disciplinary hearing had said that the allegation of misconduct was her behaviour at the preliminary hearing but had not specified what that behaviour was. The investigation report was attached to the letter. It contained all the accounts given by the witnesses of the Claimant's behaviour at that hearing and the decisions of EJ Hall-Smith and EJ Morton. The Claimant, therefore, had sufficient information to know what the Respondent alleged that she had done at the hearing. She had sufficient detail of the allegation to be able to respond to it. The Claimant was not subjected to a detriment by not being given specifics of the allegation that she had to answer.

(ii) Ms Stokes failed to consider the two witness statements that she had produced at preliminary hearing on 10 March 2017. Those statements were not given to the Respondent's lawyers at that hearing. They were not sent to the Respondent by the EAT. The Respondent did not have them at the time of the disciplinary hearing and hence could and did not provide them to Ms Stokes. The Claimant could have provided them if she thought they were relevant. The Claimant was not subjected to the detriment alleged by her.

(iii) Louise Coyne disclosed the Claimant's confidential medical report to Sarah Henry. It is not in dispute that Ms Coyne shared the report with others in the legal team who then passed it on to Ms Henry. If the Respondent's lawyers become aware of information about the Claimant's health that might have an impact on her ability to participate in disciplinary hearings or that indicates that continuing with the process at that time might have an adverse impact upon her health, it is only right that they should share it with those managing the

disciplinary process. To do so would not be to the detriment of the Claimant but in her best interest to ensure that she was well enough to participate in the process or that continuing with it would not harm her health. The Respondent did not subject the Claimant to a detriment by Ms Coyne sharing that report with the Claimant.

(iv) No good reason for the delay between her suspension in February and the disciplinary hearing on 26 September 2017. There were good reasons for most of the delay. The Claimant was absent sick with stress from February until the end of May. She was not willing to engage in the process while she was absent sick. From the middle of April until the end of June the Claimant was involved in the hearing of her claims in the London South Employment Tribunal. Thereafter, the Respondent attempted to get a medical assessment as to whether the Claimant was well enough to participate in the disciplinary process. The Claimant was not subjected to the detriment which she alleged.

(v) Failure to extend the deadline for appealing beyond 27 October 2017. The Respondent's policy provides that any appeal should be brought within seven working days of the dismissal letter. The deadline was extended on two occasions for the Claimant – first to 20 October and then 27 October. The Claimant was given three weeks to submit her appeal. She was given more time than allowed under the policy. The Claimant was not subjected to a detriment in circumstances where she was granted two extensions and given more time than permitted under the policy.

(vi) Louise Coyne submitted an incomplete copy of the Claimant's appeal to the EAT to Mr Patel. It is accepted that there was s canning error and a page was missing from the Notice of Appeal. That error did not put the Claimant at a disadvantage and was not a detriment.

(vii) Mr Patel was junior to Ms Stokes. They are both partners. He was, as required by the Respondent's appeals procedure a senior person who had not previously been directly involved with earlier stages of the procedure. The Claimant was not subjected to a detriment by the appointment of Mr Patel to hear her appeal.

(viii) The appeal chair wrongly concluded that the Claimant had been sent the specific allegations when she was invited to the disciplinary hearing. The first time the Claimant was given specifics of the allegation was when she received the outcome letter which categorized as her behaviour as "excessively aggressive". The conclusion was not wrong (see (i) above). The outcome letter set out Ms Stokes' conclusions on the evidence that she had before her. She was setting out her findings, not the specifics of the allegation. The Claimant was not subjected the detriment alleged. The same point was made at paragraph 23B(x) in the Claimant's Amended Particulars of Claim.

(ix) Mr Patel failed to take into account the Claimant's grievance against the Final Written Warning. The Claimant's grievance was not in disciplinary appeal

investigation pack. The Claimant could have submitted it to Mr Patel if she thought that it was relevant. In any event, his failure to take it into account was not to the Claimant's detriment. Ms Stokes had not taken the Final Written Warning into account. Mr Patel merely commented that she could have done so. The correct route to challenge the Final Written Warning was by way of appeal against it. The Claimant had chosen not to exercise her right of appeal. She could not circumvent that by raising a grievance about it later.

If the Claimant was subjected to any of the above detriments, there was no evidence to indicate that any of those decisions were related to the Claimant giving information about the conduct of her solicitors amounting to a miscarriage of justice.

