



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A M Moussa

**Respondents:** First Greater Western Ltd (1)  
Mr D Haynes (2)  
Mr B White (3)

**Heard via CVP (London Central) On: 24, 25, 26, 31 January, 1 February 2022**

**Before:** Employment Judge Davidson  
Ms S Campbell  
Mr D Clay

## **Representation**

**Claimant:** Mr J Singh, Senior Paralegal  
**Respondents:** Mr R Fitzpatrick, Counsel

# RESERVED JUDGMENT

**The claimant's complaints of victimisation for having done a protected act and detriment for having made a protected disclosure succeed against the first respondent but fail against the second and third respondents.**

# REASONS

## Issues

The issues for the hearing were as follows:

1. Has the claimant carried out a protected act pursuant to section 27 of the Equality Act 2010? The claimant relies upon the following;
  - 1.1. bringing Employment Tribunal claim 2205166/2013; and
  - 1.2. bringing Employment Tribunal claim 2204462/2013?
2. The respondent accepts that the claim referred to at 1.1 is a protected act but denies that the claim referred to at 1.2 is a protected act.

3. Were the allegations made by the claimant in Employment Tribunal claim 2204462/2013
  - 3.1. false and
  - 3.2. made in bad faith?
  
4. Did the claimant make one or more disclosures pursuant to section 47B of the Employment Rights Act 1996? The claimant relies on the following:
  - 4.1. a disclosure said to have been made on 19 March 2012 consisting of a written grievance about Pat Hayes' threatening and intimidating behaviour;
  - 4.2. a disclosure said to have been made in late July/early August 2012 when the claimant reported an alleged breach of confidentiality and victimisation by Pat Hayes to the second respondent;
  - 4.3. a disclosure said to have been made on 17 August 2021 consisting of a collecting grievance complaint addressed to the second respondent about the actions of Pat Hayes;
  
5. Are any of the disclosures "qualifying disclosures" by virtue of section 43B, as it was in force at time the disclosure was said to have been made?
  
6. Are any of the disclosures "protected disclosures" by virtue of having been made in accordance with any of sections 43C to 43H?
  
7. Has the respondent carried out any of the treatment set out below?
  - 7.1. On 8 March 2018, the second and third respondents alleging that the claimant had made a false statement about the Gateline incident on 27 February 2018;
  - 7.2. suspending the claimant;
  - 7.3. the third respondent conducting an investigation which was inadequate and partial in that he failed to interview Aiesha Selway, Mustafa Koroma, and 'Martin the Gateline supervisor' about the incident of 27 February 2018;
  - 7.4. two additional allegations being added on 27 April 2018 at the conclusion of the formal investigation process;
  - 7.5. the decision by the Respondent to take the allegations to a disciplinary hearing;
  - 7.6. the failure to address the Claimant's complaints submitted on 6 September 2018 and 11 November 2018;
  - 7.7. the failure to follow the recommendations given in the Occupational Health reports of Dr Krishnan of 13 July and 18 October 2018;

- 7.8. the failure to liaise with the Claimant's legal representative regarding the Claimant's complaints about the disciplinary process;
- 7.9. the failure to pay 40 days' overtime and the failure to pay 46.55 days' holiday pay.

- 8. If so, does the treatment amount to a detriment?
- 9. If so, was the treatment because of the protected act(s) identified above at 1.1 and 1.2 and/or done on the ground that the claimant made the protected disclosures identified at 4.1-4.3?
- 10. Are any of the claimant's claims out of time?
- 11. If the claimant succeeds what remedy is he entitled to?

### Evidence

- 12. The tribunal heard evidence from the claimant, who submitted a witness statement and a supplemental witness statement and was cross examined on behalf of the respondents. He also submitted statements from Aiesha Selway and Labor Mustafa Koroma, who were prepared to attend the hearing. The respondents' representative confirmed that he did not intend to ask any questions of those witnesses so their statements were taken as read. A statement from Jagdeesh Singh was withdrawn due to the fact that he was acting as the claimant's representative in this hearing.
- 13. The respondents called Adam Field (Assistant Station Manager), Dean Haynes (second respondent and Station Manager, Paddington), Billy White (third respondent and Duty Station Manager), Steven Hawker (Regional Station Manager) and James Adeshiyan (Head of Stations). They submitted witness statements (and supplemental witness statements in some cases) and were cross examined on behalf of the claimant. The respondents submitted a witness statement from Dorothy Colmer (Duty Station Manager) who was unable to attend this hearing, although she had made herself available at an earlier hearing which was adjourned. We did not have a statement from Klaudia Czechowicz although she was a key individual in this case.
- 14. The tribunal also had an agreed bundle running to 885 pages and a supplemental bundle submitted by the claimant running to 376 pages. We also had CCTV footage before us, supplied by Network Rail. We did not have the CCTV from the British Transport Police.

