EMPLOYMENT TRIBUNALS

Claimant: Ms Fatmata Mustapha

Respondent: (1) London Borough of Croydon

(2) Ms Lisa Taylor

Heard at: London South via CVP **On: 28, 29, 30 September, 1 October and in chambers 2 October and 13 November 2020**

Before: Employment Judge Khalil sitting with members
Ms Von Maydell-Koch
Ms C Edwards

Appearances

For the claimant: in person
For the respondent: Ms R Kight, Counsel

RESERVED JUDGMENT

Decision (unanimous):

The claim for unfair dismissal under S.98 Employment Rights Act 1996 is not well founded and is dismissed against the first respondent.

The claim for unfair dismissal under S.103A Employment Rights Act 1996 is not well founded and is dismissed against the first respondent.

The claim for detriment for making a protected disclosure under S.47B Employment Rights Act 1996 is not well founded and is dismissed against both respondents.

The claim for victimisation under S.27 Equality Act 2010 is not well founded and is dismissed against both respondents.

Reasons

The claim, documents and appearances

1. The claims before the Tribunal were for unfair dismissal under S.98 Employment Rights Act 1996 ('ERA'), automatic unfair dismissal under S.103A ERA (protected disclosure), detriment under S.47 ERA (protected disclosure) and victimisation under s.27 Equality Act 2010 ('EqA').

2. The claim had been presented on 19 November 2018 following ACAS conciliation between 23 August 2018 and 23 September 2018. The claim form included complaints of victimisation (EqA) and detriment for alleged protected disclosures. The Tribunal accepted that the claim form could be read as including both claims.

3. An application to amend the claim form was made on 9 April 2019 to add a complaint about unfair dismissal (based on the claimant's effective date of dismissal on 31 December 2018), automatic unfair dismissal under 103A ERA and a further complaint of victimisation and protected disclosures detriment in relation to the appeal against dismissal outcome on 20 December 2018. The amendment application was allowed on 22 May 2019, subject to determination of the Tribunal's jurisdiction.

4. The claimant appeared in person. She had been legally represented but her solicitors had come off the record before the hearing. The claimant advised however that she was still receiving legal advice.

5. The respondent appeared by Ms Kight, Counsel.

6. The claimant had prepared a witness statement – it was 140 paragraphs. Ms Dhana Balasubramaniam, a former employee of the respondent, also gave evidence for the claimant (under a witness order).

7. The respondent called 4 witnesses – Ms Lisa Taylor, Director of Finance, Investment and Risk, Ms Shifa Mustafa, Executive Director (Place), Ms Felicia Wright, Head of Services (Place) and Ms Josephine Lyseight, Head of Services (People).

8. There was an agreed bundle of documents though this had exceeded the 400 pages permitted by the case management order. The extra documents were allowed. The claimant confirmed that there were no documents she sought to rely upon which were missing from the bundle.

9. There was also a list of issues which had not been been finalised before the hearing but which were agreed at the outset of the hearing by both parties.

10. The respondent had raised jurisdiction arguments (time limits) in relation to the ordinary and automatic unfair dismissal claims and the detriment and victimisation claims relating to the appeal (against dismissal) outcome and also in relation to whether the alleged protected disclosure of 12 June 2018, was a qualifying protected disclosure under S. 43A ERA.

11. Following discussion with the parties, the Tribunal considered it in the overriding objective not to carve out time and decide the jurisdiction (and S. 43A) points first, but instead to hear the totality of the case and decide jurisdiction as part of all the

issues. This was considered a more productive and proportionate use of the Tribunal's time as the preliminary points would require a lot of evidence and the claimant appearing now as a litigant in person, would be ill-equipped to deal with such matters first, without some preparation.

12. The Hearing was conducted by CVP upon the application of the respondent and consent from the claimant. The Tribunal ensured the taking of regular breaks. The claimant, as a litigant in person was directed on the procedure and the relevant legal tests were explained. Following the conclusion of the evidence, the parties delivered submissions and the Tribunal reserved its decision. The claimant was provided with the respondent's written closing argument in advance on the penultimate day of evidence.

Relevant findings of fact

13. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

14. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

15. The claimant was one of several management accountants in the finance department of the respondent London Borough Council.

