EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr Ebrahim Piperdy		A2Dominion Housing Group Ltd

Heard at: London Central Employment Tribunal

On: 23 (Judge only for preliminaries), 24, 25, 28, 29, 30 March 2021, 1 April 2022 (31 March in chambers)

Before: Employment Judge Adkin
Ms L Moreton
Ms C Marsters

Representations

For the Claimant: in person
For the Respondent: Mr S. Butler, Counsel

JUDGMENT

(1) The following claims are not well founded and are dismissed:

a. Automatic unfair dismissal (section 103A of the Employment Rights Act 1996);

b. Protected disclosure detriment (s. 47 ERA 1996)

c. Direct race discrimination and/or direct religion/belief discrimination (section 13 of the Equality Act 2010).

REASONS

1. Oral reasons for the Tribunal's decision were given at the hearing. Written reasons were requested.

Procedural matters

2. This was an in person hearing at the Claimant's request due to noisy building work that was going on in the neighbourhood of his house. It became a hybrid hearing on 28 March 2022 initially because of travel time for a couple of the Respondent's witnesses, and latterly because a couple of the witnesses tested positive for Covid-19. The Tribunal panel members, the Claimant and Respondent's counsel were physically present in the hearing room at Victory House at all times.

Application for document to be added to the agreed bundle

3. The Respondent applied to introduce a new document 662. This application was opposed. We granted the application and admitted document in addition to 663 and 664 which were respectively the Respondent's and Claimant's printouts of the documents properties.

4. The content of the document, notes of a conversation in which Mrs Slade the Claimant's line manager confirmed to him that she would not be renewing a fixed term contract, goes to the reasons for dismissal. This was relevant consideration for the Tribunal. In short we found that the content of this document would be likely to assist the tribunal. As to the possible prejudice that this might have caused the Claimant by late submission, we took account of the fact that the Claimant did not need to cross-examine the Respondent witnesses until the second week of the hearing. He had been provided the document on the Wednesday of the first week of the hearing. He would therefore have time to consider how to deal with the document. We also allowed him to introduce his properties document with regard to this particular document.

5. Employment tribunal cases are document heavy. This case is no exception and it is quite frequent that we find on the first morning of the hearing that there is a new document or documents that need to be introduced that have been overlooked or discovered late.

6. We made it clear that the Claimant could challenge the accuracy of the document in cross examination and make submissions on the evidence we receive on it.

Application for a witness order

7. The Claimant's made an application for a witness order. He applied for the Tribunal to make an order that Mr Hakim Whitaker attend to give evidence.

This was dealt with by Employment Judge E Burns on papers who rejected the application, but said that the Claimant could renew it at the hearing.

8. The Claimant renewed the application orally at the hearing. We invited the Claimant to tell us which issues Mr Whitaker's potential evidence his could relates to. It seems to be principally alleged disclosure 1, a disclosure to Mrs Slade at a one-to-one meeting on 30 July 2020 that he contemplated raising disclosures formally about leasehold property managers, another team not checking service charges accurately and promptly. We noted that the respondent denies that these comments were made.

9. The first point the Tribunal would need to consider in this respect is whether or not those words were said. As we understand it, this was a meeting between the Claimant and Mrs Slade. Mr Whitaker was not present so it is unclear that he will be able to help us with that aspect of it.

10. The Tribunal would then need to consider if it was the Claimant's reasonable belief that this tended to show a relevant failure. This is an exercise in understanding what was in the Claimant's head. What was his belief at that time if he made those comments? We considered that it would be unlikely that Mr Whitaker would be likely to help us with what was in the Claimant's thought process at that time. For that reason we do not consider that he is likely to give us relevant evidence and we are going to refuse the application. We made it clear that we would not preclude the Claimant from renewing this application at the conclusion of his own evidence, if at the end of his own evidence he still felt he needed Mr Whitaker's evidence. We would allow him to briefly renew this application. At the time that we considered the application it seems unlikely that Mr Whitaker's evidence would help.

11. In fact the Claimant did not renew this application at the conclusion of his own evidence.

The Claim

12. The Claimant presented his claim on 4 December 2022.

13. An agreed list of issues is attached as an appendix to this claim, as is an agreed chronology, which contains some more dates than appear in the findings of fact below.

Evidence

14. We heard evidence from the following witnesses who attended to give oral evidence in support of their witness statements:

    14.1. The Claimant himself;

    14.2. Mrs Susan Slade, Head of Service Charges and Project Implementation, the Claimant's Line Manager;

    14.3. Ms Claudia Sylvan, HR Adviser;

14.4. Ms Tanya Reddick, Head of Student & Keyworker services, disciplinary investigator;

14.5. Mr Paul Dempster, Head of Customer Contact, disciplinary officer;

14.6. Ms Martina Kelly, Leasehold Team Manager, comparator for discrimination claim;

14.7. Mr Ian Hill, Director of Governance and Compliance, who reviewed the Claimant's protected disclosures.

15. We received an agreed bundle of approximately 660 pages. References in these reasons [123] refer to page numbers in that bundle.

Findings of fact

Duation of fixed term contract

16. On 26 September 2019 approval was given by Leasehold Head of Department Mr Steve Michaux for a temporary cover for the role of Service Charge Manager for a period of nine months.

17. On 5 November 2019 the Service Charge Manager role was advertised under a fixed term contract of 2 years.

18. Later November 2019 the Claimant interviewed by Mrs Slade and Phil Hamlet, who was known to the Claimant from an earlier occasion on which they had been colleagues. Mrs Slade's assessment was that the Claimant "did well" at interview.

19. In the period 14 November 2019-15 November 2019 on Facebook/Messenger there messages between the Claimant and PH about length of appointment. PH wrote

> "Hi Ebrahim, I believe it's 2 years but the decision sits with Susan [Slade] as the hiring manager. Probably best go through the agency at this stage to confirm the term."

20. On 25 November 2019 Mrs Slade decided to offer role to the Claimant and asked an officer in HR to make arrangements. Mr Anil Koobarawa, HR, informed the Claimant that he had been successful at interview

21. On 28 November 2019 an offer of Employment letter sent to the Claimant. This provided that the dates of employment would be 9.12.19 - 6.12.21 i.e. just less than two years. This offer was accepted by the Claimant on 2 December 2019.

22. On 6 December 2019 in an email from the Respondent to the Claimant attached signature pane of Word version of Contract of Employment this provided that the dates of employment would be 9.12.19 - 6.1.21, that is just under 13 months rather than just under 2 years. No one within the Respondent has been able to put forward an explanation as to the days were modified in this way.

23. Ms Sylvan, HR advisor, suggested that the most likely explanation is simply a typographic error at the point that the contract was drawn up. The Tribunal accepts that this is the most likely explanation. The date should have been 6.1**2**.21

24. We find that the Claimant saw a completed version of the contract and must have known at the point he signed it that the date was wrong.

25. The Claimant's case is that he made some effort to correct the wrong date in the early stages of his employment. The Respondent denies this. It has not been necessary for us to resolve that factual dispute. Ultimately it does not appear to be in dispute that the contractual position was never altered to reflect the initial advertisement and discussion based on an assumption that it was going to be a 2 year assignment.

Service Charge Team

26. The Claimant was the manager of the Service Charge team, reporting to Mrs Slade. There were four other members of the team who were Service Charge Officers.

27. An important function of the Service Charge Team was to send out to residents service charge annual statements by 30 September each year, the deadline being 18 months after the end of the previous financial year. If that timescale could not be met, a notice needed to be provided to the residents under section 20B of the Landord & Tenant Act 1985 notifying them that costs had been incurred and that the resident would be required to contribute to them by payment of service charge, together with an estimate. This additional notice process would represent an additional cost to the Respondent.

