EMPLOYMENT TRIBUNALS

Claimants: Mr A Adeeko

Respondent: Royal Haskoning DHV (Haskoning DHV UK Ltd)

HELD AT: Manchester **ON:** 29 - 31 July 2019

BEFORE: Employment Judge Tom Ryan
Miss L Atkinson
Mr B J McCaughey

Appearances:
Claimant: In person
Respondent: Mr Alemoru, Non-practising solicitor

JUDGMENT having been sent to the parties on 19 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 16 August 2017 the claimant brought claims of unfair dismissal by reason of protected disclosure, race discrimination, unpaid holiday pay and unpaid notice pay. Prior to the start of this hearing the claim for arrears of pay was withdrawn. The claimant confirmed at the outset of the hearing that he was not pursuing notice pay and holiday pay in these proceedings.

2. The claim arose out of the claimant's employment by the respondent as Director of Transport Planning, an employment that lasted some four months between 3 January 2017 and 19 May 2017.

3. At the outset of the hearing before us the claimant confirmed that his claim of race discrimination was limited to a racial harassment and during the course of the hearing he identified that he allegations he relied upon were three comments made by Mr Brian Laird towards the start of his employment and the actions of his Administrative Assistant, Azra Moody, that took place towards the end. It was a complaint about Azra Moody's conduct in relation to some emails the claimant

alleged that he had made a protected disclosure pursuant to section 43B and the corresponding sections of the Employment Rights Act 1996, and his allegation was that the decision to dismiss him was for the principal reason that he had made such a disclosure.

4. We were provided with a bundle of documents which appeared to be a compilation of three earlier bundles but nonetheless contained the documents that we were required to see.

5. There were witness statements from the claimant, Ms Samantha Hilling, a recruitment consultant who had arranged for the claimant's employment with the respondent; Mr Patrick Hebbard, the claimant's line manager and director of the advisory group in which he worked; Ms Gray of Human Resources and Mr Francis, whose position we will explain in due course but who the respondent decided not to call. We discussed with the parties what weight should be attached to that statement.

6. Mr Alemoru for the respondent suggested we should read it, as in fact we had done, and attach such weight to it as we thought fit. Bearing in mind that Mr Francis' position in the proceedings was contentious we opined that it was better that we should simply ignore it and put it out of our minds. That was the course urged upon us by the claimant and that is what did. Therefore, we heard oral evidence from the claimant, from Mr Hebbard and Ms Gray.

Findings of Fact

7. The respondent is a company with, as its name suggests, a Dutch parent company which is based in Amersfoort in the Netherlands. Within its scope it has some five advisory groups. The advisory group for the United Kingdom, or Transport UK, was under the line management of Mr Hebbard who is himself, as the claimant is, of African origin, the claimant being Nigerian and Mr Hebbard being Namibian.

8. The advisory groups report to the Business Unit Director, Mr Frank Legters. There are five advisory groups. Mr Matthew Hunt was at an equivalent rank to Mr Hebbard in another business group involved in the United Kingdom. Mr Francis' position was to give strategic advice to the Business Unit. He, like Mr Hebbard and Mr Hunt, was line managed by Mr Legters but Mr Hebbard, whose evidence we accept on the point, explained that in effect he was on a par with him in terms of levels of responsibility and in the hierarchy. He had a reporting line to Mr Francis, or he to him, in the sense that Mr Francis was there to give advice to the Business Unit as a whole. Mr Hebbard put it in this way. Mr Francis would give advice. If he decided not to follow it and that turned out to have adverse consequences for the company then the responsibility for that would fall on his, Mr Hebbard's, shoulders.

9. It is right to say that Mr Francis, like the claimant, was eventually based in Manchester. He had previous experience of the work of the group in Manchester.

10. The claimant's history had been to work in the United Kingdom, the United States of America and in West Africa. He had some but not recent relevant experience of the sort of work that the company did.