16. The respondent's finance team had 3 Heads of Service reporting into Ms Taylor: Mr Ian Geary (Resources), Ms Wright (Place) and Ms Lyseight (People). The claimant reported into Mr Paul Cliftlands who reported into Mr Geary.

17. In March 2018, the respondent commenced a restructure of its finance team. This was because there was a need to make £216,000 cost savings per annum as a result of reduced funding. This objective was not disputed by the claimant though she disputed in evidence if this was ultimately achieved.

18. The respondent proposed the deletion of some roles and the creation of others instead. For the purposes of this claim, having regard to relevance and proportionality, it was proposed to delete the management accountant role and create 2 other roles – senior accountant ('SA') and principal accountant ('PA'). The full proposal was set out on pages 119-120 and addressed in Ms Taylor's witness statement paragraphs 9 and 10. There was no dispute between the parties about the old and proposed new structure.

19. The respondent had a pre-existing restructuring policy (pages 58-85). There was no issue before the Tribunal that this had not been applied or followed.

20. Ms Taylor, Director of Finance, commenced collective consultation on 5 March 2018. The minutes of the meeting were at 121-127. The Tribunal found the minutes to be a fair summary of the meeting. The claimant accepted in evidence that question 20 (regarding the job description, page 126) in that meeting was her question. The claimant believed that she had asked in the first meeting about the interview panel but when taken to the minutes of the second meeting on 20 March 2018 (where the question had been asked), she stated she could be mistaken.

21. Other than presiding over the consultation and communicative output, Ms Taylor delegated the execution of the proposal to her 3 heads of service. Ms Taylor's evidence was accepted in this regard. It would be normal for someone of that seniority to stand back from the operational restructuring proposal especially as she had a direct management reporting line.

22. The initial part of the restructuring proposal was to assess the job matching of the current incumbents in post with the new roles in the restructure.

23. To this end, the claimant and others were asked to indicate if they carried out additional duties which might affect their job matching with the new roles.

24. The claimant provided information by email of her additional duties. The claimant alleged that she had been told by Mr Geary that this would not be relevant. There was no reference to this in the email exchange with Mr Geary by the claimant. The Tribunal found that as an absolute comment, it would be a very irregular comment to make in the circumstances and rejects it was said. If the Tribunal was wrong in reaching this finding, the Tribunal found that based on the claimant's own evidence in paragraph 40 of her witness statement, that any suggestion that the claimant's additional duties would not aid a match to the PA role was in respect of the other candidates/at risk management accountants too, based on Mr Geary's comment to the claimant and not just the claimant.

25. Mr Geary did respond to the claimant remarking that her stated additional duties were all part of her current job description.

26. Through the job matching process, the claimant was matched with the SA role on a ring-fenced basis. This meant she would be offered an interview but it was not a direct assimilation scenario which would only have been the case if the job match was 80% plus. The claimant did not however match with the PA role but could still apply for the vacancy.

27. The job matching assessment was appealed by the claimant. This was on a collective basis for the SA role and on an individual basis (on 17 May 2018) for the PA role.

28. The outcome of those appeals was that the claimant retained ring fenced access to the SA role but was also given ring fenced access to the PA role. This was conveyed to the claimant on 8 June 2018 (pages 247 and 249).

29. The Tribunal noted that in evidence the claimant's criticism of the job-matching process was solely in relation to its fairness and thus her unfair dismissal claim,

not her victimisation or whistleblowing claim. She confirmed this in evidence and re-confirmed her position to Tribunal questions.

30. On 12 June 2018, the complaint submitted a written grievance to Mr Richard Simpson, Director of Resources; Ms Taylor and Mr Geary were 2 of the recipients. This was at page 250. It contained more than one reference to discrimination (race) and the EqA. It was a protected act under S. 27 (2) EqA. This was not disputed by the respondent. An earlier generic grievance had been submitted by the union on behalf of several unnamed members on 6 June 2018 (page 239) but this was a generic communication without any specific allegations of discrimination by name or description. Ms Taylor responded to this email on 7 June 2018 but did not receive a response (page 238).

31. The Tribunal considered if the letter of 12 June 2018 was making assertions/allegations rather than conveying information or facts. The Tribunal found that it did not convey facts. The letter made a general allegation of breach of the Equality Act (250). It also referred to discrimination against the claimant by reference to comparison with 'technical accountants' whose race was not mentioned (251). It also referred to a white male being matched to a PA role *because he* had a close relationship with a member of the senior management team (252).