28. We understand from the Claimant's correspondence with the Respondent's in-house lawyer Mr Last that the requirement for a section 20B(ii) notice to state that a cost has been incurred, the amount (or an estimate) of that amount and that the cost would subsequently be passed on through the service charge.

Leasehold Teams

29. As part of the process the Service Charge Team needed the two Leasehold Teams, comprised in total of 13 Leasehold Property Managers (LPMs) led by Martina Kelly and Michael Finnerty, to check costs it was proposed should be charged to residents, and additionally to check anomalies such as water bills that were out of line with previous charges.

30. The LPM team were customer facing and dealt with resident's queries. This team were for example dealing with queries arising from insulation cladding (following the Grenfell Tower disaster) and during lockdown dealt with a higher than usual volume of complaints about antisocial behaviour caused by the fact that people were at home far more than normal. These teams were required to provide the Claimant's team with information to assist the process of providing service charges.

Auditors

31. The external accountants/auditors Beevers and Struthers were also involved in the process of finalising the annual statements before they could be sent to residents.

Difficulties in 2020

32. There were various particular difficulties in 2020 which were partly connected to the Covid-19 pandemic and associated lockdown and partly other factors. Cladding queries following Grenfell and antisocial behaviour problems generated by the Covid-19 lockdown are referred to above.

33. The teams were using multiple new IT systems. There had been change from the old system to a system called “Dynamics”. The Claimant’s concern was that some members of the team did not have the skill to access these systems.

34. Team members were working from home because of the pandemic. The Claimant explained during an internal disciplinary process that the team used Skype and that there was a 'bombardment of emails'.

35. The Claimant found during the course of 2020 that the Leasehold Teams were not providing the information the Claimant's team needed. This was in part due in his view to some new Leasehold Property Managers, and that when they were recruited they were interviewed by the HR team and not by current Leasehold Managers. “Managers” in this context may be a misnomer. Although they had this title members of this team did not have direct reports.

36. The Claimant advised that he was asked by Susan Slade to draft a guide for them. The Claimant stressed that a number of the Leasehold Managers did not know how to use the system as they did not receive training. He considered that communication was also an issue.

Probation

37. At 10 February 2020 the Claimant attended a 2 Month Probation Meeting with Mrs Slade.

38. On 20 April 2020 there was a 4 Month Probation Meeting between Mrs Slade and the Claimant. At that time she noted “capable of fulfilling role as regards knowledge - lacks confidence to put into practice”.

39. In an attempt to assist the LPM team the Claimant prepared two "guides". The first was a 19 page Guide to Service Charge Year ends. The second was a guide to Block Management Accounting. It seems he took pride in this work. We form the impression that he worked hard on this and was diligent in the production of these guides.

40. On 11 June 2020 there was a 6 Month Probation Meeting between Mrs Slade and the Claimant. He passed his probation. Mrs Slade noted that he was "willing to take feedback and adapt".

Tensions between teams

41. It is clear from contemporaneous documentation that there were tensions between the Service Charge team and the LPM teams. In particular there was a frustration on the part of the SC team on getting information back from the LPM teams.

42. It seems to the Tribunal that the SC team may not have appreciated the additional strains on the LPM teams compared to previous years. The situation cannot have been helped by the fact of remote working, which could only hinder effective communication. It seems that the LPM teams had some grumbles about the format that data was being provided to them by the SC team.

First alleged protected disclosure (PD#3)

43. Confusingly the protected disclosures identified by the numbering given at the Preliminary Hearing in 2021 are not in chronological order. We deal first with protected disclosure number 3.

44. On 1 July 2020 there was a one to one meeting between the Claimant and Mrs Slade. In this meeting he updated her on progress.

45. We accept, as suggested in the document on page 167 that the Claimant raised that there were delays in the process of preparing service charges and that there were specific members of the Leasehold Teams who were "not doing their part".

46. Beyond that, there is a dispute between the Claimant and Mrs Slade as to precisely what was said on this occasion.

47. In her witness statement [SS32] Mrs Slade said that the conversation covered delays. Of relevance to the later internal disciplinary, she denied that the Claimant suggested that there was a concern about notices being sent out on time. There was, she says, a discussion about whether future years' charges might be recovered. She said that she asked the Claimant to speak to the legal team about this. She says that she asked the Claimant to move more schemes into the first batch to move things along. Housing schemes had been categorised into three batches for the purposes of the internal checks relating to service charges and onward submission to the external auditor.

48. Mrs Slade denies a discussion about breaches of the Respondent's legal obligation.

49. In the particulars of claim [15] at paragraph 1.9 the conversation on 1 July 2020 is described in this way

> "the Claimant during his One to One highlighted the delays caused by the Property Managers and it was agreed with Mrs Slade he outline specific Property Managers who were not doing what they were supposed to. Notices couldn't be sent on time and inaccurately."

50. At the Preliminary Hearing on 20 July 2021, the Claimant specifically identified that the first three sentences of the notes of this meeting [167] identified the protected disclosure [41]. This note contains the following:

> "Working to project plan and batches are split out and ready to go, agreed with B&S.
>
> Currently there are 32 with LPM's and 10 with SCO's fro batch 1 which need to be done by end of week – not good on either side.
>
> Susan to highlight with Ken [head of leasehold] issues with specific officers not doing their part. To provide proof that week on week they have not completed. SCO's have good support. Albeit accept that potentially one SCO's may not be providing info in agreed format and some may have been delayed in handing over."

51. In his witness statement the Claimant's version of this conversation evolved somewhat so as to make an allegation that he explicitly referred to a breach of statutory provision. The statement says at paragraph 36:

> "I advised Ms Slade that this was breaching Landlord and Tenant Act 1985. With section 19, if the Property Managers weren't reviewing the charges, then they couldn't be at all reasonable."

52. He goes on in the witness statement to refer to the Parliamentary record Hansard and a question asked by an MP about the Respondent's service charges in 2018. His witness statement does not state that he made a reference to this in conversation with Mrs Slade. We conclude therefore that if anything this was a thought process of the Claimant, rather than something that he actually said.

53. For several reasons we prefer Mrs Slade's account. First, the case has "evolved" during the course of the litigation from a complaint about delay to an explicit allegation of a breach of statutory provision.

54. Secondly an email sent the same afternoon on 1 July 2020 is rather bland, and does not suggest that a protected disclosure or specific reference to breach of a legal obligation had been made. The email reads:

> "just to advise not much to update done what I provided last week and as discussed this morning. Pretty much emphasis on actuals and other ad hoc tasks. Please find attached an email but I've sent to Martina and Michael highlighting LPMs who are overdue for batch 1.
>
> As you may see I do not want them to think I haven't checked when the SCO passed the scheme over to them for review and hence added previous weeks status as well as how many weeks overdue.

> I will try to liaise with Phil [Hamlet] and try and work around swapping schemes within allocated batches as well as other work around where possible." [165]

55. Thirdly we find is inherently unlikely that the Claimant would suggest that it was a breach in these terms in circumstances where both he and Mrs Slade had experience of the legislation and the process.

56. We do not find it likely that the Claimant said what he now alleges in his witness statement that he said at the time.

6 July 2020 (PD#4)

57. On 6 July 2020 there was a Service Charge Team meeting.

58. According to the Claimant in his witness statement (paragraph 42):

> "every Service Charge Team member including myself in effect gestured that the LPMs weren't doing what they were supposed to be doing i.e. review service charges and were in breach of legal obligations"

59. It appears to be the Claimant's case the whole team were alleging breach of legal obligation by gesture.

60. The Claimant's own notes of the meeting (174-5) suggest that the Service Charge Team were complaining about the LPM team, and complaining about members of that team who were perceived to be particularly bad. On page 175 the Claimant's own comments appear. He emphasises that there are some good and not so good LPMs. Particular individuals are named. There is a reference to "retrospective issues" and delay and the Covid situation not always been easy but we've attempted communicating as best as possible.