11. The company was seeking to recruit into Manchester at an Associate or Assistant Director level, and therefore at a lower salary than the claimant was seeking. He was seeking to be appointed at a Director level at a higher salary. Negotiations were carried out through Ms Gray. Mr Hebbard decided to take a chance on the claimant, and he appointed him at Director level but on a temporary to permanent basis. The claimant's employment was to be kept under review, the understanding being that if all worked well the claimant would become a permanent employee. If it did not the employment relationship might, as indeed it did, come to an end.

12. Mr Hebbard described that he had taken over this group a year or so before the events with which we are concerned. He described the group, in blunt terms, as being dysfunctional. It had been unproductive and he was brought in to see whether the business could be turned round. If it could not it would have been closed down or restructured in some other way.

13. The group consisted of some 50 other employees at various levels. They included Administrative Assistants. Azra Moody was the Administrative Assistant who provided support to the claimant and others within the group. A number of people within the group had become complacent, or lazy, or both, and simply were not generating business. The claimant's role was to drive the business of the group, both nationally and locally. The claimant was based in Birmingham. It was agreed that for the first month he would remain based in Birmingham where the respondent has an office. It has offices in Manchester, Birmingham, Peterborough and London. Principally the claimant's base was to be Manchester within a month, as indeed it became, and he was to work there for four days a week.

14. It was necessary for the claimant to obtain information from members of the group. Mr Hebbard accepted that it was exactly what he wanted the claimant to do. He himself said that when he had started if he sent out an email to his group saying "Please let me have this information for a meeting in a week's time" maybe two out of the group would reply. He had to turn round that lack of responsiveness, and indeed it was part of the claimant's job to do so also.

15. The claimant's approach, as we have seen in his evidence and in his presentation, is direct. He tells things as he sees them. In the course of that early period he may well have used to the established members of the group, expressions such as "instructing" them to do things. It is clear that this met with some resistance.

16. The claimant nonetheless began to take steps to try and drive the business forward in the way that was required of him. He was confident he would be able to do so. In doing so be came into contact with a number of older members of the respondent's staff. One of them was Dean Johnston, the Associate Director of Mr Hebbard's group, Mr Francis, who we have already mentioned, and Mr Laird were others.

17. Mr Laird made comments about what the claimant's qualifications were and whether he had been brought in to "crack the whip". Mr Laird expressed the opinion that he thought the respondent would have employed somebody with more local connections i.e. more Manchester based connections or North West based connections rather than Birmingham ones. Those comments were evidenced by Mr Adeeko. It was not suggested to him that Mr Laird did not say them. The

claimant accepted that they were apparently innocuous when they were first made. They contained no overt racist context or content. Later events, he said, led him to believe that they in fact had racist connotations, and that Mr Laird using those expressions amounted to of racial harassment.

18. The claimant's work went on until a stage came when there were series of emails exchanged between the claimant and various people concerning the claimant's recommendation that this particular group should subscribe to the Greater Manchester Chamber of Commerce. He appears to have had a meeting with Emma Parr of that organisation. Ms Parr emailed the claimant at 11:26 on 10 March 2017 and effectively suggested to him that that part of the company should subscribe. The email is at pages 88 and 105. The email exchange we are about to describe on behalf of the Tribunal is what we will call “chain 1”, because there is a difference between one aspect chain 1 and an aspect of a second and slightly overlapping chain (“chain 2”) that gives rise to the major issue in this case.

19. In chain 1 the first email, email A is from Emma Parr to the claimant on 10 March 2017 (pages 87 and 104). The claimant replied to that email and sent an email to Patrick Hebbard and Matthew Hunt recommending that they sign up with the GMCC and split the cost, he recommended, between the two business entities.

20. No response was made by either Mr Hunt or Mr Hebbard at that stage a chasing email was sent by the claimant at 8.00am of 17 March 2017 (pages 87 and 104 – email C).

21. Later that morning at 10.52am Mr Hunt replied to the claimant, Mr Hebbard and copied two other people in as well, saying that he thought they should go ahead as a test with that and he provided the cost centre code for his part of the business. Four minutes later Mr Hebbard emailed Mr Hunt and the claimant (email D at page 87) with the heading “Thanks, please book and code”, and gave Mr Hunt and Mr Adeeko the cost code for his part of the business.