32. The Tribunal also found there was no earlier disclosure of information relating to discrimination. Whilst the claimant referred to historic discrimination in her witness statement there was no reference to whether or when such concerns were raised. Paragraph 33 of her witness statement referred to a restructure in 2015 but not the conveyance or disclosure of any concerns at any time about discrimination and if so who to. Paragraph 34 was a general assertion about unfairness but again without specificity.

33. On 21 June 2018, the PA assessment took place. The panel consisted of Ms Wright, Ms Lyseight and Simon Maddox **(**Governance). Mr Geary (and Mr Simpson) were removed from the panel as a result of the grievance which the claimant had raised.

34. Both Ms Wright and Ms Lyseight stated that they were informed of the existence of the grievance but not its content or nature. The Tribunal accepted their evidence. They both expressed their evidence assuredly; under cross examination they were also consistent with their witness statements. There was no reason, in the Tribunal's view, that their evidence should not be believed. There was no evidence of any hostility towards the claimant or any comparable bad faith agenda. They believed it was a grievance relating to Mr Geary who as a result was removed from the PA interview panel. The Tribunal found, based on Ms Wright's witness statement paragraph 4, that this was requested by them. The Tribunal were satisfied on this basis that Mr Maddox did not have knowledge of the content or nature of the grievance too and nether was this alleged.

35. There was a briefing note for the PA assessment – this was at page 171. There was a written part which essentially entailed a presentation on a question. This carried 20 %. There was also an interview which carried 80%. The claimant's

written assessment was at page 257-258. The interview notes were at pages 506 to 534 of all 3 assessors.

36. All of the written assessment scores were at page 331; the interview scores were at page 334-335; the overall scores were at page 336.

37. The minimum/benchmark score was 60%. From the witness statements of Ms Lyseight and Ms Wright, it was noted that there were 5 successful candidates of BAME race/ethnicity and four white candidates. Amongst the unsuccessful candidates there were 4 of BAME race/ethnicity and 1 white. This was not challenged by the claimant. Further, under cross examination, the claimant agreed that it was appropriate to have a benchmark.

38. Ms Lyseight, Ms Wright and Mr Maddox assessed independently and then moderated the scores through discussion of all the candidates.

39. The claimant challenged that she was marked down in her written assessment for spelling and grammar. Under cross examination she was taken to 7 grammatical errors which she agreed with. In the claimant's cross examination of Ms Lyseight and Ms Wright, she challenged that another two candidates had made errors and said candidate 'J' (see below) had made 10 errors. The claimant illustrated a few examples of these. The respondent did not challenge this number. Both Ms Lyseight and Ms Wright explained that to get a score of 0, the presentation would need to be quite bad. The Tribunal found based on Ms Mustafa's investigation during the appeal process that the other two candidates 'D' ('Tracey') and 'J' ('Petrina') referred to by the claimant also scored 1 like the claimant.

40. The claimant was also critical of how she was assessed against 'financial processes' believing her answer to be more appropriate/of better quality than at least 2 other candidates who scored better than her. The Tribunal noted that whilst the claimant was in a minority of 2 in scoring '0' for her presentation she was also in a minority of 2 in scoring the top mark for risk and opportunities.

41. The claimant was also marked down for the timing of her presentation as she overran. The Tribunal found that of the 14 candidates assessed, 10 others (including the claimant) had over-ran and not scored any points (appeal outcome, page 484). The claimant has also criticised the respondent for not making a clock available in the room. Ms Lyseight and Ms Wright were unable to confirm whether or which other rooms were used for the other interviews or whether there was a clock in any such room. Ms Wright believed there was one other room consistent with the claimant's view in her amended particulars of claim. The Tribunal finds that there were 2 rooms used and was not satisfied that there was a clock in either of the two rooms used.

42. The claimant was informed that she had been unsuccessful in her application for the PA role and was given notice of termination on 2 August 2018 with a termination date of 31 October 2018. The claimant confirmed that she did not wish to be considered for the SA role, considering it to be a downgrade. It was not in dispute that had she secured that role, her salary would have been protected for 1 year.

