EMPLOYMENT TRIBUNALS

Claimant: Mr Anatoli Smirnov

Respondents: Network Rail Limited (1)
Mr Geoffrey Montagne (2)
Mr Thomas Beck-Nielson (3)

OPEN PRELIMINARY HEARING

Heard at: London South - Croydon (by video) **On:** 24 & 25 February 2022

Before: Employment Judge C H O'Rourke

Representation

Claimant:	In person
First Respondent:	Mr S Liberadzki – counsel
Second and Third Respondents	Ms K Moss - counsel

JUDGMENT

The Claimant's claims of protected disclosure detriment and direct race discrimination, against all three Respondents and his claims of harassment and victimisation on grounds of race against the Second and Third Respondents are dismissed, for the reasons set out below.

REASONS

Background and Issues

1. There have been two previous preliminary hearings in this matter, on 25 November 2020 and 16 September 2021 [102-122]. The latter of those ('EJ Dyal's case management summary') set out the issues to be determined in today's Hearing. Those documents also set out much of the background to this matter, but, by way of summary, the following details are provided (largely based on the previous case summary).

2. The Claimant is a British citizen, currently living in France. On 15 November 2015, in Denmark, the Claimant entered into an employment

contract, a contract of service, with a Danish company, Ramboll Danmark a/s ('the Danish company').

3. The Claimant sought to return to London (where he has a flat) and to be employed instead by Ramboll UK Ltd, ('the UK company'). The Claimant's case was that the Danish company told him that he would be an employee of the UK company once he developed a pipeline of projects to justify the move. The Danish company would employ him in London, initially on a three-month contract, on the basis that he worked on a project in Belgrade, which he did. He would then be moved to a permanent contract with the UK company. All three Respondents' cases (to the extent of their involvement in this matter) was that the Claimant was assigned to London as an employee of the Danish company and no assurances were given as to future employment by the UK company.

4. The Claimant moved to London in August/September 2018. Once in the UK his case was that, as expected, he worked a good deal on a project in Serbia whilst waiting for a UK opportunity [170]. He also still spent some time in Denmark [154-156] and lived two to three days a week in France, with his family (C's WS 27-28).

5. On 20 November 2018 he signed an International Assignment Contract with the Danish company [134-136]. The Contract assigned him to be based at the UK company, reporting to a Mr Matson. The contract stated that the assignment period was from 1 October 2018 to 31 December 2018. His salary was to be unchanged and to be paid in Danish Krone by the Danish company, into his Danish account. Clause 5 provided that, "*The assignee will continue coverage by social (*security?*) in the home country*" (sic). Clause 6 provided that "*pension contributions will continue in accordance with home company procedures*". Clause 7 provided that the Claimant was entitled to support with his tax return in the UK. The contract provided that estimated UK taxes would be withheld at payroll and settled after the filing of the UK tax return (although this did not happen in practice). Annual leave would be in accordance with the Danish company's standard terms.

6. Whilst working in the UK the Danish company paid taxes on the Claimant's salary into his Danish bank account. However, it later concluded that this was in error because he had earned the money in the UK. It then made PAYE payments to the UK tax authorities, it appears via the UK company and tried (and at the date of the previous hearing continued to try) to get the money back from the Danish tax authorities.

7. The International Assignment Contract expired on the due date. The Claimant continued to work in the UK. On 14 March 2019, the Danish company emailed the Claimant enclosing a signed extension to this International Assignment Contract until 31 March 2019.

8. The Claimant returned to Denmark on a temporary basis in May 2019. The Danish company dismissed the Claimant, in Denmark, on 28 May 2019, with effect on 30 September 2019, on conduct grounds. The Claimant then moved, at some point in that summer, to France, to be with his family.

9. Previous Claims. The Claimant initially brought two now-consolidated claims against the UK company, the Danish company and also Ramboll Group a/s, the Danish group company. Those claims came before Employment Judge Nash at a preliminary hearing on 25 November 2020. She held that the Claimant had been, at all relevant times, employed by the Danish company and not by the UK company, at any point. That judgment is now the subject of appeal by the Claimant to the Employment Appeal Tribunal and those claims have been stayed.