22. We should address the question of cost codes. .he claimant says it is the giving of those codes that was the authorisation to him from the managers to whom he reported, Mr Hebbard and Mr Hunt, that the subscription with the GMCC was authorised. Those were authorisation codes, he said. Mr Hebbard disagreed. Mr Hebbard says they are no such thing, they are cost centre codes and they are merely the cost centre codes against which the two halves of the subscription, which was going to be roughly £1,000, were to be billed for accounting purposes within the company. In our judgment Mr Hebbard is right and was also likely to be right as to that. It is clear that the expression “please book our half too” then giving a code number suggests exactly that.

23. Almost immediately the claimant replied to Mr Hebbard and Mr Hunt, “Thanks for your responses.”

24. Three days later, on 20 March 2017 at 8:53 Mr Adeeko forwarded, rather than replied to, that email chain in that form to Azra Moody asking her to contact Emma Parr and complete the membership application. He referred to the “codes for T & P and Environmental Services” and gave the references “respectively for splitting the cost”. In our judgment, by his own email he shows that the codes are not

authority for the transaction but are merely cost codes against which to charge the expense.

25. Chain 2 started in a similar way in that it included the emails that we have described as emails A-D of chain 1 but then, on 21 March 2017, chain 2 (page 103) is in slightly different terms. At that point having received from Mr Hunt the email containing the code for his part of the business Mr Hebbard then sent an email to Ms Moody on 21 March 2017 at 13:06 saying, "Hi Azra, coding for Chamber of Commerce. Regards, Patrick", and Ms Moody one minute later forwarded that email to Mr Francis simply saying, "Hi Craig, as per our conversation earlier".

26. We find, that the reason that Ms Moody did that was that Mr Francis was the person who held the credit card for the group and so he would need to make the transaction or ensure there were sufficient funds on the card to make that particular transaction. It is that divergence between one chain and the other that led the dispute in this case.

27. A telephone call took place then on 23 March 2017 between the claimant and Ms Moody. The transcript, as she called it in later investigations, was a word she used to describe her best recollection of what she had recorded in writing afterwards (page 133). That was produced because Ms Moody was upset by the conversation. Her part of the call was witnessed, according to Ms Moody and Mr Hebbard who spoke to the observer, Julie Bird. Ms Bird was able to confirm at least that Ms Moody was not given much chance to speak. We infer that the style of writing, i.e the use of capitals and multiple punctuations indicates Ms Moody's impression of the volume and intensity of the claimant's way of speaking to her.

28. The transcript shows that the claimant was asking whether there had been a payment for the GMCC subscription. Ms Moody appears to have replied that she was busy and had not had a chance to do it and was also waiting on confirmation. The claimant asked what that meant. Ms Moody explained she had had a quick chat with Craig Francis.

29. Mr Hebbard's evidence showed that in fact Craig Francis had previously had a negative experience within the group of the respondent previously being a subscribed to the GMCC. His opinion had been that it had not produced any business and was not worth the outlay of the subscription. Because at this point there was shortly to be a management team meeting he had effectively put a hold on the payment of the subscription pending that meeting.

30. The management team meeting was chaired by Mr Legters. It was attended by people at Mr Francis and Mr Hebbard's level but not by the claimant.

31. It was unarguably within the authority of managers, such as Mr Francis, Mr Hunt, Mr Legters and Mr Hebbard, to either confirm the authorisation that the claimant had previously been given or to revoke it. It is not clear whether at the management team meeting on 21 or 22 March, the date does not really matter very much, it had been discussed. Mr Hebbard could not recall. Even if it was discussed and approval was given, which appears unlikely, it had not reached Ms Moody by 23 March.

32. The claimant did not take Ms Moody's explanation well. He queried Ms Moody why she had not contacted Mr Francis. She said she could not do so, he was still in London in meetings. According to Ms Moody, the claimant said, "I do not believe you. There was no reason for you not being able to get hold of him". When she tried to explain he asked why she had not told him any of this. She explained that she knew invoicing would take time, she had been in regular conversations with the GMCC and she had forwarded the card to Craig. The claimant in emphatic terms said:

> "Why??!! It has nothing to do with him. It is nothing about his business. I gave you written instructions to follow, not verbal ones. You disobeyed me. When I give you instructions, you follow."