### Facts

- 15. The tribunal found the following facts on the balance of probabilities.

*Background*

16. The first respondent operates a number of stations including Ealing Broadway (Ealing) and Paddington.
17. The claimant started working for the first respondent in May 2006 at Ealing. During the course of his employment, he has received awards and public acknowledgement for his performance and featured on a TV documentary about Paddington Station.

*Events of 2012 and 2013*

18. In 2012 an issue arose within the trade union at Ealing where the claimant and a number of others objected to the appointment of a new Health & Safety representative because they did not believe the correct appointment process had been followed. The local union leader was Pat Hayes, who had supported the appointment of the Health & Safety representative. Matters became heated at a union meeting, following which the claimant raised a grievance by letter to the second respondent (at that time station manager at Ealing) dated 19 March 2012 (First Alleged Disclosure) alleging Pat Hayes had been threatening, intimidating and abusive to him.
19. The second respondent attempted to deal with the matter informally by holding a meeting between the claimant and Pat Hayes. We have seen a transcript of the meeting and find that the second respondent acted appropriately in attempting to resolve a dispute within the union so that it would not escalate and threaten the operation of the station. We disagree with the claimant's characterisation that the second respondent took the part of Pat Hayes and showed animosity towards the claimant.
20. On 17 August 2012, the claimant and a number of his colleagues submitted a collective grievance about the actions of Pat Hayes, including breach of confidentiality, to the second respondent (Third Alleged Disclosure).
21. The dispute at Ealing developed during 2012 and 2013 which culminated in the claimant and three others being dismissed for being intimidating towards Pat Hayes and others.
22. In 2013, the claimant brought proceedings in the employment tribunal under case number 2205166/2013. He also brought separate proceedings under case number 2204462/2013. The claimant alleged unfair dismissal and race and religious discrimination. The second respondent was a named respondent in those proceedings.

*Period 2014 to 2018*

23. In April 2014, the claimant's tribunal claims were settled by way of a settlement agreement which included provision for the claimant to be reinstated to a different workplace, Paddington Station. There was also provision for payment of Sundays

and holidays to be calculated with the claimant having the option of challenging any dispute on this matter if he disagreed with the first respondent's assessment. The claimant has not made any legal challenge but has repeatedly queried why he has not received these amounts. He compares himself to Redouane Assad, who received these amounts, with the authorisation being signed by the second respondent.

24. In 2016, the second respondent was transferred to be station manager at Paddington, where the claimant was working. The claimant has made no complaints about the second respondent relating to the period from the second respondent moving to Paddington in 2016 and the events of February 2018 and there is no evidence before us of any problems with the claimant.

#### *Events of February 2018*

25. On 27 February 2018 a member of the public attempted to cross the Gateline barrier apparently without a ticket. One of the claimant's colleagues, Patrick Larkin was at the barrier when the member of the public moved passed him. The claimant moved across from the other end of the ticket gates to help. Aiesha Selway, Staski Gomes and Koroma were also present. There appears to have been a degree of physical contact between the member of the public and the claimant, mostly the claimant shepherding the member of the public away from the ticket gates. The incident was caught on CCTV. Staski Gomes called for the British Transport Police (BTP) to attend. They arrested the individual, who turned out to be carrying a knife and drugs.

26. The BTP asked Patrick Larkin and the claimant what had happened. Subsequently, Patrick Larkin attended the BTP office and made a formal statement, although this was not before us. There is no suggestion that the claimant made a formal statement to the BTP.

27. Both Patrick Larkin and the claimant were asked by the first respondent to complete an 'Assault Report Form'. Patrick Larkin completed his in his own handwriting, stating that the '*assailant pushed him aside*'. DC completed the form on behalf of the claimant, who was not confident in English, and described Patrick Larkin being '*pushed aside*' and the claimant being '*pushed in the chest*' when he went to assist.