10. This Claim. The Claimant had already also brought this claim, on 21 July 2020, against the above-stated Respondents. I set out briefly the involvement of each Respondent, as follows:

    a. First Respondent (R1) (Network Rail Limited). The Claimant asserts that by virtue of s.43K(1)(a) of the Employment Rights Act 1996 (ERA), he meets the contract worker provisions/extended definition of worker in relation to R1, as he was effectively working for that company during his time in UK. On 1 April 2020 he made a complaint to R1's on-line 'whistleblower portal' that the Danish company had underpaid his UK PAYE taxes and had retaliated against him for making his Tribunal claim against them. R1 effectively 'logged' his complaint, but took no action in respect of it [296]. As a consequence, the Claimant alleges protected disclosure detriment and direct race discrimination against R1.

    b. Second Respondent (R2) (Mr Montagne). The Claimant asserts that by virtue of s.47B(1A) ERA and s.110(1) Equality Act 2010 (EqA), Mr Montagne, a then employee of Ramboll Group a/s, was an agent of the Danish company, acting with their authority. On 9 March 2020, the Claimant made the same complaint as he had to R1, to the UK and Danish companies' on-line whistleblower portals. R2 wrote to the Claimant on 24 March 2020, indicating that Ramboll Group a/s Compliance would not investigate his complaints [259], '*as your claims are the subject of ongoing employment tribunal proceedings and a criminal complaint has been made the police authorities, Ramboll has assessed that these channels are now the more appropriate forum.'* The reference to the 'criminal complaint' was a report that the Danish company had made to the Danish police that the Claimant had allegedly stolen from them, through misuse of his company credit card. As a consequence, the Claimant alleges protected disclosure detriment, direct race discrimination and harassment and victimisation on grounds of race against R2.

    c. Third Respondent (R3) (Mr Beck-Nielsen). On the basis of the same legislation, a claim is brought against Mr Beck-Nielson, as an employee of the Danish company, acting with their authority. The Claimant relies on his earlier claim against the Danish company, presented on 29 December 2019, alleging various breaches of equality, protected disclosure and other allegations, as constituting a protected disclosure/act. He asserts that in consequence of that

disclosure, the Danish company, in the person of R3, on 18 December 2019 and 16 January 2020, in correspondence of those dates, falsely accused him of theft [241 & 250]. As a consequence therefore of that action, the Claimant alleges the same detriment and discriminatory behaviour as alleged against R2.

11. The Issues for this Tribunal. EJ Dyal set those out as follows:

    a. To decide whether Network Rail Infrastructure Limited should added as a Respondent and if so whether this is in substitution for, or in addition to R1;

    b. Whether the Claimant was a worker of R1 within the meaning of s.47K(1)(a) ERA?

    c. Whether the Claimant was a contract worker of R1, within the meaning of s.41 EqA?

    d. Whether there is a need for any particular type of connection between the Claimant's former ·employment with R1 and the public interest disclosures / detriments and if so whether there is any reasonable prospect of the Claimant proving that there was such a connection?

    d. Whether there is any reasonable prospect of the Claimant proving that the allegations of unlawful discrimination under the EqA arise out of or are closely connected to his former 'employment' with R1?

    e. If this is a matter that can be fairly dealt with (without needing to hearing all the evidence at trial), whether the complaints against R1 and/or are out of time and if so whether time should be extended?

    f. Whether the claims have any/little reasonable prospect of success on their merits?

    g. Whether the claims against R2 / R3 are vexatious, because pursued in bad faith?

    h. Whether the tribunal has territorial jurisdiction pursuant to rule 8 of the ET Rules 2013 to hear the complaints against R2 / R3?

    i. Case management generally, including any issue of consolidation.

The Law

12. All three representatives referred me to extensive legal authorities on the multiplicity of issues before me. Those references were contained in their comprehensive skeleton arguments, with copies of the relevant authorities provided in separate bundles. Reference, therefore, should be made to those written submissions for the full details of the authorities relied upon, but I will refer below to those I consider most relevant.

13. The relevant statutory authorities state the following (although this is not exhaustive, as there are other statutory references, to which I shall refer further in my reasons, as I consider appropriate):

    a. *s43K Employment Rights Act 1996 - Extension of meaning of "worker" etc. for Part IVA.*

       (1) For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

       (a) works or worked for a person in circumstances in which—

       (i) he is or was introduced or supplied to do that work by a third person, and

       (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.

    b. *47B ERA - Protected disclosures.*

       (1)A worker …..