43. The claimant appealed against her unsuccessful application for a PA role. The appeal process had 3 hearings - 19 October 2018, 31 October 2018 and 19 November 2018. It was postponed to allow the outcome of the claimant's grievance (12 June 2018) to be completed, at her request and of the union. This grievance investigation had been outsourced to Mr David Weaver an independent consultant not employed by the respondent. The process, findings and outcome of that grievance were not referred to by either party during the course of the hearing at all. No witness for either party was questioned on that grievance. It had a chronological relevance as the appeal was delayed for that process to conclude first.

44. The appeal hearing concluded on 19 November 2018. The appeal was heard by Ms Shifa Mustafa. She was supported by Ms Jennifer Sankar, Head of HR. The appeal outcome was at page 478 to 493 of the bundle. The claimant's appeal was rejected and her effective date of termination was varied to 31 December 2018.

45. In evidence, Ms Mustafa was questioned about whether she was aware of the content of the claimant's grievance and whether she had seen any of the grievance documentation – including the report from Mr Weaver and the claimant's critique of that. She confirmed she was not aware of the content and had not seen the grievance documentation at the time. Her evidence was accepted in this regard. Ms Mustafa knew of the grievance process - she had agreed to adjourn the appeal hearing but confirmed she had no knowledge of its content.

46. The Tribunal reached its conclusion regarding knowledge of the content of the 12 June 2018 grievance from its assessment of the credibility of the respondent's witnesses but in addition, there was no supporting documentation -email or otherwise at the time. No corroborating testimony was presented in Tribunal. The Tribunal considered if it was more likely than not that Ms Taylor in particular may have informed any or all of them - to influence their selection or decision-making process. The Tribunal concluded, on a balance of probabilities, she did not. The Tribunal took into consideration Ms Taylor's approach to Unison's generic complaint of discrimination on 6 June 2018. Ms Taylor responded the next day. She used language that she would not tolerate any form of discrimination. She invited examples of discrimination to investigate rather than 'brush it under the carpet'.

47. The Tribunal noted the genuine need for redundancies arising from the restructure was not in dispute. Neither was the consultation process in terms of its duration or in respects of its informativeness and openness. The Tribunal found in any event the consultation process to be genuinely about avoiding redundancies where possible and was open, thorough and of sufficient duration.

Applicable Law

Jurisdiction

48. By S. 111 (2) Employment rights Act 1996 ('ERA'), an Employment Tribunal shall not consider a complaint unless it is presented to the Tribunal before the end of the period three months beginning with the effective date of termination, or, within such further period as the Tribunal considers reasonable in a case where it was not reasonably practicable for the complaint to be presented before the end of that period of three months. The same test applies to a protected disclosure detriment claim under S.48 (3) ERA.

49. By S.123 EqA, a Tribunal may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

50. By S. 207 B (2) to (5) ERA, the ACAS Early conciliation procedure operates to stop the clock and extend time for presentation of a claim form. The effective date of termination in this case was 31 December 2018. The outcome of the appeal (against dismissal) was communicated to the claimant on 20 December 2018.

51. The Tribunal had regard to various established authorities, in particular ***Palmer and Saunders v Southend on Sea BC 1984 ICR 372 CA, Walls' Meat Co Ltd v Khan, 1979 ICR 52, Dedman v British Building*** and ***Engineering Appliances Ltd 1973 IRLR 379*** and ***Software Box Limited v Gannon 2016 ICR 148.***

52. The test for reasonably practicable as described in ***Palmer*** leads to the question as to whether it was reasonably feasible for the claimant to have presented the claim in time.

53. In relation to the 'just & equitable' test, the Tribunal had regard to ***British Coal v Keeble [1997] IRLR 336*** - the so called 'Keeble Factors in paragraph 8 endorsing the earlier EAT guidance:

> "*The Industrial Tribunal should adopt as a check list the factors mentioned in Section 33 of the Limitation Act 1980. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to*
>
> *(a) the length of and reasons for the delay*
>
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay*
>
> *(c) the extent to which the party sued had co-operated with any requests for information.*
>
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.*
>
> *(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*

Unfair Dismissal S.98 (2)/(4)

54. Pursuant to S. 98 (2) Employment Rights Act 1996 ('ERA'), an employer needs to have a potentially fair reason for dismissal. The burden is on the employer to establish the reason. Redundancy is one of the reasons and is relied upon by the respondent in this case.