28. After these statements were made, the BTP reviewed the CCTV footage and concluded that the events did not happen as described by the station staff in their statements. The Station Commander, Juliet Owens, called Adam Field to the station police office to complain because her officers believed that station staff (the claimant and Patrick Larkin) had made false allegations of assault occasioning their attendance at the scene and the arrest of the member of the public. She intimated that the police could take action against the members of staff for perverting the course of justice or other charges but made it clear that she was content for the first respondent to deal with the matter. This was not put in writing and it was not

clear precisely what statement(s) were the subject matter of Commander Owens' concern and what evidence she was relying on. On 28 February, Adam Field sent an email to Commander Owen to ask if she or PS Fishlock (who had attended the incident) could provide a statement.

29. On the basis of the conversation with Commander Owens, Adam Field suspended Patrick Larkin and the claimant pending an investigation, having taken advice from HR (Klaudia Czechowicz). The sole basis for Adam Field to take the matter further was the conversation he had with Commander Owens. He had not yet received any written evidence from the BTP.
30. We understand that Aiesha Selway was wearing a bodycam at the time and that the claimant switched it on as the incident developed. We are surprised that neither Adam Field, Klaudia Czechowicz or anyone else thought to preserve this evidence before it was automatically overwritten after seven days. It does not appear to have formed any part of the third respondent's investigation.
31. At this time, the second respondent had family issues which resulted in him being away from the business for much of the time. There is a conflict of evidence between the respondents' witnesses regarding his presence on the day of the incident. Adam Field says that he was not in the business on that day, which is why it was him who went to see Commander Owens, whereas Dorothy Colmer states that she passed him the information she had gathered and the CCTV footage on that day. The second respondent himself was unable to shed any light on this as he could not remember. We find that the most likely explanation is that the two witnesses are not talking about the same time period. We do not believe anything turns on this particular detail.
32. On 1 March 2018, Natalie (a co-worker of the claimant) sent him a whatsapp message saying that she had overheard management talking privately about the matter in the second respondent's office. She advised him to include something in his statement about protecting himself and told him to check if the CCTV had sound. It appears that she is trying to help him, suggesting that he adjusted his story to deal with what she understood the managers had discussed about him. His reply was "*I haven't done anything wrong nat. You know very well how I work and my attitude with customers. Don't worry It's gonna be fine thanks so much for your concern*".
33. The suspension letter was dated 6 March 2018 and referred to the claimant having 'provided a false statement' regarding the incident on 27 February 2018. Although the suspension letter does not refer to gross misconduct, Adam Field's evidence before the tribunal was that he had been advised by Klaudia Czechowicz that it was potentially gross misconduct.
34. On 7 March 2018, Adam Field repeated his request to Commander Owens for a statement and she replied attaching a statement from PCSO Dalling, unsigned and

undated. This is the only evidence before us of what was said to the BTP, other than copies of a police notebook where the claimant and Patrick Larkin both sign to confirm that they do not want to take any action against the member of the public.

35. PCSO Dalling's statement gives a summary of the events. According to the statement, Patrick Larkin said he had been pushed. It is not clear what the claimant said. It is reported by PCSO Dalling (who we assume compiled his statement at a later date) that '*Moses [the claimant] also said he was pushed*'. From the context of the statement, '*he*' could mean Patrick Larkin or the claimant. In any event, they both made it clear that they did not want to take the matter further and were making no complaint of assault.
36. We find that most of the statement relates to the interaction with Patrick Larkin, who was the one who asked to have the member of the public arrested when he found out he had a knife. There is no mention of the claimant in this respect. The claimant was clear all along that he did not want to take any action against the member of the public. There is a passing reference to the claimant ('*Moses also said he was pushed*') but it is clear that the conversation was mostly with Patrick Larkin and it was Patrick Larkin who made a formal statement to the police which he later retracted.
37. Parts of PCSO Dalling's statement are inconsistent with what Commander Owens apparently told Adam Field. For example, she said that the member of the public was carrying a knife but for legitimate purposes and they had released him. PCSO Dalling says that the member of the public was searched and this resulted in further offences for which he was arrested and conveyed to custody. The claimant's understanding according to his evidence was that the member of the public was carrying a knife and drugs. This was not challenged and it was repeated by Patrick Larkin in his investigation interview.
38. PCSO Dalling's evidence includes hearsay evidence of the 'DSM', which we understand to refer to Tom Law, Deputy Station Manager on the day. We did not have a statement from Tom Law before us and no statement was taken from him as part of the investigation.
39. Adam Field was relatively new to the site and wanted to keep his manager, (the second respondent) updated. Klaudia Czechowicz advised the second respondent and Adam Field to appoint someone to conduct the investigation, suggesting two names, the third respondent and 'Charlie'. The second respondent then sent an email to the third respondent asking him "*Fancy doing the investigation for the gateline???*". We find that the second respondent was proactive in this aspect of the process, effectively appointing the third respondent to carry out the investigation. We find this a surprising choice, given that this was the first investigation that the third respondent had conducted. Given the history of this particular employee and the potential seriousness of the allegation, it would have been advisable to ask someone with more experience to carry out the investigation.

