EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr R Norris	AND	Bristol City Council (1)
		Mr Colin Molton (2)
		Mr Marvin Rees (3)
		Mr John Walsh (4)
		Mr Mark Williams (5)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON** 1 April 2021
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr A Small of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:
1 The third respondent Mr Marvin Rees is dismissed as a respondent from these proceedings; and
2 With the exception of the six alleged detriments said to have arisen on 3 July 2020, the claimant's claims for detriment on the ground of having made protected public interest disclosures are all out of time and are all hereby dismissed; and
3 These remaining claims are not struck out as having no reasonable prospect of success, but they have little reasonable prospect of success and are subject to the attached Deposit Order.

REASONS

1. This is the judgment following a Preliminary Hearing to determine (i) whether or not the claimant's whistle-blowing detriment claim was presented in time; (ii) whether any of the individual respondents should be dismissed from these proceedings; and (iii) whether the claimant's claim should be struck out on the grounds that it has no reasonable prospect of success, or whether the claimant should be ordered to pay a deposit as a condition of continuing with the claim because it has little reasonable prospect of success.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. Each of the parties adduced some contemporaneous documents, but not in an agreed paginated bundle. The order made is described at the end of these reasons.
3. I have heard from the claimant, and I have heard Mr Small of Counsel on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
4. The claimant Mr Roy Norris is a long-standing employee of the first respondent Bristol City Council. The second fourth and fifth respondents namely Mr Molton, Mr Walsh and Mr Williams are all senior employees of Bristol City Council. The third named respondent, Mr Rees, is the elected Mayor of Bristol.
5. Although the claimant has only brought one claim, namely that he has suffered detriments on the grounds of having made protected public interest disclosure, the claimant relies on 22 alleged disclosures, and 120 acts of detriment.
6. The 22 protected public interest disclosures relied upon are said to be contained in five emails to the first respondent on 21 May 2012, 29 May 2012, 3 July 2012, 2 July 2012 and 2 August 2012. They all relate to financial matters and alleged fraud relating to the first respondent's market licence fees. The respondent disputes that these were protected public interest disclosures.
7. With regard to the alleged detriments, 95 of these are said to have occurred during 2018 and three between January and August in 2019. Another 13 are said to have occurred on 9 January 2020, one on 25 February 2020, two on 24 March 2020 and the final six on 3 July 2020.
8. I have not heard detailed evidence about the disclosures or the alleged detriments and I therefore make no findings as to whether the disclosures were protected public interest disclosures nor whether the claimant suffered the detriments which he alleges.
9. The first respondent commenced disciplinary proceedings against the claimant in 2018. In short there were two grounds for these disciplinary proceedings, and both related to tweets which had been published. The first was an offensive tweet under the anonymous pseudonym "Bristol Citizen". The claimant accepts that the tweet was offensive but has always denied that he was the anonymous "Bristol Citizen". The second was a tweet made by the claimant in which he offered to forward to local colleagues in the Labour Party an exchange of emails. At the time the first respondent considered that this was a potential breach of confidential information by the claimant, although it was subsequently accepted that the emails were already in the public domain.
10. The claimant was suspended on 9 March 2018 and the fifth respondent, Mr Mark Williams, who is the first respondent's Head of Human Resources, commissioned an independent external investigator Mr Greaves to undertake the investigation. The claimant attended an investigation meeting on 23 March 2018 and was accompanied by his trade union representative. On 3 May 2018 Mr Williams notified the claimant that he would be required to attend a disciplinary hearing which would be determined by the fourth respondent Mr John Walsh, the first respondent's Director of Workforce and Change.
11. On 7 May 2018 the claimant raised a grievance in relation to the disciplinary process. The disciplinary process was put on hold pending the claimant's grievance, which was investigated by an independent external investigator namely Mr Geater. The second respondent Mr Colin Molton, who was the first respondent's former Interim Director of

Growth and Regeneration considered Mr Geater's grievance report but did not uphold the claimant's grievance. At that stage the claimant had suggested that his complaints about the disciplinary process were related to his earlier disclosures but Mr Geater's had concluded that there was no evidence to support this contention. The claimant appealed against the outcome of the grievance on 8 October 2018, but subsequently withdrew that appeal. Given that the claimant had complained about the fourth respondent Mr Walsh during his grievance, Mr Walsh stood down as the chair of the disciplinary hearing.