33. There is a note saying at that point Mr Adeeko was going on and not allowing Ms Moody to say very much. Ms Moody appears to apologise, and appears to have been cut off again. The text reads:

> "I do not know what you're playing at, you're up to something. I do not know why you have to speak to Craig. I know there's something going on here. You are colluding with Craig."

34. She replied:

> "There's nothing going on at all, it was a simple mistake. Everything you have always asked for has always been taken care of."

35. She wrote that she was stopped as the claimant interrupted:

> "SIMPLE MISTAKE!! This is not a SIMPLE MISTAKE. You have made A HUGE MISTAKE. This is major. Do you understand? There is no way this is simple. You know something, you are not telling me. There is some plotting going on. I do not know where your loyalty lies. You have been lying to me. For this huge mistake there will be consequences for your actions. You will pay the price for what you have done. This is huge. You will not get away with it. Do you understand? I want you to forward the email that you sent to Craig."

36. Ms Moody replied:

> "But there was absolutely nothing in the email apart from me saying 'I'm forwarding this email to you'."

37. The reply recorded is this:

> "I do not believe you. Forward the email to me. Do you understand. There will be consequences. This conversation is in confidence: in confidence. Do you understand? You are not to repeat any of this to anyone. There will be actions resulting from what you have [done]. Send me the email now and you are not to repeat this conversation. Do you understand?!!!!!!!!!!!!!!!!!!"

38. It appears that that led to the email from Ms Moody on page 103 on 23 March 2017 at 18:12 forwarding chain 2.

39. It rapidly came to the attention of other members of staff that Ms Moody was very upset by this. On 24 March 2017 at 10:31 at page 137 there is an email from Danny Lamb (a slightly more junior member of staff who was nonetheless involved in these exchanges of emails) to Mr Francis, copied to Mr Hebbard, Mr Johnson and Ms Moody, saying:

> "Further to our recent telephone conversation about Alex Adeeko's behaviour I just wanted to let you and your senior colleagues know Azra is very upset and has gone home as we agreed."

40. Three days later, probably on the following Monday, at 11.50am Mr Lamb emailed Mr Francis, Mr Johnson and Mr Hebbard (who at this stage was on holiday) saying:

> "I've just spoken with Azra. She's still upset. She has sent me a script of her recollection. Please see the attached."

41. That script was, we find, the "transcript" document.

42. That email was forwarded to Jo Gray of Human Resources by Mr Johnson at 4:41pm on 27 March in which Mr Johnson said:

> "I understand Craig called you [about] this on Friday but it now seems it has legs. I've been out this morning but I tried to speak to Azra to talk through it directly."

43. Mr Hebbard, on 28 March 2017, replied to Mr Johnson and Ms Gray saying:

> "Both, I'm running through yesterday's emails so apologies if events have moved on. Based on the transcript I would suggest Alex be instructed not to come into any of the offices until we are happy with where we are going with this. The transcript indicates a threatening tone at the very least."

44. Based on the transcript we accept that the tone was rightly characterised as threatening. By this point in time (28 March) both Mr Hebbard and Mr Johnson and indeed as well Ms Gray had seen copies of what Ms Moody had written.

45. We revert to the transcript to explain that in addition to the account of the conversation, probably because she was asked to describe Mr Adeeko's behaviour, Ms Moody added:

> "Following on from the above I have had [to] put [up] with [his] demanding ways for a very long time now. He is constantly calling, he is not in the office, constantly on my case. I have had some really busy periods of work. Regardless of this he expects his demands to be met. There are some past incidents and conversations that come to mind."

46. She then wrote this, which is alleged by the claimant to be the fourth act of racial harassment by Mr Adeeko,

> "AA had not long started. We had a conversation about Africa. I felt it was really sad that the people were still not entitled to the freedom they deserved.

> Unfortunately it was dictatorship from their own. AA's response to this was, he felt dictatorship was needed, that is how you get good leadership."