It would also have been advisable for the second respondent to distance himself formally from the process. We also find that the third respondent was aware of what had happened and clearly knew what was being referred to as the 'investigation for the gateline'.

40. The third respondent took advice from Klaudia Czechowicz during the process. When he received the report from PCSO Dalling, he saw that the BTP alleged that the claimant had assaulted/physically restrained a member of the public. He asked Klaudia Czechowicz if he could add this allegation to the existing allegation, which had formed the reason for the suspension. He states in his email to Klaudia Czechowicz that it is 'quite clear' that the claimant has committed this misconduct. He asks if he can include this in his 'findings'. Klaudia Czechowicz did not challenge his approach, which suggested to us that the third respondent had pre-judged the outcome, although she suggested that he asked questions as they went through the CCTV. He was an inexperienced investigator and she failed to give him proper guidance on this point.
41. We have seen the CCTV referred to by the third respondent and we cannot agree with his conclusion. The relevant footage lasts about ten seconds. We can see that the claimant shepherded the member of the public away from the scene, at which point they go out of the scope of the camera, and there does not seem to be any physical restraint or assault. Even if there is some scope for doubt, we cannot see how the third respondent could determine that 'it was quite clear', as, to us, it is anything but clear even after watching the footage a number of times.
42. The third respondent conducted an investigation interview with the claimant on 21 March 2018. The first thing the claimant says to the second claimant is '*I'm here to discuss the allegation from Dean Haynes*'. He stated that the Assault Form completed by DC did not reflect what he had said. He also challenged the truth of PCSO Dalling's statement.
43. On 22 March 2018, Patrick Larkin retracted his statement as a result of which his suspension was lifted shortly thereafter and he returned to work. He expressed regret that his actions had led to all that happened since. At no stage did he blame the claimant.
44. The third respondent spoke to Patrick Larkin, the claimant and Staski Gomes as part of his investigation. He made contact with Aiesha Selway and Koroma but did not end up having a statement from either of them. He asked Dorothy Colmer to give a statement. He did not interview either Adam Field or Tom Law or ask them to provide a statement as part of his investigation.
45. His conclusion following the investigation was that the claimant should face three disciplinary allegations and these were put to him in a letter dated 27 April 2018:



- 45.1. on 27 February 2018 he breached GWR Violence at work policy by laying his hands on a customer unnecessarily;
  - 45.2. on 27 February 2018 he unnecessarily put himself at risk despite there being no evidence of a customer posing any threat;
  - 45.3. following the incident, he provided a false statement to GWR stating that the customer had pushed his colleague when there is no evidence to support this including CCTV.
46. We note that none of these allegations matched the allegation which was the cause of the claimant's suspension but there is no finding within the Investigation report to explain why that initial allegation had been dropped. The letter did not include any suggestion that the allegations amounted to gross misconduct. We also note that the allegations do not include any reference to the claimant alleging that he had been pushed and there is no reference to 'assault'.
47. At the time that the investigation was being concluded, Klaudia Czechowicz asked David Pinder (Station Manager) if he would conduct the disciplinary hearing. She told him that she did not perceive this to be a gross misconduct matter, which meant that a Station Manager could conduct the hearing.
48. Although the original reason for suspension was no longer regarded as a matter for disciplinary action and the new allegations did not, according to HR, amount to gross misconduct, the claimant remained on suspension. The disciplinary rules state
- 'In gross misconduct cases, suspension from duty pending investigation will be justified. The colleague concerned will be informed, in writing, at the earliest possible time, of the nature of the allegations they are facing.'*
- The claimant was under the impression, therefore, that he was facing the prospect of summary dismissal and nobody told him otherwise. This led to the stress and anxiety which was the reason for his long-term absence. This was not an unreasonable conclusion for the claimant to draw since Steven Hawker also assumed that the allegations must be gross misconduct due to the continuing suspension of the claimant.
49. The claimant's suspension continued pending a disciplinary hearing. The claimant had, by this time, presented with stress and anxiety arising from these matters and was signed off by his doctor. The claimant was unable to attend on the original dates set for the disciplinary hearing due to his ongoing ill-health.
50. He attended an occupational health assessment on 12 July 2018, following up an earlier appointment, with Dr P Krishnan, Occupational Health Physician. Dr Krishnan noted the claimant's medical treatment and medications. He also noted that the claimant had expressed concerns about his current line manager (which we take to be the second respondent) in connection with the current suspension