12. The claimant attended a disciplinary hearing on 21 November 2018 in the presence of his trade union representative. The hearing was chaired by Mr O'Gara the first respondent's director of Legal and Democratic Services. Although the previous information and reports was before the panel, there was no one to present the case on behalf of the first respondent. Mr O'Gara decided that there was insufficient evidence to support either of the two allegations against the claimant and the disciplinary process was withdrawn, and no further disciplinary action was taken against the claimant thereafter.
13. On 21 January 2019 the claimant raised a second grievance relating to the disciplinary process which had been applied during 2018. Mr Gilmore of the first respondent investigated that grievance, but he did not uphold it. The claimant then appealed against that finding and after delays caused by the Covid-19 pandemic the appeal was eventually heard on 3 July 2020 by Ms Murray, the first respondent's Finance Director. The claimant's appeal was upheld in part and recommended that further investigations be undertaken through the first respondent's Internal Audit department.
14. The respondent has accepted that certain aspects of the earlier investigation were not dealt with properly, for instance the fact that the original allegations against the claimant seem to change and develop, and the fact that no one was present to present a disciplinary case against the claimant.
15. The respondent says that during the long period of the claimant's suspension changes had taken place in the claimant's department which had previously been based at a location called the Welsman. The claimant contends that these changes had taken place immediately before his suspension. In any event the claimant was offered the opportunity to return to his previous work location at the Welsman, but preferred to remain at another location, namely Knowle West, where he had been offered and had accepted a role at his substantive grade.
16. Throughout this process the claimant was represented by his chosen trade union representative and had access to advice about his legal position. The claimant and his union representative discussed the possibility of Tribunal proceedings in 2018, but the claimant asserts that ACAS suggested that he should try to exhaust various internal processes before issuing proceedings.
17. The claimant first approached ACAS under the Early Conciliation procedure on 1 August 2020 (Day A). ACAS issued the Early Conciliation Certificate on 5 August 2020 (Day B). The claimant then presented these proceedings on 19 August 2020.
18. Finally, the claimant chose to give evidence as to his means. He earns in excess of £20,000 per annum, and owns his house with his wife, subject to a mortgage, and his wife also works. He has some savings but these are not extensive.
19. Having established the above facts, I now apply the law.
20. <u>The Law - Protected Public Interest Disclosures:</u>
21. The relevant statute is the Employment Rights Act 1996 ("the Act").
22. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending

to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

23. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
24. Under section 47B of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Under section 47B(1A) of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done – (a) by another worker of his employer in the course of that other worker's employment, or (b) by an agent of his employer with the employer's authority, on the ground that he has made a protected disclosure.
25. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
26. Section 48(3) of the Act provides that an employment tribunal shall not consider a complaint of detriment on these grounds unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
27. <u>The Correct Respondents:</u>
28. Under section 47B(1A) of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done – (a) by another worker of his employer in the course of that other worker's employment, or (b) by an agent of his employer with the employer's authority, on the ground that he has made a protected disclosure.
29. Each of the second, fourth and fifth respondents, namely Mr Walton, Mr Walsh and Mr Williams, where all workers of the first respondent Bristol City Council at the relevant times. The first respondent has asserted that it is vicariously liable for their actions, and there is no need for them to have been joined as individual respondents. That may well be the case, but nonetheless the claimant is entitled to include them as individual respondents if he so chooses pursuant to section 47B(1A) of the Act.
30. The position is different with regard to the third respondent Mr Rees. He was the elected Mayor of the City of Bristol at the relevant times. He was not a worker of the first respondent Bristol City Council. There was an initial complaint from the Mayor's office which led to the disciplinary investigation, but there is no evidence to suggest that Mr Rees personally was acting as the agent of the first respondent when that complaint was first raised, nor subsequently when the claimant complains that he refused to take part in any of the first respondent's internal proceedings.
31. In these circumstances in my judgment this Tribunal does not have jurisdiction to entertain any complaint which the claimant may have against Mr Rees, and he is therefore dismissed as a respondent to these proceedings.
32. <u>Are the Claims Out of Time?</u>
33. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
34. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier,

is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

35. I have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; and Royal Mail Group Limited v Jhuti UKEAT/0020/16/RN.
36. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
37. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases, the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
38. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

39. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
40. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
41. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: “The question at “stage 2” is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months.”
42. In this case the claimant first approached ACAS under the Early Conciliation procedure on 1 August 2020 (Day A). ACAS issued the Early Conciliation Certificate on 5 August 2020 (Day B). The claimant then presented these proceedings on 19 August 2020. In the absence of a series of similar acts or failures the last act or failure in respect of which these proceedings have been presented within time must be on or after 2 May 2020.
43. Of the 120 acts of detriment of which the claimant complains, they are all out of time with exception of the six acts of detriment all dated 3 July 2020 which relate to complaints about the grievance appeal hearing on that date. Unless any one of these complaints is an act or failure which is part of a series of similar acts or failures, the remaining earlier alleged acts of detriment are all out of time.
44. There are two striking aspects to this case. The first is that the public interest disclosures relied upon by the claimant took place more than five years before the first of the detriments said to have been made on the grounds of those disclosures. It beggars belief that any of the respondents would wait at least five years before choosing to take detrimental action on the grounds of those disclosures. The second is that any actions taken by the first respondent ceased as at November 2018 when the disciplinary allegations were not upheld and were effectively withdrawn. Any act which allegedly took place after that date were the result of the claimant’s grievance which he himself raised in January 2019 and following delays and absences caused by the Covid-19 pandemic, were not concluded until the appeal was heard on 3 July 2020. This creates two problems for the claimant: the first is the evidential difficulty with regard to proving that any alleged actions taken by the respondents were on the grounds of the alleged disclosures more than five years previously; and secondly (and only to the extent that the respondents were orchestrating some vindictive reaction to those disclosures in 2018) any impetus or actions from the respondents had concluded by 2018. The matter was only kept alive by the claimant’s decision to pursue a subsequent grievance and appeal. This was of course his right, but this dilutes even further the evidential possibility that the events on 3 July 2020 were acts and/or omissions committed by any of the respondents on the grounds of the alleged disclosures which by then happened approximately eight years previously.
45. Applying Royal Mail Group Limited v Jhuti, the last of the acts or failures to act in the series must both be in time and proven to be actionable if it is to be capable of enlarging time under section 48(3)(a). The claimant has not established any causative or evidential link between the six alleged detriments on 3 July 2020, and the previous 114 alleged