61. As was the case in the discussion on 1 July 2020, the central point was again that there was delay. There is no express reference to breach of legal oligation in these notes.

Progress

62. The agreed bundle contains email exchanges in July between the Claimant and the external auditor in which the two discussed three batches of properties for the purpose getting these housing schemes signed off regarding service charges.

63. The Claimant provided weekly update reports from the Claimant to Leasehold Team Managers, copied to Susan Slade, e.g. on 7 July 2020 (286-289).

64. On 9 July 2020 Mrs Slade complimented the Claimant referring to 'great piece of work' relating to Kennett House and Clyde House. It is clear that at this stage

relations were good and we infer that Mrs Slade felt that the Claimant was performing well.

65. On 13 July 2020 there was an email from the auditor to the Claimant asking whether batch 1 schemes were ready for examination. This was chased up on 17 July 2020. On 20 July 2020 the Claimant to wrote to the auditor setting out which schemes had been signed off.

66. The third weekly update report was sent on 15 July 2020 from the Claimant to Leasehold Team Managers, copied to Mrs Slade.

Respondent's service charges mentioned in Parliament

67. On 20 July 2020 the topic of the Respondent's service charges was raised in the House of Commons by the Shadow Minister for Employment, Seema Malhotra MP to Luke Hall MP, Parliamentary under-Sec (Housing, Communities and Local Government).

Further weekly meetings

68. On 22 July 2020 the 4th Weekly update report from the Claimant to Leasehold Team Managers was sent and copied to Susan Slade.

69. On 29 July 2020 the 5th Weekly update report was sent from the Claimant to Leasehold Team Managers, copied to Susan Slade.

30 July 2020 (PD#1)

70. On 30 July 2020 the Claimant had a one-to-one meeting with his manager Mrs Slade. Although she took some notes of this meeting, Mrs Slade did not provide a note to the Claimant at the time. Her contemporaneous notes at page 184 were not seen by the Claimant until the disclosure stage of these proceedings. We accept however her evidence that these notes were taken at the time and not provided to the Claimant because she went on holiday shortly thereafter and was under some pressure in preparation for departure. These notes included the following:

> Objectives/Activities:
>
> …Identify estates with a deficit balance which will not be sent by end September 2020 and ensure compliant s210B Notice is sent to all customers affected.
>
> Comments:
>
> …Batch 1 is with B&S [external auditor], Still Some Stragglers with LPM's despite work SCO's have done to complete and provide.
>
> SS has spoken to Ken James (Head of Leasehold) in regards the work outstanding for LPM's and concerns over same officers. There is now a clear consequence for not completing on time.

71. There is no reference to a contemplated protected disclosure, or anything that suggests this have been said. We considered carefully whether "clear consequence for not completing on time" might be a reference to the requirement to issue a notice under the LTA. Read in context however, we find that on the balance of probabilities this was a reference to the consequences for individual LPMs who were not completing work on time. We are fortified in this conclusion by the fact that the Claimant's team had previously been complaining about particular members of the LPM teams and also that subsequently a couple of members of that team were put on performance improvement plans.

72. In her evidence to the Tribunal, Mrs Slade confirms the content of the note but specifically denied that the Claimant said that he was contemplating making a protected disclosure.

73. The Claimant's account of this conversation appears in his witness statement paragraph 45. He stated again that LPMs not doing their job in reviewing the service charges. As to the context he says:

> "I was prompted about what Ms Malhotra stated in the House of Commons on 20th July 2020 (page 471) and contemplated formally raising a protected disclosure. I found Ms Slade to not be comfortable with what I was saying to her.

74. What the Claimant does not say in his witness statement in terms is that he referenced the question raised in the House of Commons, nor that he told Mrs Slade that he was contemplating raising a protected disclosure. In other words the signed statement does not prove the allegation made at paragraph 1.9 of the Particulars of Claim [15]

75. Ultimately, on the balance of probabilities, we find that the Claimant did not state that he was contemplating raising a protected disclosure at the meeting on 30 July. We do find however that he was raising the were delays with awaiting LPM completing their work on the schemes.

<u>Concerns about meeting 30 September 2020 deadline</u>

76. According to the Claimant's predecessor in the role Phil Hamlet, at some time in late July or early August he had a discussion with the Claimant about "raising" with Mrs Slade that the deadline of 30 September 2020 deadline for submission of annual statements] would not be met. The significance of this was that section 20B notices would need to be sent, which represented an additional administrative burden with significant associated cost.

77. The Claimant sent the 6th Weekly update report from the Claimant to Leasehold Team Managers, copied to Susan Slade on 5 August 2020.

78. An equivalent further report was sent on 12 August 2020. As well as containing data, this email contained the line

> "it appears section 20b notices may need to be issued for batch 3 scheme. I've have (sic) instructed my team to do everything possible to ensure we recover from what has occurred to date"

79. This was received by Mrs Slade (copied) upon her return from annual leave on 17 August 2020. Mrs Slade's evidence is that this was the first time that she understood from the Claimant that the need to issue section 20B notices was likely. This was (in Tribunal's terms) treated by her as a red flag that there was a significant problem.

80. The Claimant's perspective is that he was providing Mrs Slade with regular data throughout and that it ought to have been obvious at an earlier stage and certainly during July 2020 that the team was unlikely to meet the deadline.

81. On 14 August 2020 the was a Service Charge Team meeting. In that meeting one of the members of the service charge team said:

> "highlight issues to SS [Mrs Slade] and KJ [Ken James, head of leasehold] so option of s20b they go out with consequences."

82. On 19 August 2020 the Claimant sent the 8th Weekly update report to Leasehold Team Managers, copied to Susan Slade.

21 August 2020 meeting

83. On 21 August 2020 there was a meeting called by Mrs Slade which the Claimant and Phil Hamlet attended. This meeting is described in a timeline that Mrs Slade put together for an internal investigation in the following way [265]:

> "asked EP to discuss as there was contradiction to what was previously told that everything was all ok. Mrs Slade had a call with EP and PH to clarify the situation as Mrs Slade was not getting clear answers from EP alone. They went through everything and put a plan together with EP and PH, as EP did not seem sure or confident of the situation. EP Finally confirmed that batch 3 could not go out on time"

84. The Claimant's equivalent timeline contained the following:

> "I will send email to PM's [property managers] now about expectations and as I said any changes to above please let me know ASAP. I will break bad news to Steve [Michaux, Director of Leasehold, SS's line mgr] about section 20B's.

85. It seems to the Tribunal that this week in August 2020 was a crucial turning point in the chronology and the relationship between the Claimant and Mrs Slade. Mrs Slade thereafter treated the Claimant's conduct as worthy of disciplinary investigation, initially on the basis that he was guilty of gross misconduct.

86. Previously there had been a good working relationship between the two. Thereafter the trust was lost between the two individuals.

Removal from project

87. On 24 August 2020 the Claimant was removed from the I&E (Income & Expenditure) project by Mrs Slade in a telephone conversation.