55. Redundancy is defined in S.139 ERA:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

56. Pursuant to S.98 (4) ERA, the Tribunal needs to be satisfied, having regard to the reason shown, that the employer acted reasonably in treating that reason as a sufficient reason for dismissal. This is a neutral burden.

57. In ***Williams and others v Compair Maxam Ltd 1982 IRLR 83***, the EAT laid out guidelines to consider in assessing the fairness of a dismissal for redundancy: warning of impending redundancy, [collective] consultation, fair selection criteria, fair selection (based on the criteria) and consideration of alternative employment.

58. The Tribunal must also have regard to the 'range of reasonable responses' test. It has long been established that, under section 98(4), a Tribunal must assess objectively whether dismissal fell within the range of reasonable responses available to the employer. Whether or not the Tribunal would have dismissed the employee if it had been in the employer's shoes is irrelevant: the Tribunal must not "substitute its view" for that of the employer. (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439)***. The range of reasonable responses test applies not only to the question of whether the sanction of dismissal was permissible, but also to that of whether the employer's procedures leading to dismissal were adequate. (***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).***

Protected Disclosures

59. Under S. 103A ERA, an employee shall be regarded 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.

60. By virtue of S.47B ERA, a worker has the right not be subjected to a detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. In ***NHS Manchester v Fecitt and others 2012 IRLR 64***, it was stated that the test is whether the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower".

61. A protected disclosure qualifying for protection is one made in accordance with S. 43A (which refers to S.43 C to S.43H about the conveyance of a qualifying disclosure) and S.43B (which defines a qualifying disclosure by reference to disclosure of information which , in the reasonable belief of the worker making the disclosure, tends to show one of more of the following:

- that a criminal offence has been committed, is being committed or is likely to be committed
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
- that a miscarriage of justice has occurred, is occurring or is likely to occur
- that the health or safety of any individual has been, is being or is likely to be endangered
- that the environment has been, is being or is likely to be damaged
- that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

62. S.43B requires consideration of whether the claimant had a belief that the information disclosed tends to show one of the six matters listed above (subjective test) and if so, was that belief a reasonable one (objective). ***Chestertons Global Ltd v Nurmohammed 2018 ICR 731 CA and Babula v Waltham Forest College 2007 EWCA Civ 174***.

63. Pursuant to S.48 (2) ERA, the burden of proof in relation to the reason for the alleged detrimental treatment rests on the respondent. However, this is once a protected disclosure has been established and that the respondent has subjected the claimant to a detriment.

64. In relation to S.103A, if the employee puts forward evidentially that there is an issue which warrants investigation and which is capable of establishing the competing (protected disclosure) reason for dismissal, the burden will fall on the employer to prove the (principal) reason for dismissal.

Victimisation – EqA

65. Under S.27 EqA:

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(1) A person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act:

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

66. The burden of proof is set out in S.136 (2) EqA. This provides:

"*If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."*

67. S.136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

68. The guidance in ***Igen Ltd v Wong 2005 ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd 2003 CR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent.

69. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

70. In ***Laing v Manchester City Council 2006 ICR 1519 EAT,*** the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

71. In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

72. With regard to victimisation, the claimant would need to establish that she did a protected act and that there followed detriment; however, in accordance with ***Madarassy***, something more would be require to indicate a prima facie case of discrimination to shift the burden of proof.

Conclusions and analysis

73. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

Jurisdiction – time (reasonable practicability) – unfair dismissal (ordinary and automatic) and protected disclosure detriment regarding the appeal against dismissal outcome (S.111/S.48 ERA)

74. The ACAS early conciliation procedure had already been concluded in relation to the victimisation and protected disclosure detriment claim in the claim form presented on 19 November 2018.

75. Accordingly, the time limit to present the S.98 ERA claim and the claim under S.103A ERA was 30 March 2019.

76. The time limit to present the detriment claim under S. 47B ERA (based on the appeal outcome) was 19 March 2019.

77. The time limit to present the victimisation claim under S. 27 EqA (based on the appeal outcome) was 19 March 2019.

78. The Tribunal is left to determine whether it was reasonably practicable for the claimant to have presented a claim form on or before 30 March 2019 and 19 March 2019 in relation to unfair dismissal and protected disclosure detriment respectively. The amendment application which was permitted on 22 May 2019 was expressly subject to determination of jurisdiction. The Tribunal also noted that the amendment was permitted as new causes of action. Although re-labelling had been raised by the claimant's solicitors, this was rejected.