47. Mr Hebbard is based in London. He arranged a Skype meeting with the claimant which took place on 30 March 2017. In the course of that Mr Hebbard raised with the claimant that he (the claimant) had been aggressive and/or threatening towards Ms Moody. It is common ground that the transcript, as we have described it, was not shared with the claimant at that point, a matter about which the claimant made a number of complaints. Mr Hebbard also raised other matters with the claimant, such as the use of his language to Pedro Vincente and Dean Johnson using the expression "instruct" or "instructions". Finally, it is clear that one of the things that the claimant raised with Mr Hebbard was the suggestion that the email chain that we have described as forwarded to Craig Francis had been edited.

48. The claimant explained in evidence that by that he meant that the authorisation code, as he called it, that Mr Hebbard had sent him and which he had forwarded on to Ms Moody had not been included in the emails that Ms Moody then sent him back. The suggestion here was by the claimant, put in extravagant language, that this had been hacking, tampering, collusion, corruption of emails, even to the point where he suggested in his claim that it amounts to a criminal offence.

49. Mr Hebbard gave evidence, which we accept, that in the course of the Skype call he explained that what he (Mr Hebbard) had sent to Ms Moody was one version of the chain (chain 2 as we have described it) rather than chain 1, and indeed it is not surprising that that should have occurred because the email chain in that form was what Mr Hebbard.

50. Mr Hebbard said that at one point the claimant said that he was not going to labour the point about the chain and appeared to have accepted the explanation that Mr Hebbard gave him; at another point the claimant suggested that Mr Francis and Ms Moody were lying. That was a matter that caused him concern.

51. We should say that in a letter that Mr Adeeko sent on 31 March 2017 he set out (pages 126 and 127) his response. Some part of what was raised with him by Mr Hebbard, namely the use of the word "instruction" he acknowledged. He denied absolutely being aggressive or threatening towards Ms Moody. He said in the fifth paragraph that he asked Mr Hebbard to investigate his communications with Azra Moody and Craig Francis, and "why Azra Moody was editing/manipulating and forwarding my email communications to Craig Francis on a matter/task that is my primary responsibility and which he was not party to". Then he said this:

> "Of note, why is the email chain that triggered your response re GMCC on 21/3/2017 at 13:06 to Azra Moody which originated from me edited, and why was this forwarded to Craig Francis immediately at 13:07, presumably following an earlier conversation between him and Azra Moody. What pressure did Craig put on Azra before she shared these communications with him? The complete email chain with your approval and Matt Hunt's approval was sent to Azra Moody in my email dated 20 March 2017, a day earlier with clear directives and context."

52. It is that that the claimant asserts is a protected disclosure. He submits that it contains information which tends to show that he reasonably believed a criminal offence or a breach of a legal obligation had been committed. He asserts it was made in the public interest and he asserts that it was the primary reason why a few days later Mr Hebbard dismissed him.

53. What in fact occurred was that Mr Hebbard spoke to Ms Gray and he spoke to Mr Legters. He was aware of the claimant's performance at that point not having produced work. He was aware of the way in which he believed Ms Moody had been treated by the claimant. He was aware of the way in which Mr Adeeko had responded to the explanation about the emails, and he was aware that the claimant was still on a temporary contract and had not yet achieved protection from unfair dismissal. He discussed with Mr Legters two options: one was to carry out a full investigation to get to the bottom of who said what in the conversation on 23 March 2017, or simply to break ties with the claimant and dismiss him at that point.

54. Mr Hebbard's evidence, which was not seriously challenged on this point, was to the effect that he was probably more inclined to give the claimant the benefit of the doubt and try and get to the bottom of it. Mr Legters took a harder line with which Mr Hebbard eventually agreed, and Mr Hebbard made the determination to dismiss the claimant at that point.

55. Mr Hebbard's evidence was that he did not understand the claimant to be making a disclosure of information that could be protected. His reasons for the dismissal were those that we have outlined. They were not because of the claimant's allegation that Azra Moody had edited the emails but rather more because he was accusing Azra Moody and Craig Fancis of lying, and more particularly because of his behaviour towards Azra Moody and his attitude to his colleagues in the department.