24 August 2020 (PD#5)

88. On 24 August 2020 the Claimant emailed Mrs Slade. This email is an explanation and justification of the approach that he had been taking. He explains some of the difficulties that he was experiencing. He wrote:

> "I emphasised I feel very saddened and feel hard done by because of this."
>
> "Under no circumstances did I ever feel I'd want to advise you something couldn't be achieved. I wanted to demonstrate those weekly reports demonstrated we were always on the back foot. I made sure everyone could clearly see where we were with SCOs working on something against what was with the LPM etc"

89. The Tribunal has considerable sympathy for the situation that the Claimant was in. As he saw it, he had been flagging up delay and problems with the Leasehold team with Mrs Slade as he went along, with weekly data. He was still relatively new to the role and trying to avoid being defeatist, even as he began to doubt that it would be possible to meet the deadline. We find that he assumed that it was obvious to Mrs Slade that there were problems.

90. On 1 September 2020 the Claimant emailed Ms Sylvan, requesting a copy of the Claimant's Contract of Employment. The following day Ms Sylvan attaching a copy of the Claimant's Contract of Employment and signed signature pane.

Suspension

91. On 7 September 2020 the Claimant was suspended. His access to the Respondent's facilities restricted whilst suspended. Mrs Slade's evidence is that this was standard practice given the seriousness of the allegation.

92. The Respondent's policy is that suspension may be appropriate in cases of alleged gross misconduct [495].

Complaint about suspension

93. On 7 September 2020 the Claimant emailed Ms Sylvan in which he raised that the previous two weeks had caused him considerable stress and anxiety. He queried the suspension on the basis that this might have been appropriate for something like fraud or a criminal act. He mentioned that he's never been in trouble in his career with any type of process.

Grievance 8.9.20 (PD#2)

94. On 8 September 2020 the Claimant submitted a grievance by letter. The Respondent admits that this was a protected disclosure.

95. This contained two elements:

96. First, what was described as a Public Disclosure Act 1998 disclosure of two pages of close type in which the Claimant alleged that (i) the Respondent had been providing residents with unreasonable and inaccurate service charge statements, leading to unnecessary later revisions; (ii) examples where managing agents have been charging for 6 years where they should not have been; and (iii) incorrect charges had been set that has not safeguarded taxpayer interests and reputation of the sector e.g. housing benefit from Local Authorities. He quoted from a question posed by Seema Malhotra on the topic of the Respondent's service charges in the House of Commons on 20 July 2020.

97. Second, a complaint under the "Equalities Act 2010" of one page of close type. He contrasts his treatment with that of other managers and suggest that this was direct discrimination.

HR attempts clarification

98. On 8 September 2020 Ms Sylvan, HR advisor, wrote to the Claimant asking him to confirm the remedy he was are seeking. This is in line with the Respondent's grievance policy, which provides that the employee may be asked to clarify their complaint before any meetings take place. [510]

99. The following exchange took place the same day:

> Claimant: "Would you be able to clarify what you mean by remedy I'm seeking?".
>
> CS: "In regard to point to of your Grievance under the Equality Act 2010, I wanted to know what outcome you were expecting as a result of raising this point."

100. Later on 8 September, the Claimant raised seven detailed outcomes that he was seeking. Some of these related to what he regarded as unequal treatment, i.e. that other managers had not been subject to investigation (relevant to the allegation of discrimination). Others of these related to the protected disclosure about the unreasonable and inaccurate service charge statements.

101. Ms Sylvan replied (Claimant's points in standard text; her answers in *italics*):

> " 1. An explanation as to why the Leasehold Managers and some LPMs did not have the same investigative actions as against me for their clear lack of actions on service charge schemes analysis, why was no one within the teams replaced, suspended or any other review given they were aware of the importance of accurate and transparent charges; -
>
> *As advised in my call to you earlier, the investigation has not commenced, and therefore, should further action need to be taken against anyone else as part of the investigation such as a suspension, this will be done. However, you will not be made privy to such action just as no one has been made privy to your suspension and investigation.*
>
> 2. Why there were still 96 schemes not completed by the LPMs for the new batch 3 on 21st Aug 2020; -
>
> *You can raise this as part of your mitigation at your investigation meeting*
>
> 3. Why no information was inputted by the Leasehold Managers when I'd sent them weekly reports, why did they not complete deficit/surplus information, why was it okay for me and the Service Charge Team to complete this hence further extra work; -
>
> *You can raise this as part of your mitigation at your investigation meeting*
>
> 4. Overall an explanation as to how it is still okay for there as at 7th Sept for LPMs to have not completed their scheme tasks; -
>
> *You can raise this as part of your mitigation at your investigation meeting*
>
> 5. Does the above indicate that it is not surprising the Housing Ombudsman upheld 18 of the 25 maladministration complaints received from homeowners; -
>
> *I believe this would be part of your Protected Disclosure which is being investigated by our Governance team and they will contact you in due course*.
>
> 6. A full review and restructure of the process, also to acknowledge that if the Service Charge Officers did not provide training and support which was shut off after 30th July that less schemes would have been signed off; -
>
> *You can raise this as part of your mitigation at your investigation meeting*
>
> 7. A written explanation as to why I was only allowed 1 hour and 15 minutes to gather evidence on the day I was suspended, why

> so far I am not able to gather any further evidence as advised to you so I can plan ahead for any potential Tribunal claim. –
>
> *We are not at a Tribunal case, we have instigated a Disciplinary Investigation in line with the Disciplinary Policy & Procedure. We are able to ask IT to access emails in your Outlook email if there are any emails you are going to refer to in your investigation, and that would be sent to the Investigation Officer as part of your supporting evidence. However, will ask IT to permit you 2 hours tomorrow, to access your Outlook emails only to support your case for your investigation. I will come back to you on tomorrow on the time that will be allocated to you*."

102. Ms Sylvan replied to each of these seven points. She explained that the protected disclosure part was being investigated by the Respondent's governance team but other points could be raised as mitigation in the investigation meeting. There were two other points on which she gave more detailed guidance.

103. She also wrote

> "you have not advise on what outcome you are seeking specifically around your allegation of Race and Belief discrimination… Please can you provide supporting evidence of the discrimination you have faced."

104. The following day, 9 September 2020 the Claimant replied

> "I'm not looking for compensation. I'm requesting why no other employees have been treated the same way I have."

105. The Claimant clarified that point 5 above was not just part of the protected disclosure. He made the point that this also supports that he had received harsher treatment than for others, which is the central thrust of his allegation of discrimination. He referred to the ACAS discrimination questionnaire

106. There was a further lengthy email exchange between Ms Sylvan and the Claimant. The email chain initially impinges on the protected disclosure but later on seems more focused on matters of process and the disciplinary investigation.

Mrs Slade's awareness of protected disclosure

107. Mrs Slade's evidence was that the first time that she became aware of the grievance letter dated 8 September 2020 which contained a protected disclosure was in the Tribunal bundle, i.e. after the Claimant had left the employment of the Respondent.

108. We have not received any direct evidence to contradict this position.

109. We have considered carefully whether we could infer that she was aware of it from the factual circumstances. Ms Sylvan was aware of the grievance containing the protected disclosure. We have born in mind that Ms Sylvan appeared to be carrying out substantially administrative responsibilities, rather than advising or influencing Mrs Slade. It seems reasonable to assume that Ms Sylvan's line manager Laura Wooster, who did not give evidence to the Tribunal, was also aware.

110. Our finding generally is that the grievance was not properly investigated, which is a criticism that can be made of the Respondent. One of the consequences of this however is that we find it is more likely than not that Mrs Slade simply was not aware of the content of it and the fact it contained a protected disclosure. The balance of probabilities we accept her evidence about her lack of knowledge at that time.