79. The claimant confirmed in evidence twice that she was aware of the time limits – she referred accurately to "3 months less a day". She also confirmed she had presented her claim on 19 November 2018 to avoid any time limits issues.

80. The claimant had pursued a previous Tribunal claim, the judgment for which was admitted in evidence. A part of that claim had been struck out because of time limits.

81. The claim did get advice from her union but explained that her regular contact person had been off. There was no reason why somebody else could not have been contacted at any time if she needed assistance.

82. The Tribunal accepted the claimant's evidence that she had visited her GP in January 2019 and February 2019 on the occasions cited in paragraph 140 of her witness statement and had developed a skin reaction. The Tribunal accepted this even in the absence of medical evidence. However, to the extent that this inhibited or prevented her from amending her claim sooner or presenting a new claim, the Tribunal did not conclude that it did so – that is where medical evidence would have been required.

83. The Tribunal accepted the claimant's evidence that she suffered a bereavement on 6 March 2019 causing her to travel to Sierra Leone returning on 4 April 2019 even though no travel itinerary evidence was provided. However this was not a complete answer to why a claim could not have been presented before 6 March 2019 or, why she could not have applied to amend or bring a new claim sooner by submitting an on-line claim or an amendment application by email or asked the union to do so especially as she was very aware of the time limit.

84. The claimant was cognisant of her right to make a claim. Her claim form in these proceedings made references to 'protected act' and 'injury to feelings' which means she either had undertaken research or was taking advice. These are not lay phrases, but legal terminology. She was also very aware of time limits. There was no underlying or persistent health reason which meant she could not have submitted a new claim or applied to amend her existing claim within time.

85. The notice of the preliminary hearing sent on 8 January 2019 should have been a prompt to the claimant. By then she knew her appeal had been unsuccessful and her employment had (finally) ended on 31 December 2018.

86. It was thus reasonably practicable for these claims to have been presented in time and cannot proceed against the respondents.

<u>Jurisdiction – time (just and equitable) – victimisation in relation to the appeal against dismissal outcome (S.123 EqA)</u>

87. In considering the just and equitable extension of time, the length of the delay was not significant – the application to amend was made on 9 April 2019 in relation to the appeal outcome for which time expired on 19 March 2019. The Tribunal repeats its conclusions above regarding the reasons for the delay which in summary the Tribunal did not consider to be very compelling. With regard to cooperation with requests for information, the claimant and respondent were engaged in communications between July and September 2018 regarding the FOI requests (pages 325, 345 and 360). Further the claimant had a response from the ICO on 30 January 2019 regarding that investigation (pages 496-505). The claimant did not get any further information until 11 April and 2 May 2019, but the claimant had by then submitted her application to amend. The delay in receipt of that information was thus not causative of or the trigger for that amendment

application. Regarding the claimant's knowledge of facts giving rise to the taking of action or the possibility of taking action upon receiving advice, the Tribunal concluded neither of these factors were applicable in light of the conclusions above. There was no evidence advanced by the respondent about prejudice to it in defending the claim. The Tribunal considered there to be little or no impact by the delay on the cogency of the evidence.

88. The Tribunal concluded in relation to the just and equitable extension that the balance of prejudice lied in favour of granting the claimant an extension of time.

<u>Ordinary unfair dismissal – alternative conclusions if the above conclusion on jurisdiction is wrong – S.98 (2)/(4) ERA</u>

Job matching

89. The claimant's individual appeal to get ring-fenced assimilation to apply for the PA role succeeded. There was thus no unfairness to the claimant (page 248-249). The claimant's collective appeal regarding the SA role did not succeed but she retained ring fenced access. (The percentage assimilation did increase from 75 to 78% however) (page 291). However, the SA role was not, in any case, a role the claimant was prepared to be considered for as she said, consistently, that she considered that to be a downgrade.