       (1A)A worker ("W") 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 W's employer in the course of that other worker's employment, or

       (b)by an agent of W's employer with the employer's authority,

       on the ground that W has made a protected disclosure.

    c. *s.41 Equality Act 2010 - Contract workers*

       (1) A principal must not discriminate against a contract worker—

       (a) as to the terms on which the principal allows the worker to do the work;

       (b)by not allowing the worker to do, or to continue to do, the work;

       (c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

       (d)by subjecting the worker to any other detriment.

       (2)A principal must not, in relation to contract work, harass a contract worker.

(3)A principal must not victimise a contract worker—

(a)as to the terms on which the principal allows the worker to do the work;

(b)by not allowing the worker to do, or to continue to do, the work;

(c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d)by subjecting the worker to any other detriment.

(4)A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5)A "principal" is a person who makes work available for an individual who is—

(a)employed by another person, and

(b)supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6)"Contract work" is work such as is mentioned in subsection (5).

(7)A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

d. *s.108 Equality Act - Relationships that have ended*

(1)A person (A) must not discriminate against another (B) if—

(a)the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b)conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

e. *s.110 Equality Act - Liability of employees and agents*

(1)A person (A) contravenes this section if—

(a)A is an employee or agent,

(b)A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c)the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

f. A summary of the Recast Brussels Regulations is as follows:

Article 4 – the underlying principle is that persons domiciled in a Member State should be sued in the courts of that Member State, regardless of their nationality.

Article 5 – this rule may be displaced by special rules relating to specific types of contract (as set out in Articles 20-23).

The effect of Articles 20–23 is that where an employer is domiciled in the UK or a Member State of the EU, the employee may sue it:

in the courts of the state where the employer is domiciled — Article 21(1)(a)

in the courts of the place where (or from where) the employee habitually works or last habitually worked — Article 21(1)(b)(i)

if the employee does not or did not habitually carry out his or her work in any one country, in the courts of the place where the business which engaged the employee is or was situated — Article 21(1)(b)(ii), or

if the dispute arises out of the operation of a branch, agency or other establishment of the employer, in the place where that branch, agency or other establishment is located — Article 20(1). An employer who is not domiciled in the UK or a Member State but has a branch, agency or other establishment in the UK or one of the Member States is deemed to be domiciled in that state in disputes arising out of the operations of that branch, agency or establishment — Article 20(2).

g. *Employment Tribunal Rules of Procedure 2013 – Rule 8 - Presenting the claim*

8.—(1) A claim …...

(2) A claim may be presented in England and Wales if—

(a)the respondent, or one of the respondents, resides or carries on business in England and Wales;

(b)one or more of the acts or omissions complained of took place in England and Wales;

(c)the claim relates to a contract under which the work is or has been performed partly in England and Wales; or

(d)the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales.

The Facts

14. I heard evidence from the Claimant and from R2 and R3. A Mr James Houghton, at the time a lead investigator of whistleblowing reports for R1, gave evidence on behalf of that Company.

15. I turn now to each issue before me, in the order of my choosing, reciting the evidence before me, making findings of fact, as necessary and reaching conclusions based on the law.

16. 'Claimant a 'worker' of R1'. I summarise the Claimant's evidence on this point as follows:

    a. When in UK he worked predominantly with R1's staff.

    b. The Danish company is a direct contractor to R1's 'Digital Railway Project' ('the Project'). He was contacted by a Ms Ann Gordon, under her title as 'Director Digital Railway', with that logo on her correspondence and on behalf of R1 and with the approval of the Danish company, invited to work for Digital Railway. He denied that the agreement to second him to support the Project was given by the UK company (based on the email addresses [146]), stating that email addresses are not relevant in these circumstances, as they can be allocated to contractors, as well as employees. He also denied that his time requirements on the Project (that he spend 70% of his time in London) were being dictated by another company, Arcadis Group Ltd (also involved in the Project) [148], stating that this could have been Arcadis speaking on behalf of R1.

    c. He worked on this project with a person from the UK company and a couple of managers from Arcadis. He agreed that this was approximately for the period late January to the end of March 2019.

    d. Ms Gordon provided a document called an OBC Benefits Change paper, on Digital Railway letterhead and which was prepared by a person the Claimant stated to be a director of R1, containing terms relevant to his working on the Project, to include his presence in London, so he could be in direct contact with R1's staff, being available four days a week until June 2019 and a day rate for his services of £800 [Claimant's supplementary bundle 8]. He agreed, however, in cross-examination that the Mr Done referred to was not an employee of R1 (despite his email address), but a contractor and that this document was addressed to Arcadis. He also agreed that the term 'budget' was used to describe the £800, not 'salary'. He submitted time sheets for his work to the UK company, for referral to Arcadis.