Investigation meeting

111. On 9 September 2020 the Claimant was invited to investigation meeting, which he attended on 14 September 2020 by Zoom. This meeting was held by Tanya Reddick. There were four allegations to be investigated:

111.1. That despite numerous opportunities the Claimant had failed to advise Mrs Slade of delays and had reassured her that he was on target and there were no issues;

111.2. That it was identified that there was delay in getting batch 1 to the auditor on 17 August 2020, despite Mrs Slade having told the Claimant to move things along on 1 July;

111.3. On 21 August 2020 the Claimant confirmed that batch 3 would not go out on time and that he was not on target to deliver the I&Es;

111.4. That the Claimant was aware throughout the project of the potential loss and reputational damage if the I&E's were not delivered on time.

112. During investigation meeting, the Claimant alleges that he was asked "culpability questions", i.e. questions tending to show or imply that he was culpable.

113. Ms Reddick accepts that during this meeting the Claimant discussed the fact that he had blown the whistle. She understood that this related to the lateness of the LPMs. She was provided with the Claimant's timeline which referred to him raising "whistleblowing concern due to accuracy of service charges as a breach of legal and regulatory obligations as well as race and religious discrimination".

114. Ms Reddick's oral evidence to the Tribunal was that she received the notes of the meeting on 1 July 2020 after the investigation meeting. It is not clear exactly how that happened. We nevertheless accept her evidence that she did receive that note and that she did consider the content, although it did not feature in her ultimate report.

Suspension lifted

115. On 16 September 2020 the Claimant attended suspension review meeting at which his suspension was lifted on the recommendation of the disciplinary investigator Tanya Reddick. According to Ms Reddick this was on the basis that the Claimant was working remotely and it was considered that there was no risk of him for example tampering with evidence.

Allocation to other duties

116. On 17 September 2020 the Claimant was allocated to other duties, namely 'Service Charge Estimates'. The Claimant characterised this as an "isolation project" as a result of which he lost his direct reports.

Further investigation and conclusion

117. On 17 September 2020 Ms Reddick interviewed Martina Kelly (Leasehold Team Manager) and Anna Hoppe (Service Charge Officer).

118. Further interviews were carried out with Michael Finnerty (Leasehold Team Manager), Phil Hamlet, Michael Haile (Senior Service Charge Officer)

119. On 30 September 2020 Tanya Reddick completed an investigation report with appendices. She concluded that there was insufficient evidence in relation to allegation four that he was aware of the potential loss and reputational damage.

Protected disclosure process

120. On 28 September 2020-29 September 2020 there was an email exchange between the Claimant and Mr Ian Hill (Interim Head of Governance & Compliance) regarding 'Whistleblowing'.

Disciplinary hearing

121. The Claimant was invited to a disciplinary hearing on 7 October 2020 with Mr Dempster the disciplinary officer.

122. There were a series of documents which were not provided to Mr Dempster by the investigator Ms Reddick, with the result that the Claimant himself had to provide these documents. The Tribunal understands why the Claimant was frustrated by this, since one document in particular, a meeting in July 2020 was potentially of significance. However we acknowledge and accept the observation of the disciplinary officer Mr Dempster that the nature of such investigations is that some documents do only materialise later on in the process, and this was merely an oversight.

123. The disciplinary hearing took place on 19 October 2020. The Claimant submitted a written skeleton summary after that hearing [350].

Disciplinary outcome

124. In an outcome letter dated 21 October 2020 Mr Dempster produced a disciplinary outcome in which it was made clear that there would be no formal warning. Each of the three allegations considered by Mr Dempster was rejected.

Protected disclosure investigation outcome

125. On 23 October 2020 Mr Hill emailed the Claimant re 'Protected Disclosure', attaching letter in which he accepted that the Claimant had made a disclosure falling under the relevant statute in good faith. He explained that his recommendation was that with the Claimant's consent this should be passed forward to the Director of Residential Services, who should consider undertaking a review of the matters raised.

End of fixed term contract

126. On 29 October 2020 a conversation took place between Mrs Slade and the Claimant about the fixed term contract on which she was working coming to an end.

127. Although the Claimant objected to this document being introduced to the bundle and there was some discussion about the date it was created, we have the benefit of seeing the properties of this document that it was created on 29 October 2020, i.e. the day of the conversation and we accept that this file note was created by Mrs Slade on the day of the conversation.

128. Based on that file note, we find that Mrs Slade told the claimant that Phil [Hamlet] was returning from an FFP project and was able to carry out his substantive role and therefore the Respondent would not be continuing with the Claimant's position.

129. In this discussion the Claimant mentioned that his contract was for two years and that he would check it. He did not mention at that stage what he has told this Tribunal which is that he had spent some time trying to challenge the date of the contract at the outset of his employment.

130. There was then a discussion about the remaining work that the Claimant had to do for the Respondent and details such as taking before the conclusion of the contract.

Grievance process conclusion

131. During this time the grievance had not been progressed.

132. On 27 October 2020 Ms Danielle Gatewood, HR adviser, wrote to the Claimant, asking him to confirm whether points raised in his grievance had been addressed and if they had not if he could respond to Ms Sylvan's email and confirm which points remained outstanding.

133. There were a series of emails back before the Claimant's email dated 28 October 2020 centre 09:43 in which he made it clear that he sought to complain that the following points were not resolved:

- No pre investigatory meeting;
- Being removed from my contractual role;
- Original disciplinary letter;
- Investigatory meeting with the Investigating Officer and HR;
- Disciplinary relating to some other substantial reason;
- Disciplinary relating to reasonableness/misconduct;
- Suspension with pay, other duties and contemplating gross misconduct;
- No access to facilities with 2 hours access to emails only;
- The ACAS Code of Practice;
- Any relevant case law e.g. Orr v Milton Keynes Council;
- Email exchanges relating to the above

134. These are matters connected to the disciplinary and his treatment rather than the protected disclosure. He also makes reference to his "skeleton summary" dated 19 October 2020. The substance of the skeleton summary, in particular the first three pages, was an answer to the allegations that were pursued by the Respondent as part of the disciplinary investigation. This is essentially his defence. The Claimant did however refer to protected disclosures or alleged protected disclosures in it. At page 353, at paragraph 4.1 he refers to the formal protected disclosure made on 8 September 2020 based on breach of legal obligation. This is a minor reference in a document which is otherwise about the substance of the disciplinary matter.

135. In a further email dated 29 October the Claimant continued to raise his concerns about the way that he had been treated and the fact that he considered this to be a whistleblowing case and that he wished to pursue a remedy in the employment tribunal. He said that the procedures have been exhausted. He made it clear that he had no issue with Mr Dempster.

136. According to the amended response at paragraph 39 Ms Hilary Hill, head of HR (Business Partnering) had drafted a response [to conclude the grievance process], but

> "it has now become apparent that the email remained in her drafts and was not sent to the claimant. This was an oversight on the Respondent's part. Notwithstanding this the Claimant made clear in his email that he considered that the internal process had been exhausted".

137. This position is confirmed at paragraph 31 of Ms Sylvan's witness statement. We have not been provided with the draft document of Ms Hill.

138. In our view the draft response of Ms Hill ought to have been disclosed by the Respondent as part of their obligation to disclose relevant documents.

139. On 30 October 2020 the Claimant emailed Mr Hill regarding 'Protected Disclosure', attaching final version of 'Breaches of Legal Obligations and Regulatory Standards with Leasehold Department' document, and alleging that the Claimant's contract is being cut short to penalise the Claimant. This provides further detail of the Claimant's concerns about breaches of legal obligations and regulatory standards, but is not relied upon him as a protected disclosure in the context of this case, given that this postdates the detrimental treatment he received and also the decision not to renew his contract.