and the context of historical problems going back to Ealing. Dr Krishnan advised that the claimant's workplace concerns should be addressed '*in due course prior to any return to work*' and that he should have a representative to help him with communications.

51. On 6 September 2018, the claimant's lawyers wrote to Mark Hopwood, Managing Director, enclosing a formal complaint on behalf of the claimant. This was passed to Klaudia Czechowicz. Klaudia Czechowicz sent an email on 12 September to her HR colleagues to give them some background. We make the following observations regarding that email:

51.1. Klaudia Czechowicz referred to the letter from the claimant's lawyer as being from '*potentially his friend who writes to us twice a year regarding various concerns Moses has*'. We find that this trivialises the claimant's concerns and exhibits the fact that she found this correspondence unwelcome.

51.2. It is factually inaccurate in that it states that Patrick Larkin was unable to write up the Assault Report Form and asked another member of staff to write it up on his behalf. We have seen the Form and it is clearly in Patrick Larkin's own handwriting. In contrast, the claimant did have another member of staff to write up his form.

51.3. Klaudia Czechowicz mentions that '*management team called me*' explaining that '*Patrick can be easily led and that Moses is a confident individual who might have a strong influence on individuals such as Patrick*'. We heard from three members of the management team, all of whom denied saying this to Klaudia Czechowicz. Either the witnesses are lying, Klaudia Czechowicz is lying in her email or the issue was discussed among the other managers, some of whom fed back to Klaudia Czechowicz, in a way that was seriously prejudicial to the claimant. We find that the latter is the most likely and this shows a received wisdom and collective memory relating to the claimant as being an agitator and a malign influence which we find dates back to the events of 2012 and 2013.

51.4. She states that '*Moses has been adamant from the beginning that customer pushed Patrick and was aggressive towards him*'. We have not been taken to any evidence which supports the suggestion that the claimant continued to make this claim. It formed part of the wording on the form completed by DC, which the claimant stated was incorrect when shown it in his investigatory interview.

51.5. She goes on to say '*Moses never changed his statement even upon seeing CCTV*' but it is not clear to us which statement she is referring to. To the extent that she means the Assault Report, it is clear from the investigation interview notes that the claimant stated that the contents of the report were not correct.

- 51.6. The email also states '*Patrick retracted that report...he did not remember being pushed – rather told by Moses that he had been pushed*' but there is no evidence before us that this is what Patrick Larkin said at any time. On the contrary, in the investigation interview, Patrick Larkin states that he told his supervisor that he thought he and the claimant had been pushed.
52. The first respondent replied to the lawyer's letter dated 6 September 2018 by way of cursory acknowledgement but did not engage with the substance of the complaint.
53. On 18 October 2018, the claimant attended the first respondent's Occupational Health centre in Reading for an assessment. On 23 October 2018, Dr P Krishnan, Occupational Health Physician, wrote to Klaudia Czechowicz stating that the claimant presented with mental health problems which he indicated arose from workplace issues. He confirmed that the claimant would be unlikely to be fit enough to attend a meeting for the rest of that year (2018) and that he was not well enough to engage in any direct communication with management and that he would require a representative to act on his behalf.
54. The claimant's lawyers wrote a further email to Mark Hopwood on 11 December 2018, repeating and amplifying the claimant's concerns.
55. The following day, 12 December 2018, the claimant submitted his claim to the Employment Tribunal.
56. The disciplinary hearing eventually took place on 3 April 2019 and was conducted by Steven Hawker. Although this post-dates the claim, we consider that the outcome of this meeting sheds light on the events which form the narrative of the claimant's complaint. We note that his meeting dealt with both grievance and disciplinary matters. The claimant was given an opportunity to air his grievances. The meeting then moved on to deal with the disciplinary allegations. Steven Hawker dismissed the allegation regarding the false statement and found that the allegation regarding Violence at work was not upheld as, having reviewed the CCTV, he did not believe the claimant's actions were excessive. However, he found that the claimant had put himself at risk by being overzealous, for which he imposed a First Written Warning.