132 The final detriment alleged by the Claimant was that the Respondent sent her multiple copies of the appeal investigation report. We find it difficult to see how a reasonable worker would or might take the view that the employer sending her important information in different ways when she is not in the office to ensure that she received it puts her at a disadvantage. Sending it by email is the quickest way to convey that information. However, the appeal pack was very large in this case and a worker might well either not be able to print it or prefer not to do so. Receiving two copies of the hard pack might be irritating (because of the volume of papers) but would not put the worker at any disadvantage. The purpose in doing it was to ensure that the Claimant received it as soon as possible, especially as she had a short deadline within which to respond. In any event, Ms Love did not send it in those different ways because the Claimant have information tending to show that he r solicitors had been in breach of their legal obligations to her which had resulted in a miscarriage of justice.

Harassment and Direct Discrimination

133 We have set out at paragraph 120 (above) what we found were Ms Henry's reasons for suspending the Claimant on 3 February 2017. The mere fact that the Claimant was suspended and that she was a woman and black and of African origin is not sufficient evidence from which the Tribunal could draw an inference that there was a causal link between the two. Something more is required and there was no evidence from which we could infer such a link. There was no evidence from which we could infer that a man or someone who was white and not of African origin would have been treated differently in similar circumstances.

134 It is not in dispute that the Claimant's suspension letter was delivered to her home address by an employee of the Respondent who took photographs to show that she had delivered the letter and that she was accompanied by a security guard. We accept that that would be not be the normal way of sending a suspension letter. However, we have found that there had been problems in the past when the Claimant had claimed that she had not received documents sent to her by post or by courier. In those circumstances, the Respondent wanted to ensure that the documents were delivered and that it could prove that they had been delivered. Ms McGoldrick was accompanied by a security guard because the Respondent had no means of knowing who would be present at the Claimant's flat and what the reaction would be to receiving the suspension letter. In light of the events of 31 January, it cannot be said that such concerns were unreasonable. There was no evidence before us from which we could infer that in similar circumstances the Respondent would have acted differently if the employee in question had been male or someone

who was white or not of African origin. Hence, we find that the Respondent's actions were not related to or because of the Claimant's race or gender.

135 Ms Essuman contacted the Claimant on 7 February (not 6 February) to invite her to attend an investigation meeting by telephone. We do not see how that could amount to a detriment or harassment as defined in section 26 of the Equality Act 2010. We accept that the Claimant was absent sick at that time because of stress at work. If the Claimant felt that that she was not well enough to conduct such an interview, all she had to do was as to say so. As it happened the matter was put on hold until she was able to return to work. In any event, there was no evidence from which we could infer that Ms Essusman's invitation to the Claimant had anything to do with her race or gender or, to put it another way, that Ms Esuamn would have approached the matter any differently had the Claimant been male and/or white and non-African.

Unfair Dismissal

136 We considered first what the reason for the dismissal was. It was abundantly clear to us that the Claimant was not dismissed because she had given information in the emails of 31 January which tended to show that her solicitors had been in breach of their legal obligations to her and that that had resulted in a miscarriage of justice. If the Claimant had made any protected disclosures to the Respondent, that was the extent of it. We concluded that the reason for the dismissal was the Claimant's behavior at the preliminary hearing on 31 January – Ms Stokes believed that she had behaved in an excessively aggressive manner which had included shouting at and interrupting the Judge, the unacceptable behavior had continued after an adjournment and after the Judge had said that he would not tolerate it, that seasoned users of the Tribunal had described her conduct as disgraceful and exceptional and that a number of people in the room had been affected by her conduct. That was conduct that was likely to bring the Respondent into disrepute. That is a reason related to conduct and a potentially fair reason for the dismissal.

137 We then considered whether in all the circumstances the Respondent acted reasonably in treating that as a sufficient reason for dismissing the Claimant. At the time when Ms Stokes formed the belief that she did about the claimant's conduct at the preliminary hearing, the Respondent had conducted as much investigation as was reasonable and had she had reasonable grounds on which to sustain her belief. The Respondent had the accounts of its three employees who had been present at the hearing, the Respondent's counsel and the Employment Judge. The Claimant was provided with the evidence upon which the Respondent relied and was given the opportunity to present her side of the story and any evidence that she wanted to present. She was advised of her right to be accompanied. The Claimant chose not to engage in the process. She was offered a right of appeal and the time for presenting her grounds of appeal was extended on two occasions. An appeal pack was prepared by the Respondent and the Claimant was provided with a copy of it.

Although the Claimant did not submit detailed grounds of appeal her appeal was nevertheless considered on the basis of her emails. The procedure and the process followed was fair. The decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. We concluded that the dismissal was fair.

Employment Judge Grewal

Date 12 April 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

16 April 2019

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FOR THE TRIBUNAL OFFICE