    e. The Claimant was 'onboarded' by R1, with access to confidential documentation, but agreed that this did not include briefing on employment procedure-related matters, but rather confidentiality and non-disclosure. He worked with a range of other staff, from R1,

the Danish company, Arcadis and PWC, on the Project and also attended workshops with such participants. He did not have a pass to enter R1's offices in Euston, but once met and escorted in, he was free to move about freely. Nor did he have an R1 email address, but said that not many had such facilities.

f. He did no work with the UK company, although he did agree that he worked for a time from their office.

g. In the end, he presented his findings and recommendations to R1, which were negative for the Project. Following his final report, he left on holidays (at the end of March 2020) and did not return to the Project thereafter.

h. He was challenged that despite extensive searches by R1, as evidenced by Mr Houghton (WS 8), no documentation had been found that showed any direct contractual link between R1 and the Danish company and he denied that his assertions to the contrary were 'mere speculation', stating that he had a 'strong suspicion' that was the case. He asserted that Mr Houghton's searches were inadequate. When asked what evidence he had to the contrary, he said that he had internet articles that referred to the Danish company's involvement with the Project and his time sheets showing his work for the Project.

i. He believed that in effect there was a joint project by R1 and the Danish Company and perhaps others. He accepted that there were no contractual documents to that effect in the bundle, but asserted that that was because of inadequate disclosure by R1. He accepted the possibility that he remained an employee of the Danish company and provided his services, via Arcadis, who were sub-contractors of R1, but did not consider such a scenario '*fatal'* to his claim. While he did not dispute that R1 did not determine his terms and conditions of work, he considered that they nonetheless had an '*influence'*

j. He denied that his salary had been paid throughout by the Danish company, referring to a pay slip from the UK company [306] and that he paid taxes in UK.

k. He asserted that it was Arcadis who extended the scope of his time spent on the Project and did not accept that an email from the Danish company on 7 February 2019, proposing an extension of his 'outplacement' by a month, provided he worked on the Project, contradicted this assertion [154].

17. Submissions and Findings. I heard extensive submissions from all three representatives, on this issue and all the issues before me. Taking these into account, I find that the Claimant cannot rely on 'worker' status with R1 and that therefore the Tribunal does not have jurisdiction to hear his claims against R1, for the following reasons:

a. S.41(5) EqA – Discrimination claim. The requirement in this case is that he was a 'contract worker' and that R1 was the principal. This requires R1 to have made work available for him, while being employed by the Danish company and supplied by them, to R1, '*in furtherance of a contract to which the principal* (R1) *is a party (whether or not* (the Danish company) *is a party to it)'*. Matters of relevance to this statutory requirement are as follows:

    i. In **Jones v Friends' Provident Life Office [2004] IRLR 783**, the Northern Ireland Court of Appeal held that for a contract worker to be 'supplied' to a principal, required the principal to be in a position to control or influence the worker's conditions of employment and therefore to discriminate against them. Also, the work must be done in pursuance of the contract to which the principal is a party.

    ii. While the Claimant did perform work on the Project, which was for the benefit of R1, there is a lack of evidence to show that he was supplied to them, that they made work available to him, or that they could control his terms and conditions of work. In reality, he was placed into the Project by the UK company, in the person of Ms Gordon, an employee of the Ramboll group and in consultation with Arcadis. On his own evidence his task was to provide a report on '*the business case for Digital Rail technologies'* on the East Coast Main Line. This is a classic consultancy role, to provide an external expertise and perhaps dispassionate advice on the feasibility of one aspect of the Project.

    iii. As such a consultant, he of course needed access to R1/the Project's data and documents, to produce his report, just as will other consultants, such as those from PWC, who will have been involved in other aspects, but, crucially, he was not provided with a security pass, or an R1 email address.

    iv. There is no evidence that R1 had any control or influence over his conditions of employment. They didn't influence his salary, hours of work, how he did his work and he came and went from their offices (and the offices of others, to include the UK company, Arcadis and PWC), at will.

    v. As he himself admitted, it was possible that his services were being provided to Arcadis, as sub-contractors of R1 and which seems, based on the evidence, the most likely scenario, particularly as he submitted his time sheets to them. It runs entirely contrary to common sense that an entity such as R1 would wish or permit persons such as the Claimant, working on a discrete element of the project, for such a very short period of time (just over two months), to enter into any kind of contract worker relationship with them. This is why they have sub-contractors such as Arcadis.

vi. The requirements of s.43K(1)(a) ERA in relation to the Claimant's protected disclosure claims are that he must show that he worked for R1. As already found, he did not. Also, the terms on which he was engaged to do the work must be substantially determined by R1 and again, as found, they were not. His placement on the Project made no difference to his terms of engagement, only to the details of the work he carried out.