PA assessment

90. Under cross examination, the claimant accepted she had made 7 grammatical mistakes in her written assessment (pages 257-258) but claimed that at least 2 other candidates 'D' (Tracy) and 'J' (Petrina) had made more mistakes. The Tribunal was taken to page 271 which was J's written assessment. 5 grammatical errors were highlighted. The claimant said there were 10 in total. This was not disputed by the respondent. The Tribunal noted at page 333 that candidates 'D' and 'J' had scored 3 out of the maximum mark of 4 (page 333). It was also clear to the Tribunal that Ms Mustafa had investigated the scoring in more detail and 'D' and 'J' had also both been marked down on spelling and grammar (page 485).The marking scheme was at page 253. Under cross examination Ms Wright and Ms Lyseight said to score '0' the errors would have needed to be very bad. The Tribunal concluded there was no unfairness. It was open to the respondent to have a broad and general approach to the errors without numerical sophistication.

91. Timing of presentation – the Tribunal concludes that there was no unfairness in the non-provision of a clock regarding the claimant's 5-minute time limited presentation. There was no evidence that the other candidates did have the benefit of a clock. There was insufficient evidence before the Tribunal about the exact use of any other room or rooms but the Tribunal has found and accepted the evidence of Ms Wright that she believed 2 rooms were in use. This was consistent with the claimant's belief there was another room (not rooms) – paragraph 21 (b), amended particulars of claim on page 21. The Tribunal concludes that there would have been several candidates who were assessed in the same room as her, on a half and half basis up to seven or eight. In any case, the claimant could have relied on her own time keeping based on her practice or by having a wristwatch. The

Tribunal also noted that there 10 other candidates who had gone over time and had also been marked down (484). The claimant was thus in a majority in this regard.

92. Clarity of presentation and answer in relation to financial processes - it was open to the respondent to mark the claimant down in relation to the clarity of her presentation and her response to the question regarding financial processes. The inclusion of three assessors guarded against the subjectivity of the process. The assessors were all finance experts. Ultimately, the Tribunal's jurisdiction was extremely limited in this regard (see below). The Tribunal's role is not to substitute its view, neither could it have the expertise to do so. All candidates faced the same question and same ambiguity or interpretation in so far as this applied. The Tribunal notes that selection processes are *comparative* assessments. The respondent's process in so far it had subjectivity was within the range of reasonable responses for reasons set out in this paragraph.

93. In ***British Aerospace Plc v Green & others [1995] EWCA Civ 26*** the Court of Appeal said:

> *"The whole tenor of the authorities to which I have already referred is to show, in both England and Scotland, the courts and tribunals (with substantial contribution from the lay membership of the latter) moving towards a clear recognition that if a graded assessment system is to achieve its purpose it must not be subjected to an over-minute analysis. That applies both at the stage when the system is being actually applied, and also at any later stage when its operation is being called into question before an industrial tribunal."*

94. The Court of Appeal also observed:

> *"Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge — namely a swift, informal disposal of disputes arising from redundancy in the workplace. So, in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him."*

95. With the above guidance in mind and the findings and conclusions above, there was no basis for the Tribunal to interfere with an assessment which was carried out in good faith without improper or dishonest motive.

Appeal

96. The appeal panel were independent. The panel comprised of Ms Mustafa, Executive director of place and Jennifer Sankar, Head of HR. The claimant was accompanied by a union representative from UNISON. The appeal process was thorough and the outcome comprehensive. It was clear to the Tribunal that Ms Mustafa had drilled into more granular detail to uncover what had happened with regard to the PA assessment. There were several examples. She had examined how others had scored with regard to running over time regarding the

presentation. She had examined how others had scored with regard to spelling and grammar. She had examined the ethnicity of the successful and unsuccessful candidates. She had also presided over other appeals in the past and overturned decisions.

Conclusion

97. The Tribunal thus concluded, in pursuance of the foregoing findings and conclusions, that the claimant's dismissal was by reason of redundancy and was both procedurally and substantively entirely within the range of reasonable responses and that the guidelines in ***Williams v Compair Maxam*** were adhered to in so far as they were relevant. There was no challenge by the claimant that there was no genuine redundancy situation. In any event, the Tribunal was satisfied there was a genuine redundancy situation under S. 139 (1) (b) ERA. The Tribunal has made a specific finding above with regard to consultation too which was not criticised by the claimant (paragraph 47).