### The Law

57. The relevant legal principles are as follows:
58. The Employment Rights Act 1996 ("ERA 1996") contains the following relevant provisions, the applicable provisions being those in force before the 2013 amendments so there is no requirement for the disclosure to be in the public interest:

*Section 43A: Meaning of 'protected disclosure'*

In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.]

*Section 43B: Disclosures qualifying for protection*

In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure 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.

*Section 47B: Protected disclosures (detriment)*

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

*Victimisation*

59. Section 27 Equality Act provides:

- (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...;
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Determination of the Issues

*Protected act for victimisation claim*

60. We find that the claimant carried out a protected act pursuant to section 27 of the Equality Act 2010. The claimant relies on two claims: 2205166/2013 and 2204462/2013. The respondent concedes that the first claim is a protected act but disputes that the second claim is a protected act. Having heard all the evidence, we find no distinction between the two proceedings as far as this claim is concerned and therefore we find that we do not need to determine whether the second claim also amounts to a protected act and, in any event, we do not have sufficient information to be able to determine that. There is no situation in which the claimant would succeed based on the second claim and not the first so we find we do not need to resolve the question.

*Protected disclosure for whistleblowing claim*

61. We find that the claimant made one or more disclosures pursuant to section 47B of the Employment Rights Act 1996, namely

- 61.1. a disclosure on 19 March 2012 consisting of a written grievance about Pat Haye's threatening and intimidating behaviour; and
- 61.2. a disclosure on 17 August 2021 consisting of a collecting grievance complaint addressed to the second respondent about the actions of Pat Hayes.

62. We find that these disclosure were protected disclosures. If we are wrong about this, our decision would be the same if the complaint related only to the protected acts (victimisation) as we consider that the background of the claimant's historic grievances and claims as a whole, including protected disclosures and protected acts, influenced the later events.

*Detriments*

63. We find that the first respondent has subjected the claimant to the following treatment:

- 63.1. on 8 March 2018, it was alleged that the claimant had made a false statement about the Gateline incident on 27 February 2018;
- 63.2. the claimant was suspended and the suspension was continued;
- 63.3. the third respondent conducted an investigation which was inadequate and partial in that he failed to interview Aiesha Selway, Mustafa Koroma, and 'Martin the Gateline supervisor' about the incident of 27 February 2018;

63.4. two additional allegations were added on 27 April 2018 at the conclusion of the formal investigation process;

63.5. the allegations were taken to a disciplinary hearing;

63.6. the first respondent failed to address the claimant's complaints submitted on 6 September 2018 and 11 November 2018 by his legal representative;

63.7. the respondents partially failed to follow the recommendations given in the Occupational Health reports of Dr Krishnan of 13 July and 18 October 2018;

63.8. the first respondent partially failed to liaise with the claimant's legal representative regarding the Claimant's complaints about the disciplinary process;

63.9. the first respondent failed to pay 40 days' overtime and 46.55 days' holiday pay.

64. We find that the treatment amounts to a detriment in each case.

65. We must now consider whether the treatment was done because of the protected act(s) and/or done on the ground that the claimant made the protected disclosures.

*Holiday pay and arrears of pay claim*

66. We find that the comparator Redouane Assad, relied on by the claimant as somebody who did receive these additional payments, had also made the protected disclosures and protected acts, so the difference in treatment cannot be attributed to those matters. The claimant's claim fails in relation to this treatment.