18. Territorial Jurisdiction in respect of R2 and 3**.** The evidence and/or submissions in respect of this issue was as follows:

    a. The Claimant said in his skeleton argument that he didn't '*want to waste too much time on this, as it's obvious that the ET has territorial jurisdiction under Rule 8'*. This was because one of the Respondents (R1) is in business in England and Wales and that the damage caused to him took place to him in UK, '*not where the culprits* (R2 & 3) *were located* (Denmark). He relied on his alleged contract worker status with R1 to show his connection with England.

    b. Ms Moss referred to the Recast Brussels Regulations as to whether, under international law, these claims are capable of being heard in a UK tribunal. The underlying principle of the Regulations (which apply to the claims because they were presented before the end of the UK/EU 'transition period' on 31 December 2020) is that persons domiciled in an EU state (in this case Denmark) should be sued in the courts of that state.

    c. An exception to that rule, in respect of an employer, is that an employee may sue it in the courts of the place where the employee habitually works or last habitually worked (Article 21(1)(b)(i). The ECJ ruled in **Weber v Universal Ogden Services [2002] ICR 979** that 'habitually worked' is in principle the place where he worked the longest on the employer's business over the course of his employment. In this case the Claimant worked the vast majority of his four years of employment with the Danish company, in Denmark, only spending seven or so months in UK. The Claimant provided no evidence to contradict these conclusions.

19. Finding. Accordingly, therefore, it is clear that this Tribunal does not have jurisdiction, in international law, to hear the Claimant's claims against R2 and 3, as agents or employees of the Danish company and those claims, therefore, must be dismissed. Even, however, if that were incorrect, Rule 8 of the Tribunal's Rules of Procedure do not permit presentation of such claims to an English or Welsh Employment Tribunal because:

    a. R2 and 3 (as agents or employees of the Danish company) do not reside or carry on business in England or Wales. While the Claimant considers that because one of the Respondents (R1) carries on business in UK that permits him, subject to Rule 8(2)(a), to also present claims against R2 and R3, who do not reside in UK

that is a misreading of that Rule. In this case, the Rule permits him to bring a claim against the one respondent who does reside in UK, R1. The logical outcome of the Claimant's interpretation of this Rule is that merely by naming an English employer as one of several Respondents he could also present claims against several other unrelated Respondents residing in other countries.

b. R2 and 3's alleged acts (the writing of their correspondence in January and March 2020) took place in Danmark, not England and Wales and on the Claimant's evidence, was seen by him in France.

c. The claims do not relate to a contract carried out partly in England and Wales. The Claimant's allegation as to non-payment of tax relate to his contract with the Danish company. The alleged retaliation for bringing his employment tribunal claim has nothing to with any contract carried out in England, but with allegations by the Danish company that he had misappropriated funds from one of their credit cards.

d. The claims against R2 and 3 have no connection with England and Wales. They are in relation to his employment by a Danish company and correspondence, in Denmark, from their Danish-based employees, received by the Claimant while living in France.

20. Remaining Issues. While I consider that my findings above dispose of the claims against the Respondents, I nonetheless, for the sake of completeness, consider the remaining issues.

21. Connection between 'contract worker' engagement and alleged discrimination by R1. Applying s.108(1) EqA, the requirement is that the discrimination arise out of and be closely connected to a relationship that which used to exist between them. As already found, the Claimant was not a contract worker of R1, but, in any event, his allegation of discrimination against R1 (that they had failed to investigate his complaint that the Danish company/R2/3 had discriminated, harassed and victimised him) is not 'closely connected' to whatever former relationship he had with R1. His allegations were solely about those latter entities and when asked in the on-line form '*who was involved?'*, specifically said '*no-one from Network Rail'*, having previously stated that his complaint was against the UK company and complaining of the above-mentioned discrimination [297]. Even, therefore, if there had been a past 'relationship' between he and R1, any alleged discrimination certainly did not arise out of it. Clearly, therefore, R1 had no duty to him to investigate his complaint, as it had nothing to do with them.