Victimisation - protected act – reason for treatment? (S.27 EqA)

98. The Tribunal has already found that the panel members (Ms Wright, Ms Lyseight and Mr Maddox) and Ms Mustafa did not have knowledge of the protected act. Ms Taylor had not told them. For the Tribunal to conclude otherwise it would have needed to reach a conclusion that Ms Wright, Ms Lyseight, Ms Mustafa and Ms Taylor were all being untruthful. The Tribunal did not form that impression, unanimously, at all. It could, thus, not have played any part in their decision making. In ***Scott v London Borough of Hillingdon 2001 EWCA Civ 2005 CA,*** the Court of Appeal said knowledge of a protected act was a pre-condition of a finding of victimisation.

99. Even if the Tribunal was wrong in its conclusion, the Tribunal was equally satisfied, in the alternative, that the protected act was in no sense whatsoever behind either the selection or decision-making process. These were senior finance professionals. Ms Wright and Ms Lyseight had a significant restructure to oversee. As a matter of fact, 5 of the successful candidates were of BAME ethnicity. Ms Mustafa was already presiding over an appeal raising several allegations of discrimination. There would be no reason for her to be 'bothered' by an earlier race discrimination complaint. Ms Taylor was already aware of a discrimination Tribunal claim made by the claimant in 2014 (paragraph 48 of her witness statement) – which had not caused her to victimise the claimant who had remained performing her role for 4 years since.

100. The burden of proof did not shift. The protected act and the claimant's subsequent selection for redundancy or her unsuccessful appeal against that were not, without more, sufficient to establish a causal link for the burden of proof to pass to the respondent. The claim against both respondents fails.

Protected Disclosure dismissal (S.103A ERA) and Detriment (S.47B ERA) – including alternative conclusion on appeal against dismissal detriment if the jurisdiction conclusion above is wrong

101. The Tribunal refers to its finding above that the claimant's letter of 12 June 2018 did not convey facts to the first respondent. As a result, the Tribunal concluded this did not amount to a protected disclosure under S.43A ERA. having regard to ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325 EAT*** which confirms that an assertion or allegation is not enough. There was no suggestion that read with any other communication it conveyed facts or information. (The Tribunal did not go on to conclude but would likely to have been satisfied that the claimant had a reasonable belief (subjective and objective) that the claimant believed the disclosure of information (*if this had been found*) tended to show a failure to comply with any legal obligation and that that the claimant had a reasonable belief this was in the public interest (subjective and objective).

102. If the Tribunal was wrong in its conclusion in this regard, it went on to reach conclusions in the alternative.

103. The Tribunal considered if the principle settled by the Supreme Court in ***Royal Mail Group Ltd v Jhuti [2019] UKSC 55*** could apply. In that case the Supreme Court confirmed that if the real reason for dismissal was that if a person had made a protected disclosure and that fact had been hidden from the decision maker by a person in the hierarchy of responsibility above the employee, the dismissal is automatically unfair even though the decision maker has relied upon the 'invented' reason in good faith.

104. The Tribunal was satisfied however that Ms Taylor had not in fact been influenced at all by the grievance of 12 June 2018 though she was aware of it. The Tribunal refers to its findings in paragraph 46 above and its conclusions in paragraphs 98 and 99.

105. There was no properly arguable basis to displace redundancy, as implemented, as the reason for dismissal. The reason or principal reason for dismissal was not the protected disclosure.

106. The Tribunal also concluded, based on the findings above and the conclusions already reached under ordinary unfair dismissal, in particular paragraphs 84 to 91 above, that the claims for detriment for the making of protected disclosures fail. There was no material influence on the first respondent's decision to select the claimant for redundancy or in not upholding of the appeal against it. The Tribunal has already addressed in its findings above the lack of knowledge on the part of Ms Wright, Ms Lyesight and Ms Mustafa with regard to the content of the 12 June 2018 letter.

107. As a result, the Tribunal also concluded that the claims for detriment (including dismissal in so far it was alleged) against Ms Taylor as the second respondent must also fail. Ms Taylor did not affect the outcome of the redundancy/PA selection as she had no involvement and her management response at the appeal was not influenced by the protected act at all.

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Employment Judge Khalil

13 November 2020