*Claim against third respondent*

67. We find that there are shortcomings in the third respondent's investigation process, many of which stem from his apparent pre-judgment that the claimant had committed the misconduct. We find that, for example, he did not take into account the content of his interview with Patrick Larkin as far as it related to the claimant.

68. We consider that the third respondent had not properly understood exactly what happened, what the claimant was accused of or what allegations flowed from those events. There is confusion about what 'statement' is relied on and the outcome of the investigation does not address the questions he was tasked with investigating. He did not seem to grasp the necessity for clarity when dealing with disciplinary allegations and the evidence relied on.

69. However, we find that, although there are significant flaws in the way that the third respondent dealt with the claimant, we find no reason to conclude that these are

directly due to the protected acts/protected disclosures, which pre-date the third respondent by some time. The third respondent was overzealous in pursuing allegations against the respondent, which was facilitated by Klaudia Czechowicz, but we accept that he had no direct knowledge of the claimant's history. We therefore do not uphold the complaint against the third respondent.

*Claim against second respondent*

70. We find that the second respondent would clearly have been aware of the events of 2012 and 2013 and, although we did not see anything in the documents from that time which suggests a vendetta against the claimant, we must take note that the second respondent was a named respondent in the 2013 tribunal proceedings. Whatever the outcome of those proceedings, being named as a respondent was unlikely to endear the claimant to the second respondent.

71. However, we find that the claimant had a fixation with the second respondent which does not appear to have been reciprocated by the second respondent to the same degree. The claimant saw the hand of the second respondent in every decision made on behalf of the first respondent, which we do not find to be the case. While we consider that it would have been prudent for the second respondent not to get himself at all involved in any disciplinary process with the claimant, and this should have been acted on by HR, we do not find that he had the control or influence over the process as alleged by the claimant. As it is, we find that his involvement was limited to asking the third respondent to carry out the investigation and then being copied in on various emails. We have no evidence that he responded or was proactive in the conduct of the disciplinary process. He appears to have been aware of all the steps being taken but was entirely passive. We disagree with the claimant that he was orchestrating it all. We therefore do not uphold the complaint against the second respondent.

*Claim against the first respondent*

72. In relation to the first respondent, we find that there is a 'collective memory' within the first respondent, which is prejudicial to the claimant and which has permeated the approach of HR (in particular Klaudia Czechowicz) and, in turn, those advised by HR, including the third respondent. This is illustrated by Klaudia Czechowicz's email of 12 September 2018. Taken as a whole we find this email demonises the claimant and is wholly sympathetic towards Patrick Larkin. The email shows us that there is a general negative view of the claimant within the management 'lore', which we find is connected with the history of the claimant's employment with the respondent, including the involvement of the claimant's legal representative. By sending that email to the Head of HR Business Partnering, she perpetuated the prejudicial view of the claimant within the organisation.

73. We find that this negative view had its origins in the events of 2012 and 2013. We reach this finding because there is evidence of a series of contentious events at that time, resulting in the dismissal and subsequent reinstatement of the claimant

in a different station. We have not been shown any evidence of more recent problems with the claimant which would explain the negative assumptions about him and we therefore conclude that this view of the claimant dates back to the earlier period, when he was clearly a thorn in the side of the first and second respondents.

74. The detrimental treatment of the claimant is manifested in the following ways.

74.1. The stark difference between the treatment of the claimant and Patrick Larkin, particularly in relation to the way the suspension was dealt with. From our findings, it was Patrick Larkin who had done more than the claimant to trigger the original investigation, yet he was taken off suspension quickly. His Assault Report Form was not held against him on the grounds that he was dyslexic and had problems filling it in, even though it was clearly in his handwriting and it is not apparent to us what impact the dyslexia had. In contrast, the first respondent continued to rely on the claimant's Assault Report Form to support a disciplinary case against him, even though it was not completed by him, he said from the first time he was told what was in it that it was not accurate, and English is not his first language. No allowance at all appears to have been made for any communication issues arising from the language barrier or any possible misunderstanding on the part of Dorothy Colmer, who may have had in her mind what Patrick Larkin had said to her.

74.2. A distinction was drawn between Patrick Larkin and the claimant on the basis that Patrick Larkin withdrew his statement and showed remorse for having made it. Patrick Larkin made a formal statement to the police, which the claimant did not, so he had a statement which he was able to withdraw. On the claimant's understanding, he had not made a statement and was unable to withdraw something that did not exist. To the extent that the respondents rely on his Assault Report Form, he said that it was not accurate and did not reflect what was said.