22. Connection between extended 'worker' status and alleged protected disclosures and consequent detriment by R1. The case of **Woodward v Abbey National plc (No. 1) [2006] ICR 1436 EWCA** established that a 'worker' can rely on post-termination detriments and disclosures, in a protected disclosure claim. However, it is clear to me that the Claimant cannot rely on this authority, for the following reasons:

a. There must be a substantive connection between the conduct complained of and the former relationship and as indicated above in my findings in respect of the alleged discrimination by R1, there was none.

b. As found also above, the Claimant can establish no 'worker' status of any kind with R1.

c. As stated, R1 owed no duty to him to 'investigate' his complaint about alleged discrimination by the UK and Danish companies and/or R2 and R3 and therefore he cannot conceivably have suffered any 'detriment' by their decision not to do so.

23. Time Limits in relation to R1. There is at least an arguable case, on the Claimant's part that he was unsure, for some time, as to whether or not R1 was going to deal with his complaint, hence him presenting his claim on 21 July 2020 (which, it was not disputed, if time is taken to run from the date of his complaint, was seven days out of time). He argues that on entering Early Conciliation, he was told by ACAS that when they contacted R1, they were informed that R1's investigation was still 'open' and that therefore, as no substantive response to his complaint had been provided, time in effect continued to run. However, by that point, no substantive response having been received, he decided to present his claim and it is not therefore out of time [C's supp bundle 42]. It is possible, therefore that this claim is in time, but as the claim has been dismissed for other reasons, this is of no consequence.

24. Merits of Claimant's Discrimination and Protected Disclosure claims against R1. These claims are completely without merit. There is no evidence whatsoever that the decision by R1 not to substantively respond to his complaint had anything to do with his nationality (he was born in the former USSR) and his Slavic race and nor has the Claimant even attempted to establish such a link. There's no evidence that the person handling the complaint (Mr Houghton) had any personal knowledge whatsoever of the Claimant, or his nationality or race. Instead, as I have already found, R1 had no duty or obligation to investigate a complaint that had nothing to do with them and that is the sole reason they chose not to do so. As already stated, in any event, the Claimant suffered no detriment, as a consequence.

25. Limitation in relation to claim against R3. R3's letter to the Claimant was received by him on 16 January 2020. Early Conciliation dates A and B, were both on 22 June 2020, outside the primary limitation period and therefore had no effect in extending that time limit. The claim should therefore have been presented by 15 April 2020, but was not presented until 21 July 2020, so approximately three months out of time. Considering the two jurisdictional points separately:

a. 'Reasonably Practicable'. Briefly, it was of course reasonably practicable for the Claimant to have brought his protected disclosure claim within time and indeed the Claimant offered no explanation to the contrary. He was clearly aware of the contents

of R3's letter and which formed the entire basis of his subsequent claim and therefore was not awaiting any further information. He was, by this time, an experienced litigant-in-person, having already brought several claims and was clearly aware of the time limit. By delaying a further three months, beyond the initial time limit, again without explanation, he clearly did not bring his claim within 'such further period as was reasonable'.

b. 'Just and Equitable'. Again, the Claimant has provided no explanation for the delay, satisfactory or otherwise. There would be prejudice to R3 in having to defend against a claim stemming from incidents already over two years' old and with no prospects of being heard for at least another year. While the Claimant, in turn, would suffer the prejudice of not being able to advance his claim, it is, I consider, for the reasons set out below, without merit and has no reasonable prospects of success and therefore there is, in effect, no real prejudice suffered by him.