56. Accordingly, the claimant was given one month's notice which he worked from 5 April 2017.

Submissions

57. We received written submissions from both parties. We do not propose to rehearse them. The outcome of the case turns in nearly every respect upon whose evidence we prefer. We discussed with the claimant and with Mr Alemoru in the course of submissions, particularly Mr Alemoru, the various legal aspects of the case, and we received as well as submissions copies of two authorities on which Mr Alemoru relied, in both cases in the Employment Appeal Tribunal, the case of **Bakkali** and the case of **Panayiotou**.

The Law

58. The relevant legal provisions are as follows.

Whistleblowing

59. The statutory framework is found in the Employment Rights Act 1996.

59.1. Section 43B defines a qualifying disclosure;

59.2. Section 43C by which a qualifying disclosure to the worker's employer is protected.

60. So the issue was whether the claimant disclosed information which he reasonably believed showed the commission of a criminal offence or a breach of a legal obligation; and, if so, whether he reasonably believed that the disclosure was in the public interest. It was not disputed that the disclosure, if so qualified, would have been protected as being made to respondent as employer.

61. Section 103A of the Employment Rights Act 1996 ("the Act") provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

62. "… under section 103A unfairness is automatic once the reason for the dismissal there proscribed has been found to exist. In **Kuzel v Roche Products Ltd** [2008] EWCA Civ 380, the Court of Appeal addressed the location of the burden of proof under section 103A. It held that a burden lay on an employee claiming unfair dismissal under the section to produce some evidence that the reason for the dismissal was that she had made a protected disclosure but that, once she had discharged that evidential burden, the legal burden lay on the employer to establish the contrary: see paras 57 and 61 of the judgment of Mummery LJ." per Lord Wilson in **Royal Mail Group Ltd v Jhuti** [2019] UKSC 55 at paragraph 30.

Harassment

63. Section 26 of the Equality Act 2010 defines harassment. The issues a tribunal has to decide in a claim such as this are:

63.1. Whether the respondent's acts or omissions were unwanted conduct.

63.2. Was the conduct related to the claimant's protected characteristic of race?

63.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

63.4. If not, did the conduct have the effect of violating the claimant's dignity or creating such an environment for the claimant, having regard to: the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Conclusions

64. We first address the allegation of harassment.

65. We were reminded by Mr Alemoru properly that as well as that definition the Equality Act 2010 contains a provision that the burden of proof provisions derived

from the European Directives apply to every form of discrimination in the Act. It is not common for them to be needed to be considered in harassment cases, but here we have to do so.

66. We remind ourselves that the burden of proof in such a case means this: that the claimant must put before the tribunal some evidence which links the treatment (in this case the comments by Mr Laird and/or the comments by Ms Moody in her transcript) with race.

67. Mr Alemoru submitted that in relation to the comments by Mr Laird the claimant has accepted that they appeared innocuous and it was only later that he realised that they were discriminatory.

68. The claimant's case is that they amounted to, what he calls “dog whistle racism”. By that what he means is a comment that appears innocuous but which because of the knowledge of the people speaking it and the people hearing it has a connotation of racism beyond that which the words themselves contain. It is more commonly experienced, we believe, in the political arena where politicians instead of using language that would clearly be unacceptable use coded comments, for example in one political area references by politicians to “old stock Canadians” was taken to understand to refer to white Canadians as opposed to native Canadians. It is that sort of comment. The claimant’s “dog whistle racism” is explained in this way in various parts of his witness statement and in his case.

69. The claimant’s case is that whilst he accepts that the use of expressions “local connections”, “cracking the whip” and questions about his qualifications on the face of them are not racially related, what happened later shows that they are.

70. If the claimant cannot establish some racially related link beyond simply the fact that he as a black person was addressed by Mr Laird or heard Ms Moody’s comments, then applying the burden of proof regulations and the cases on that point (**Igen v Wong** and **Madarassy v Nomura**) the claimant's case can simply be not made out on its facts.