Legal proceedings

140. On 30 October 2020 the ACAS Early Conciliation process commenced, with a certificate issued on 30 November.

141. On 4 December 2020 the Claimant submitted ET1 and Particulars of Claim.

142. On 17 December 2020-21 December 2020 the Claimant requested a reference from Respondent and raises the non-normal circumstances and intention of interim relief application to ET.

143. On 21 December 2020 the Respondent wrote to the Claimant re: End of Fixed Term Contract (letter incorrectly dated 21 December 2021).

Post termination employment

144. Happily the Claimant secured employment on a higher salary, with the result that he did not suffer an financial loss as a result of termination.

LAW

145. We are grateful to the parties for their submissions.

Service charge legislation

146. The Landlord and Tenant Act 1985 contains the following provisions:

> **19** Limitation of service charges: reasonableness.
>
> (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
>
> (a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

20B Limitation of service charges: time limit on making demands.

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Protected disclosure detriment (“whistleblowing”)

147. The Employment Rights Act 1996 contains the following provisions:

43B Disclosures qualifying for protection.

(1) In this Part 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-

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

…

47B Protected disclosures.

(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.

48.— Complaints to [employment tribunals]1 .

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection … (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(2A) On a complaint under subsection (1AA) it is for the temporary work agency or (as the case may be) the hirer to show the ground on which any act, or deliberate failure to act, was done.

(3) An employment tribunal shall not consider a complaint under this section 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.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if) —

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract

103A Protected disclosure.

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

148. The burden of proving each of the elements of a protected disclosure is on a claimant (*Western Union Payment Services UK Ltd v Anastasiou*, 13 February 2014 per HHJ Eady QC at [44]).

149. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal held that a sharp distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy, given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

150. There is an initial burden of proof on a claimant to show (in effect) a *prima facie* case that she has been subject to a detriment on the grounds that she made a protected disclosure. If so, the burden passes to the not to prove that any alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment. Simply because the respondent fails to prove the reason does not act as a default mechanism so that the claimant succeeds. The ET is concerned with the reason for the treatment and not a quasi-reversal of proof and deemed finding of discrimination i.e. there is no mandatory adverse inference mechanism (*Dahou v Serco Ltd* [2017] IRLR 81, CA).

Whether belief reasonable

151. Whether a belief is reasonable is to be assessed by reference to "what a person in their position would reasonably believe to be wrongdoing": *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 per Judge McMullen QC at [62]. In that case Mr Korashi was a specialist medical consultant and an assessment of what was reasonable needed to be by reference to what someone in that position would reasonably believe.

Legal obligation (section 43B(1)(b))

152. In *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416 in which HH Judge Serota QC, sitting with members, held at paragraph 98 that in considering whether there had been a protected disclosure:

> 'Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. …'

153. This approach was cited and approved by Slade J in *Eiger Securities LLP v Korshunova* [2017] IRLR 115 (EAT). In that case the Employment Appeal Tribunal also considered what amounted to a legal obligation. In *Korshunova* the communication held by the ET to be a protected disclosure occurred when Ms Korshunova challenged a managing director (who was a compliance officer and registered with the FCA) about using her computer screen in using an online chat with an external trader without identifying himself as not being her. Both K and the third party trader were angry and considered this 'deception'. Slade J held that it was not enough for the Tribunal to find that K had a reasonable belief in how a client should be treated, or that what she was saying was true and applicable in this industry. She held [46]:

> "In my judgment it is not obvious that not informing a client of the identity of the person whom they are dealing if the employee is trading from another person's computer is, as in Bolton, plainly a breach of a legal obligation. That being so, in order to fall within ERA s.43B(1)(b), as explained in Blackbay the ET should have

> identified the source of the legal obligation to which the claimant believed Mr Ashton or the respondent were subject and how they had failed to comply with it. **The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation**. However, in my judgment the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached
>
> [emphasis added]

154. This approach to identification of the legal obligation may be somewhat stricter than the less legalistic approach taken in earlier cases such as *Bolton School v Evans* [2006] IRLR 500, EAT. The learned editors of *Harvey on Industrial Relations and Employment Law* suggest that what appears to be a difference in approach might be reconciled as follows:

> This apparent conflict (or at least difference in approach) was resolved in *Arjomand-Sissan v East Sussex Healthcare NHS Trust* UKEAT/0122/17 (17 April 2019, unreported) where Soole J held that it depends on the stage of the complaint/action that is involved. The more indulgent (realistic?) approach in Bolton School and Anastasiou was adopted at the stage of the original disclosure to the employer, which must be viewed in a commonsense way, not requiring citation of legal chapter and verse, but rather just enough for the employer to understand the complaint. On the other hand, Blackbay and Eiger concerned the specificity required at the stage of any eventual ET complaint, where it is reasonable to expect the claimant to make clear just what the infringed legal obligation was (especially as Eiger affirms that it must indeed have been a legal obligation, not just a moral or professional one).

Public interest

155. The Court of Appeal in *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979 confirmed that public interest does not need to relate to the population at large, but might relate to a subset, in that case a category of managers whose bonus calculation was negatively affected. It seems that it cannot simply relate to the interest of the person making the disclosure.

Causation

156. The causation test for *detriment* is whether the alleged protected disclosure played more than a trivial part in the Claimant's treatment (*Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, CA).

157. The Equality Act 2010 contains the following provisions:

Discrimination

> 13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

158. We have considered the guidance set out in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA as follows:

> (1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what

inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

159. We have also considered *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> "'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

160. In *Madarassy v Nomura International plc* 2007 ICR 867 CA Lord Justice Mummery held as follows:

> "The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (para 56)

161. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination.

CONCLUSIONS

PROTECTED DISCLOSURES

162. The five disclosures identified at the hearing of 20 July 2021 do not follow chronological order. The third disclosure came first.

163. That the second alleged protected disclosure on 8 September 2020 was a qualifying disclosure was not disputed by the Respondent.

164. The other four alleged protected disclosures were disputed by the Respondent. The reasons we give below, we find that these were not qualifying protected disclosures.

Alleged Disclosure Three - 1.7.20

165. The one to one notes (and specifically, the 1st, 2nd 3rd sentences of page 1 of these notes) dated 1st July 2020 to Ms Slade

166. Was there a disclosure of information? Yes there was a disclosure that there were delays/difficulties dealing with LPM's.

167. Did the Claimant believe that this tended to show breach of a legal obligation? Tribunal has formed the view that on the balance of probabilities this was something that the Claimant has thought at a later stage, rather than something that he thought at the time.

168. If so, was that belief reasonable? Merely because the Respondent was potentially running up against deadline for service of a notice under section 20B(2) LTA 1985 does not suggest a breach of legal obligation. If the Respondent failed to serve such a notice, the Claimant has not demonstrated that this is a breach of legal obligation. It would simply mean that the Respondent might suffer additional administrative burden and risk being precluded from recover service charge costs from its tenants.

169. We take account of the fact that the Claimant was a manager, he was experienced and knowledgeable in the area of service charges. In the circumstances we do not find it was reasonable of him to believe that delays in the internal processes in July tended to show a past, current or future breach of legal obligation.

Alleged Disclosure Four: – 6.7.20

170. For the team meeting of 6 July 2020, the Claimant provided a full set of minutes of the 6 July 2020 to Ms Slade and the rest of the Service Charge Team, including a section which set out what he himself said, as is set out above.

171. We find that this meeting was the occasion of a general complaint about delays, which the Service Charge Team considered were the fault of the Leasehold Teams, and some members of those teams in particular.

172. For the same reasoning as set out for alleged disclosure three above, we do not find that the Claimant had a reasonable belief that this tended to show a breach of legal obligation.