26. Merits of the Discrimination Claims against R2 and R3. I don't consider these claims to have any merit, for the reasons set out below:

a. Harassment. Neither R2, nor R3's letters to the Claimant contains any reference to the Claimant's race and cannot, therefore, under any description, amount to the s.26 EqA definition of 'harassment', namely of creating an '*intimidating, hostile, degrading, humiliating or offensive environment',* related to the Claimant's race. Nor did the Claimant say so at the time.

b. Direct Discrimination. As to direct discrimination, the Claimant has provided no evidence that would make for even a *prima facie* case of less favourable treatment on grounds of race, necessitating the burden of proof shifting to the Respondent. He provides the name of a Mr Møller as a comparator, but does not set out how this person's, or any hypothetical comparator's case might be considered to be, apart from race, not materially different than his own. It is simply not enough to say that 'I am Slavic/not Danish and therefore I must have been less favourably treated than someone else', without providing '*something more'*.

c. Victimisation. Finally, in respect of victimisation, there is unlikely to be any dispute that the Claimant's claim of 29 December 2019 and his complaints on the Danish company's and R1's whistleblower portals constituted protected acts, as they all referenced alleged breaches of the Equality Act. However, there is little evidence to indicate that the Claimant was then victimised by R2 or R3, as a consequence. R2 simply pointed out, in a short email [259] that as, by that point, the Claimant's complaints were the subject of ongoing employment tribunal proceedings and he was being investigated by the Danish police, Ramboll Group a/s considered that these were the most appropriate forums and requested that the Claimant address any further correspondence to their legal representative. This was, of course, in view of both of those processes being in

train, an entirely proper response, as any more detailed involvement by them directly may have prejudiced either or both processes. Litigation having been commenced, R2/Ramboll Group/the Danish company were under no obligation to deal with the satellite complaints of a disgruntled former employee and their refusal to do so cannot constitute a 'detriment'. In the case of R3, the Claimant alleged that Mr Beck-Nielsen/the Danish company were motivated by his bringing of his 29 December 2019 claim against them to report him, falsely, to the police for credit card fraud. However, it is clear from Ramboll Group correspondence at the time that the Group/the Danish company had been considering involving the police in this matter, prior to any knowledge of this claim. On 6 December 2019, the Group's Head of Internal Audit wrote to R3 and others, instructing him to draft a letter to the Claimant, raising the issue and also to report the Claimant to the police [233]. Following discussion as to the draft of the letter, it was sent to the Claimant's UK address on 18 December 2019 [241]. The first reference to R3's knowledge of the Claimant having presented his claim to the Tribunal is a Group internal email from the HR Director to R3 and others, on 13 January 2020 stating that '*and by the way, Jo informed me this morning that Anatoli has raised a second tribunal claim, among others for unfair dismissal and discrimination.'* [249]. Logically, therefore, the accusation of credit card fraud cannot have been motivated by his claim.

27. Vexatious Conduct. The following is relevant:

    a. R2 is a US lawyer. Shortly after R2's letter was sent, on 27 March 2020, the Claimant wrote to him [261], stating:

    '*First of all, I'd like to note, you are listed as a member of the Oregon Bar (Geoffrey Randall Montagne – Bar Number 094475, active and joined in August 2009) and if that is you, then that raises a lot of questions about you acting in a legal capacity ("Organization as Client"), without informing me of this. I don't have the energy to start yet another process, but if you continue to reappear in all my complaints against Ramboll, I will be report* (sic) *your actions to the Oregon State Bar*.'

    By 31 March 2020, the Claimant had raised a lengthy complaint (including attaching several documents) against R2 with the Oregon State Bar [263-266], setting out the history of his dispute with the Ramboll Group and his perception of R2's involvement in it. He stated the following:

    '… I decided to research Mr. Montagne's background and was very surprised to find out, that he is a member of the Oregon Bar. In my response to Mr. Montagne, I asked about it, but he never replied to me. My complaint: Whilst I'm not a lawyer, I have an English law degree and a good deal of experience in commercial law. In England, Mr. Montagne's actions would lead to an imminent disbarment, as legal professionals have to have highest levels