71. So we ask ourselves whether the comments attributed to Mr Laird were in any sense related to race. As far as those three allegations are concerned we conclude that the claimant has not made out his case at the very first stage. Other than he was, a black person, the recipient of the comments there is no evidence of other circumstances that support his “dog-whistle” way of putting th case.

72. As to the statement included on page 134 which we have identified as the “Africa statement” by Ms Moody, Mr Alemoru took a robust approach to that. The claimant's case on that is that he simply did not say that to Ms Moody. The allegation of what is said there the claimant simply says is false. It was never said. There was no such discussion.

73. Mr Alemoru accepts on behalf of the respondent that if there was not such a discussion then bearing in mind that the claimant is black African and Ms Moody has made comments which might impute inappropriate governance to certain African states, then to report such a thing about your immediate superior referencing his presumed continent of origin establishes the racial connection.

74. He accepted that it would be an unwanted comment because it would be untrue. It would have the effect, even if it did not have the purpose, of causing a harassing, intimidating or hostile environment for the claimant.

75. In those circumstances, if that statement by Ms Moody was untrue we would uphold the allegation of racial harassment. But what if it were true?

76. If it were true then what has happened is that there has been a conversation between two people about governance in Africa. It is not specific to the claimant, it is not specific to the claimant's place of origin in Nigeria, it is simply a difference of view about governance. The fact that it puts it in the context of the African continent or African countries does not relate it to the race of the claimant, because there are many African countries that have one form of government, many have others, and the claimant does not say it was specific to his country of origin, Nigeria.

77. Secondly, if it was simply a conversation in which two people expressed their views then Mr Alemoru submits it simply cannot be unwanted conduct. Had it been unwanted conduct we infer he would submit that somebody would have said something about it. The claimant's case is simply it was never said. If we were to find it was said then for the reasons the respondent advanced the claimant simply cannot begin to say first of all it was related to his protected characteristic or secondly that it was unwanted conduct. A simple expression of views by Ms Moody cannot be said to violate dignity or create the prohibited environment.

78. The claimant's case is that it was not said, but if it was said it shows an antipathy to him and that he was seen as being aggressive and threatening. In our judgment that paragraph simply does not convey that.

79. The question then for the tribunal was whether that part of the document was, on the balance of probabilities, a true account or an untrue account.

80. In our judgment the transcript and that passage is on the balance of probabilities likely to be true. We so find for a number of reasons.

81. First, the document within itself has the ring of truth. It describes a conversation which starts with a simple enquiry and a simple response, which rapidly gets escalated. It gets escalated to the point where the claimant is recorded as demanding an email chain to be forwarded, and it is clear that that email chain, or an email chain, was forwarded by Ms Moody to the claimant that evening. Secondly, it contains language similar to that which Mr Hebbard reports a few days later. He reports the claimant as saying that Ms Moody had lied to him and there were consequences for her actions, and matters of that sort, and Mr Hebbard's evidence was that the claimant still maintained, despite his explanation a week later, that Ms Moody was lying. Thirdly, the terms in which the claimant is alleged to have spoken, bearing in mind it is not a verbatim transcript, are consistent with the direct sort of language and the sort of mental approach he has taken in the litigation as a whole. Finally, on the document itself, it seems unlikely to the Tribunal in the extreme that the last few lines which we have already reported about "the conversation is in confidence, you're not to repeat it" are remarks, in our judgment, of someone who realises they have overstepped the mark when

speaking to their employee and are seeking to rein back from that and preserve themselves from adverse consequences.

82. All those things suggest to us that the transcript is likely to be a reasonably accurate and correct account. The fact that Ms Moody was upset is corroborated by Ms Bird, who relayed that information and it came to Mr Hebbard's attention. It is clear from the emails of Mr Johnson and Mr Lamb that Ms Moody was upset and had gone home. If all of that was fabricated and untrue it is unlikely it would have been picked up in that way. Whilst we have not heard from Ms Moody and we recognise that fact we do not have from the claimant an alternative version of this telephone conversation despite lengthy pleadings and a lengthy witness statement, we cdo not have one in which he explains, point by point, why the things that Ms Moody says are untrue. For those reasons we accept the account given by Ms Moody.