Alleged Disclosure One: 30.7.20

173. A disclosure to Ms Slade in a one-to-to meeting on 30 July 2020 that "he contemplated raising disclosures formally about the Leasehold Property

Managers (another team) not checking service charges accurately and promptly" (the Respondent denies that the Claimant said this);

174. We find that the Claimant reiterated what he had said in the third and fourth disclosures, i.e. that there was some delay, with the unfinished charges for certain properties described as "stragglers" and that certain members of the leasehold teams were responsible.

175. We do not find that the Claimant had raised matters that in his view tended to show a breach of a legal obligation. To reiterate this was simply part of an internal process.

Alleged Disclosure Five: 24.8.20

176. This relates to the Claimant's email of 24 August 2020 taken as a whole, which the Claimant alleges amounts to a protected disclosure. In this email, the Claimant disputed his removal from the position of a Service Charge manager and provided Ms Slade with factual statistics of property managers being behind the reviewing schemes. The Claimant also mentioned s 20B of Landlord and Tenant Act 1985

177. In this document, the Claimant carefully and reasonably set out his position and a justification of his action and some of the supporting data. We did not find that his document tend to show in the reasonable belief of the Claimant that there was a breach of legal obligation, for similar reasons to those given above. The concern was delay not a breach of legal obligation.

Disclosure Two – 8.9.20

178. The statements contained within his grievance on 8 September 2020 (the Respondent admits that the Claimant made statements in his grievance on 8 September which amounted to "protected disclosures" within the meaning of s.43B ERA).

179. It is not disputed that this was a protected disclosure falling under section 43B(1)(b) i.e. failure to comply the legal obligation.

Considerations in determining whether qualifying protected disclosures

180. In deciding the matters above, the Tribunal has had regard to the following matters agreed in the list of issues:

> (2) Did the alleged statements constitute the disclosure of "information" within the meaning of s.43B(1) ERA (the Respondent admits this in relation to Alleged Disclosure Two)?
>
> (3) Were the alleged statements "qualifying disclosures" within the meaning of s.43B(1) ERA (the Respondent admits this in relation to Alleged Disclosure Two)? The Claimant relies upon:
>
> (a) S.43B(1)(c) ERA in relation to Alleged Disclosure Two and asserts that Alleged Disclosure Two tended to show that the

Respondent had breached its legal obligation due to the accuracy (or inaccuracy) of service charges charged to residents.

(b) S.43B(1)(b) ERA in relation to Alleged Disclosure One and asserts that Alleged Disclosure One tended to show that the Respondent had failed to comply with the following obligations under the Landlord and Tenant Act 1985 (the "ACT") relating to service charges and these apply to all the alleged disclosures ; and (c) S 43 B (1) (b) for Alleged Disclosure 3, 4 and 5.

In relation to a breach of a legal obligation, the Claimant alleged that the Act was breached in the following way:-

(i) s. 20B, the Act: This requires the service charge notices to be issued on time. The Claimant alleges that the Respondent did not comply with this; and

(ii) s 19, the Act: reasonableness of service charges. Because the Respondent was not checking if the charges were reasonable , the customers would receive inaccurate bills and be overcharged;

(2) It is agreed that if the alleged statements were "qualifying disclosures", they were "protected disclosures" within the meaning of s.43A ERA because the statements were made to the Claimant's employer within the meaning of s.43C(1)(a).

AUTOMATICALLY UNFAIR DISMISSAL BECAUSE OF PROTECTED DISCLOSURE (s. 103A)

181. (5) Was the Claimant dismissed because of the alleged statement(s) (if they amounted to "protected disclosures")?

Dismissal

182. It is agreed that the Claimant's employment terminated on 6 January 2021.

183. The Respondent asserts that the Claimant's employment terminated on this date because this was the end of the Claimant's fixed term contract ("FTC"). The Claimant asserts that his FTC was due to end on 6 December 2021 (the Respondent denies this).

184. Under section 95 of the Employment Rights Act 1996, the non-renewal of a fixed term contract amounts to a dismissal. We find that the Claimant was dismissed.

Reason

185. What was the sole or principal reason for dismissal?

186. We find that this was a case in which there were several factors which led to the decision not to renew the Claimant's fixed term contract which were:

186.1. The return of Phil Hamlet to his substantive which the Claimant had only been covering on a temporary basis;

186.2. We find that there was almost inevitably something of an awkward working relationship following the disciplinary. The relationship between Mrs Slade and the Claimant had broke down.

187. We have considered carefully whether the Claimant raising a grievance including a protected disclosure was a cause of the decision not to renew the Claimant's fixed term contract.

188. We concluded in our findings of fact that Mrs Slade was was not personally aware of the content of the protected disclosure.

189. Mrs Slade did take advice from Ms Sylvan and Laura Wooster, HR as per paragraph 18 of Mrs Slade's witness statement. This HR team was aware of the grievance, which contained a protected disclosure. The protected disclosure element was one element of the grievance, which also contained separate allegations of unfair treatment and discrimination.

190. We have borne in mind that the Claimant's assignment in this department was envisaged to be temporary from the outset. The Claimant was a temporary replacement for Mr Hamlet.

191. We have not come to the conclusion that the sole or principal reason for the nonrenewal of the fixed contract was the making of the protected disclosure on 8 September 2020.

192. We do not conclude the sole or principal reason for dismissal was the making of the protected disclosure. Therefore this claim does not succeed.

DETRIMENTS BECAUSE OF PROTECTED DISCLOSURE (s. 47B)

193. (6) Did the Claimant make "protected disclosures" within the meaning of s.43B ERA and, if so, when?

194. The grievance raised on 8 September 2020 contains the only qualifying protected disclosure in this case (protected disclosure two).

195. (7) Was the Claimant subjected to the treatment which he alleges and, if so, does that treatment constitute "detriment"(s) within the meaning of s.47B(1) ERA?

196. We have dealt with each of these alleged detriments in turn under a separate heading below.

Removal from role

197. a. being removed from his contractual role of 'Service Charge Manager' from 24 August 2020 (the Respondent admits that the Claimant was transferred from this role to a different role on 24 August 2020);

198. On the basis of our findings, the Claimant had not made any protected disclosure before this date. This detriment claimant therefore cannot succeed.

No meeting

199. b. Ms Slade not holding a "pre-investigatory meeting" and/or carrying out only the "the minimum" by way of "pre-investigatory meeting" between 25 August 2020 and 6 September 2020 (the Respondent denies this);

200. On the basis of our findings, the Claimant had not made any protected disclosure before this date. This detriment claimant therefore cannot succeed.

Suspension

201. c. being suspended by Ms Slade on full pay from 7-16 September 2020 (the Respondent admits that the Claimant was suspended);

202. On the basis of our findings, the Claimant had not made any protected disclosure before 7 September 2020 when the suspension took effect.

Restricted access

203. d. Ms Sylvan restricting the Claimant's access to the Respondent's facilities from 7-16 September 2020 (the Respondent admits that the Claimant's access to facilities was restricted as this is standard practice of the Respondent when an employee is suspended as stipulated in the Respondent's disciplinary procedure);

204. On the basis of our findings, the Claimant had not made any protected disclosure before 7 September 2020 when the restriction took effect.

Allocation to other duties

205. e. the decision by Ms Slade to allocate the Claimant to other duties (working on the 'Service Charge Estimates' project) from 17 September 2020 (the Respondent admits that the Claimant was allocated to other duties);

206. We find that losing his direct line reports was a detriment. This was inevitably a loss of status and to some extent undermined the Claimant.

207. Was this detriment material caused by the protected disclosure?

208. We found that Mrs Slade was not aware of the protected disclosure of 8 September 2020 at the time that she made this decision. We considered whether we have a basis to conclude that Ms Sylvan influenced Mrs Slade to take this decision. There is no direct evidence that this occurred. Ms Sylvan appeared to have substantially administrative responsibilities.