74.3. The Whatsapp exchanges with Natalie show us that the claimant's situation was being discussed among management, also evidenced by Klaudia Czechowicz's comment in her email about receiving information from the 'management team' about the claimant influencing Patrick Larkin. The implication from Natalie's words of warning is that the conversation did not appear to be favourable for the claimant. (This exchange also shows us that the claimant was straight-dealing and was confident in his narrative regarding the incident.)

74.4. The suspension of the claimant, including the continuation of the suspension when there was no allegation of gross misconduct against him, which appears to be contrary to the provisions of the first respondent's disciplinary policy.



74.5. The investigation was handed to the third respondent to deal with. He was inexperienced and relied heavily on Klaudia Czechowicz, whose judgment and approach was clearly influenced by the negative view she had of the claimant.

74.6. The inept handling of the allegations against the claimant also, in our view, stem from the prejudiced view of the claimant among managers and HR. For example, the original allegation which led to the suspension was subsequently dropped but there was no suggesting of ending the suspension. Two additional allegations were added on 27 April 2018. at the conclusion of the formal investigation process. It is not clear whether these were potentially grounds for suspension and, in any event, they should have been dealt with as separate matters. The first respondent ended up citing three allegations for the disciplinary hearing, none of them being the original allegation for which the claimant was suspended.

74.7. The lack of justification for the claimant's ongoing suspension was confirmed by Steven Hawker's response to the disciplinary allegations, two of which he did not pursue and the third of which resulted in a First Written Warning. We find that Steven Hawker came to the matter afresh with no knowledge of any background history with the claimant and saw clearly that the disciplinary allegations should not have been pursued in the way that they had been.

74.8. The first respondent did not deal with the letters sent on behalf of the claimant by his legal representative on 6 September 2018 and 11 November 2018. It is worth recording that the claimant's legal representative at this time (and at the hearing) was the same representative who represented him in 2012 and 2013. The first respondent, led by Klaudia Czechowicz, did not engage with the claimant or his representative in any meaningful way. The respondents relied on the provision in the Grievance Procedure which states

*'If you have a complaint about your dismissal or the taking of other relevant disciplinary action (other than warnings) by the Company under the Disciplinary Procedure, you should raise your complaint by way of appeal under the Disciplinary Procedure, rather than the Grievance Procedure.'*

The first respondent failed to realise that the claimant's complaint was not about dismissal or other relevant disciplinary action under the Disciplinary Procedure and therefore this clause did not apply. It was only when Steven Hawker met with the claimant that he was able to air his grievances.

75. The first respondent failed in part to follow the recommendations given in the Occupational Health reports of Dr Krishnan of 13 July and 18 October 2018. To the extent that the first respondent failed to engage with the claimant's legal representative, this is a failure to follow the Occupational Health physician's

recommendation. For example, on 27 September 2018, Klaudia Czechowicz wrote to the claimant's legal representative, telling him that they were engaging with the claimant direct and would be in touch with him to arrange the disciplinary meeting. However, we do not agree with the claimant that there was a recommendation for the grievance to be resolved before the disciplinary hearing. The recommendation was for the workplace issues to be addressed before the claimant returned to work.

76. For the same reasons as we set out in relation to the failure to follow Occupational Health advice, we find that the first respondent partly failed to liaise with the Claimant's legal representative regarding the Claimant's complaints about the disciplinary process. There was acknowledgement of correspondence but no proper engagement with the issues being raised.

77. In conclusion, we find that the first respondent did subject the claimant to detriments on the grounds of the protected disclosures and protected acts. We do not suggest that there was a conspiracy among the protagonists but we find that the myriad examples of unfairness and less favourable treatment cannot simply be explained by a string of unfortunate errors. In our view, they show the existence of an underlying negative attitude towards the claimant shared and understood by management, including in particular Klaudia Czechowicz.

78. The claimant's complaints of whistleblowing detriment and victimisation succeed against the first respondent but fail against the second and third respondents.

79. A hearing will be listed to deal with remedy.

Employment Judge Davidson  
Date 14 February 2022

JUDGMENT SENT TO THE PARTIES ON

14 Feb. 22

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FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.