83. That leads us then to consider why Ms Moody has added in the additional passage. With regard to the conversation about Africa, it is the claimant's denial there was such a conversation and Ms Moody's putting in writing the fact there was. We note that in all this Ms Moody herself did not seek to raise a formal grievance. That was the evidence of Mr Hebbard and Ms Gray, and we see no reason to doubt it. If the claimant had not had this conversation with Ms Moody there seems to us no real reason why she should have invented it in those terms. Insofar as she had any complaint about the behaviour of the claimant she had, it seems to us, more than enough to say about the telephone call.

84. For those reasons we find on the balance of probabilities that this is a conversation that occurred. That being our conclusion we find that as a true account it does not amount to an act of racial harassment for the reasons advanced by Mr Alemoru.

Whistleblowing

85. The claimant repeated in submissions what he put in his witness statement. His witness statement, whilst asserting that Ms Moody somehow hacked his emails, did not set any facts which show that there was any improper interference.

86. Did Ms Moody perhaps forward the wrong chain of emails? Possibly she did, although we cannot find that as a fact. Was it improper of her to speak to Mr Francis? On the evidence of Mr Hebbard it was not. Did Mr Francis have the authority to put a stay upon the claimant's desire to subscribe to the GMCC? Undoubtedly on Mr Hebbard's evidence he did.

87. In those circumstances the suggestion that there was any improper hacking or interference as a fact, as contained in the letter of 31 March 2017, is simply not made out. If you cannot make out the basics of the facts you rely upon, and we agree with the claimant that saying the emails have been edited was an allegation of fact although Mr Alemoru initially submitted to the contrary, it does not seem to us that you can begin to make out the fact that you reasonably believed that what was done amounted to a criminal offence or a breach of a legal obligation.

88. But even if we were wrong in that, there is nothing in the claimant's witness statement that we see amounts to evidence that any such disclosure was one

which he reasonably believed was in the public interest. If it went to anything, it went to the relationship between him and his employer.

89. Yet, even if we were wrong about all of that and we found that it was a disclosure made in the public interest to the employer, we then have to ask the question: was it the primary reason for the dismissal of the claimant? In other words, does it satisfy the section 103A dismissal requirement in the Employment Rights Act 1996?

90. So far as that is concerned, we have the evidence of Mr Hebbard which we have accepted. that it was not the reason for the dismissal. We remind ourselves, because we should do so, that it is not for the claimant to prove that reason was the reason for dismissal. Once the claimant has asserted a whistleblowing reason the burden is upon the employer to show the reason for dismissal. In our judgment Mr Hebbard's evidence, which we accept was measured and persuasive, does that.

91. In our judgment the reason was the claimant's behaviour:

    91.1. in response to Mr Hebbard in the meeting of 30 March maintaining that Ms Moody and Mr Francis were lying despite apparently accepting the explanation about the emails;

    91.2. his behaviour towards Mr Johnson and Mr Vincente in apparently instructing them to do things when it was not his place to do so; and perhaps most significantly

    91.3. his behaviour towards Azra Moody and the consequences upon her.

92. For all those reasons we hold that the claimant has not made out any of the complaints that he has made.

93. For the avoidance of doubt, should there be hidden in the claimant's pleading and undetected by us and the earlier Employment Judges a claim of direct discrimination concerning the dismissal, for similar reasoning we would hold that the claimant has not established any link between his dismissal and his race such as would be sufficient to make out a case of direct discrimination. Nor, having acquitted the respondent of any previous act of racial harassment can it be said that the dismissal decision was an act of racial harassment. In those circumstances we do not consider we need to make a determination on any putative application by the claimant to amend his claim notwithstanding that in the last breath of his final submissions he appears to suggest that he believed that such a claim of direct discrimination was encompassed within the pleadings.

_____
Employment Judge Tom Ryan

_____

Date 6 December 2019

REASONS SENT TO THE PARTIES ON

9 December 2019

FOR THE TRIBUNAL OFFICE

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