detriments, the vast majority of which are said to have occurred in 2018. For these reasons I reject the assertion that any of the last six alleged detriments were an act or failure which was part of any series of similar acts or failures. Accordingly, with exception of the last six detriments said to have arisen on 3 July 2020, I find that all of the alleged detriments are potentially out of time.

46. The next questions to address arise from Section 48(3) of the Act, and whether it was reasonably practicable for the complaint to have been presented within three months of the allegations in question and/or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
47. In this case the reason given by the claimant for not issuing these proceedings within time was that ACAS had suggested that it would be preferable to exhaust the internal processes first. However, (and considering the guidance in Bodha v Hampshire Area Health Authority) at all relevant times the claimant was assisted by his chosen trade union representative who was experienced in these matters. There was no physical impediment which precluded the claimant and/or his union representative from issuing tribunal proceedings. The claimant knew of his rights. There was no misrepresentation of the position on the part of any of the respondents. Finally, the claimant has not established that there was any material fault on the part of any adviser. ACAS may well have indicated that the claimant might prefer to exhaust internal grievances before considering whether to issue proceedings, but the claimant has not established that he was advised they could not do so unless and until such proceedings were exhausted. In any event (and applying Palmer) the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for an application to be made in time.
48. I therefore conclude that it was reasonably practicable for the claimant to have presented these proceedings within three months of the alleged detriments.
49. In addition, (and applying Cullinane), in my judgment the time between the expiry of the primary time limit and the eventual presentation of the claim was not reasonable. There is strong public interest in claims being brought promptly, and against a background where the primary time limit is three months."
50. I therefore determine that with the exception of the six alleged detriments said to have arisen on 3 July 2020, the claimant's claims for detriment on the ground of having made protected public interest disclosures are all out of time and are hereby dismissed.
51. Strike Out and/or Deposit Order
52. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules".
53. Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds: (a) it is scandalous, or vexatious, or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
54. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
55. I have considered the cases of North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA; and Anyanwu v South Bank Students' Union [2001] IRLR 305 HL.
56. As noted above, there are two striking aspects to this case. The first is that the public interest disclosures relied upon by the claimant took place approximately eight years before

the surviving detriments which are said to have been made on the grounds of those disclosures. The second is that any actions taken by the first respondent ceased as at November 2018 when the disciplinary allegations were not upheld and were effectively withdrawn. The remaining detriments on which the claimant relies relate to matters which took place during the appeal hearing which was heard on 3 July 2020. This creates two problems for the claimant: the first is the evidential difficulty with regard to proving that any alleged actions taken by the respondents were on the grounds of the alleged disclosures which are said to have been made eight years previously; and secondly (and only to the extent that the respondents were orchestrating some vindictive reaction to those disclosures in 2018) any impetus or actions from the respondents had concluded by 2018. The matter was only kept alive by the claimant's decision to pursue a subsequent grievance and appeal. This was of course his right, but this dilutes even further the evidential possibility that the events on 3 July 2020 were acts and omissions committed by any of the respondents on the grounds of the alleged disclosures which by then happened approximately eight years previously.

57. In my judgment the claimant's claim is a pretty hopeless. But it is clear that special considerations apply before a Tribunal should strike out any claim for discrimination or whistleblowing on the grounds that it has no reasonable prospect of success. Applying Anyanwu fact sensitive discrimination cases should not be struck out save in the most obvious cases because they are fact sensitive and require full examination to make a proper determination. Similarly, applying Ezsias, the same approach should generally inform protected disclosure cases which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step.
58. I have not heard any evidence in detail as to what happened at the claimant's grievance appeal on 3 July 2020 and applying Anyanwu and Ezsias I am unable to conclude that his claims have no reasonable prospect of success. However, for the reasons explained in paragraph 56 above, in my judgment the claimant's claims enjoy little reasonable prospect of success. I have therefore made a Deposit Order which is attached to this judgment which bears in mind the evidence which the claimant has given as to his financial means.
59. This matter will now be listed for a case management preliminary hearing, which (only if the claimant has met the terms of the Deposit Order) will determine how the case will proceed.

Employment Judge N J Roper
Date: 01 April 2021

Judgment and Reasons sent to the Parties: 09 April 2021

FOR THE TRIBUNAL OFFICE