honesty and integrity (my emphasis). *I do not know about the levels expected of lawyers in Oregon, but looking at the Oregon Bar's Rules of Conduct, I see the following specific breaches of the code: Organization as Client: As per Rule 1.13(a), Mr. Montagne is a lawyer, employed by Ramboll Group AJS (Denmark) and thus has Ramboll as his client. When dealing with me, Mr. Montagne must have clearly stated that he is representing Ramboll as a lawyer. Rule 1.13(f) states that when dealing with me (employee), he should've clearly stated that he is representing Ramboll's directors and that their interests are adverse to mine, so that I could have acted with him accordingly. I was effectively tricked passing on information about my claim to a counterparty's lawyer. Rule 7.1 confirms that he omitted the fact that he is a lawyer and was effectively carrying out covert activities against me, by pretending to be a company investigator, when in fact he was an organization's lawyer. As a result, he received a substantial amount of information from me, which was passed on to Ramboll's managers and HR, who retaliated against me. Ramboll has clearly broken a number of UK and EU laws on taxes, employment and discrimination. Rule 1.13(b) states that as much as possible, Mr. Montagne should've distanced himself from participating in these, yet he took leadership in these breaches. They were obviously not in the interests of* (sic) *organization. Rule 1. 7 on conflict of interest, meant that Mr. Montagne had no right to act as a lawyer to my February 2020 complaint. He was named in litigation against Ramboll, yet acted as a lawyer against me. Rule 8.4 on Misconduct. Mr. Montagne is clearly involved in conduct involving dishonesty, fraud, deceit and misrepresentation, which reflects on his unfitness to practice law* (my emphasis). *He is also participating in intimidation and harassment of myself on the basis of my nationality, as my original complaints related to me (a non-Dane) being treated less favorably than Danish citizens working alongside me on a project in the UK. Mr. Montagne isn't necessarily, actively discriminatory here (I just don't know), but he is supporting the discriminatory actions of Danish management of Ramboll. Attached is some of the correspondence from Mr. Montagne and I am happy to provide more.'*

The Oregon State Bar replied to him on 8 May 2020, stating that firstly, R2, even though a lawyer, could be employed in other functions and that there was therefore no reason to assume he was acting as a lawyer in dealing with the Claimant's complaints. Secondly, it pointed out that the State Bar was only concerned with the conduct of lawyers admitted to practice in Oregon and where the alleged misconduct takes place in that State [270].

b. As should be clear from my findings above, the Claimant has brought a host of misconceived and hopeless claims against three respondents who have no liability to him for any such claims. In doing so, account should be taken also of his two previous stayed claims against the UK company, the Danish company and Ramboll Group a/s. I agree with Ms Moss' submission that he has done so

with the principal intention of engaging R2 and 3 in complex litigation, in a foreign jurisdiction, out of vindictive motives and in bad faith. His correspondence to the Respondents' solicitors illustrates such attitude, when he states '*I can litigate against Ramboll for decades and I can escalate this further'* [273] and refers to the litigation as being '*an excellent spiritual journey'* and '*very helpful to my legal studies'* [277].

28. Such behaviour is, I consider, the very definition of 'vexatious' conduct (Rule 37(1)(b), justifying strike-out (albeit in this case, it is unnecessary to do so, as I have already dismissed the claims, on other grounds). The characteristics of 'vexatious litigation' were classically described by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759, QBD (DivCt)**, in terms that have frequently been quoted in succeeding cases: '*The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process. Those conditions are in my view met in this case. Many of the proceedings show no justiciable complaint and, as has been pointed out, several writs have been issued against individual officers in the same department when one writ would have served against them all*.' In **Attorney General v Roberts EAT 0058/05**, the EAT also recognised a variation of this theme, one that is particularly prevalent in the employment context. This is the bringing of repeated applications of a like type to the employment tribunal against different respondents founded on the same or similar cause of action. Finally, of course, in this claim, the Claimant has made vindictive and entirely unfounded complaints to a Respondent/witness' professional body, with the obvious intention of trying to intimidate or 'punish' R2.

29. Claimant's application for Strike-Out of Responses. The Claimant made this application in respect of an 'unless' order of EJ Dyal of 19 January 2022 [C's supp bundle 6]. The Respondents were ordered to 'respond' to the Claimant's application of 14 January 2022, requesting further document disclosure, within seven days. The Respondents stated that they had 'responded' to the application, on the date of issue of the Order, confirming (as the Claimant himself sets out in his statement) '*that they have no more relevant documentation to disclose'*. While the Claimant is clearly dissatisfied with that response and believes that the Respondents have failed to make full disclosure, the terms of the Order have nonetheless been complied with. In any event, while the Order is expressed to be made subject to Rule 38, it actually makes no threat of dismissal, or strike-out of the Responses, if not complied with, but instead refers to the possibility of '*costs or other sanctions'*. In any event, the Order having been complied with, there no grounds for strike out of the Responses.

Conclusion

30. For these reasons, therefore, the Claimant's claims of protected disclosure detriment and direct race discrimination, against all three Respondents and his claims of harassment and victimisation on grounds of race against the Second and Third Respondents are dismissed

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Employment Judge O'Rourke
Date: 9 March 2022