209. We do not conclude either from direct evidence or inference that Ms Sylvan's knowledge of the protected disclosure led to Mrs Slade's action in allocating the Claimant to other duties.

210. Ultimately we accept Mrs Slade's evidence that the reason that the Claimant was allocated to other duties was that Mr Hamlet had returned to the team and was carrying out this part of the Claimant's responsibilities.

Sham investigation

211. f. the Respondent holding an unreasonable and sham investigation

212. We acknowledge that the Claimant disagreed with the findings of the investigation and ultimately that Mr Dempster concluded that the disciplinary charges were not made out.

213. We do not however conclude that it would be fair to characterise the investigation as unreasonable and a sham.

214. Had we needed to deal with causation, the protected disclosure was drawn to Ms Reddick's attention as a passing reference. She was herself not personally implicated by that protected disclosure. She worked in a different area.

Failure to refer to notes

215. g. Ms Reddick did not refer to any of the one to one notes dated 1st July 2020

216. This allegation is somewhat ambiguous. The "refer" could denote making reference as part of her investigation or alternatively making a reference within her investigation report.

217. As to the former, Ms Reddick's evidence, which we accept is that she did have a copy of the one to one meeting notes for the meeting on 1 July 2022. This then is not a detriment.

218. As to the latter it is factually correct that she did not refer to this note in her report. Ultimately, we accept that the omission from the report of this note of 1 July was a detriment to the Claimant, especially in circumstances where this note, which was potentially important, was not provided by Ms Reddick to Mr Dempster.

219. Was this omission materially caused by the fact that the Claimant had made a protected disclosure? We have concluded that it was not. We do not find direct evidence that Ms Reddick deliberately omitted a reference to the 1 July meeting. For similar reasons to the previous detriment, we do not consider that the protected disclosure would have been of great significance to Ms Reddick.

220. We do not draw the inference that this was an omission that was caused by the protected disclosure.

Notes of 121 meeting

221. h. The Claimant not receiving any one to one notes with Ms Slade;

222. This allegation can only refer to the note of the meeting on 30 July 2020 which Mrs Slade accepts she did not provide to the Claimant at the time.

223. The Claimant's inference is that things had "turned sour" from July 2020 onwards (paragraph 167 of his witness statement).

224. Mrs Slade's evidence is that this omission was merely an inadvertent admission and that she was under pressure due to annual leave. We accept Mrs Slade's evidence and we do not find that this was because of a protected disclosure.

225. We find that the only protected act occurred on 8 September 2020. It follows that this protected disclosure cannot have been the reason why this note was not provided shortly after the meeting on 30 July 2020.

Insufficient investigation

226. i. There was not enough investigation as none of the managers had been interviewed. Only the Claimant was investigated.

227. As a matter of fact, Ms Reddick did interview Martina Kelly and Michael Finnerty, the Claimant's two actual comparators for his claims of race and religious discrimination and relevant witnesses given they could give evidence as to what was going on on the leasehold side.

228. Ms Reddick gave a rationale for the individuals she interviewed in her witness statement at 24.2.3, which we accept. She did not interview Denis Browne-Marke leasehold property manager whom the Claimant had particularly identified as performing poorly.

229. The Claimant plainly wanted a wider systemic investigation and also to point at others individual that he considered were culpable for delay.

230. We find that Ms Reddick was entitled to focus more narrowly on the charges which essentially related to a lack of communication between the Claimant and his line manager. In any event, and for reasons given earlier, we do not find that the protected disclosures were a factor that will influencing Ms Reddick's approach to the investigation.

Culpability questions

231. j. The Claimant was allegedly asked "culpability questions" by Ms Sylvan during the investigation meeting on 14 September 2020 when "HR should be limited to advising on law and procedure" (the Respondent denies this). The Claimant alleges that the following questions were asked :-

231.1. • Who did the Claimant confront in his team, suggesting that the Claimant was not proactive enough.

231.2. • Did one of the officers slowness contributed to the situation.

232. We found that these were simply "follow on" questions to aid clarification. These questions did not amount to a detriment.

Failure to investigate grievance – detriment

233. k. The Respondent unreasonably failing to investigate the Claimant's grievance submitted on 8 September 2020.

234. The Respondent admits that it did not issue an outcome to the Claimant's grievance, but denies that there was a complete or unreasonable failure to investigate.

235. We find that there was a failure to investigate the grievance. We also find that failure was unreasonable. With the benefit of hindsight Ms Sylvan appropriately conceded and accepted that the investigation could have proceeded.

236. The Respondent was initially entitled to explore what the Claimant's proposed remedy was, in line with own grievance policy and ACAS code on grievances. Subsequent to this exploration, there was an element of cross purposes. Ms Sylvan was trying to simplify matters by first exploring possible resolution and second trying to delineate between the grievance, the protected disclosure, and the ongoing disciplinary. She did this with some success, but with regard to the central grievance about unfair treatment, she never really achieved a shortcut to a resolution that she was seeking, and the Claimant did not help her out.

237. The Claimant did not see a shortcut to resolution of his grievance. He wanted the matter fully investigated. He was entitled to do this, and the Tribunal do not consider it fair to conclude that he was simply being difficult. His communications were prompt, polite and professional.

238. Approximately six weeks later, Ms Gatewood again tried to see if she could simplify the scope of what was outstanding. Again this did not resolve matters.

239. It was the Claimant who ultimately drew a line under the outstanding procedures at the conclusion of the disciplinary.

240. It is unsatisfactory that we have not seen Ms Hilary Hill's draft letter which apparently was a response to the grievance.

241. In summary therefore, for the reasons given above, we have concluded that the failure to investigate the grievance was detrimental.

Failure to investigate grievance – because of disclosure?

242. We considered carefully whether the protected disclosure on 8 September 2020 materially influenced (in the sense of being more than a trivial influence) the employer's treatment.

243. The grievance relating to the alleged race/religion discrimination and protected disclosure were treated by the Respondent as two separate matters. The protected disclosure was subject to the scrutiny of Mr Hill, who determined that it was a protected disclosure, and proposed a potential onward referral.

244. The allegations of race and religious discrimination, which were the subject of the grievance, were those allegations that did not get investigated at all.

245. We conclude that the unreasonable element was in failing to investigate these matters which related to unequal treatment and possible discrimination, which were distinct from the protected disclosure. The protected disclosure followed its own procedural path and was dealt with by Mr Hill.

246. We have considered as far as we have been able Ms Sylvan's thought process and also that of Ms Gatewood. We find that there was perceived to be a degree of complexity in the matters that the Claimant was raising and an reluctance to enter into what appeared to be complex. Ms Sylvan was candid in during the Tribunal hearing in admitting that she had formed the view that the Claimant was simply focused on going to the Tribunal. In other words she felt it was just not going to be possible to resolve it internally. This is rather unsatisfactory, and smacks of a reluctance to grapple with matters which an HR function ought to have been able to deal with. We reiterate however that it was the allegations of unequal treatment and discrimination that were being considered by HR and the protected disclosure matter had been separated out to be dealt with by Mr Hill.

247. Given the the separation of the protected disclosure and the grievance, and looking at the matter globally, for the reasons above we do not find that it was the protected disclosure element of the grievance of 8 September 2020 which was more than trivially a cause of the failure of the Respondent's HR function to grapple with the part of the grievance relating to race/religion.

Criticism of format

248. l. Ms Reddick concluding in her report dated 30 September 2020 that "a spreadsheet summary which had been sent to Ms Slade by the Claimant should instead have been provided in a different format and that the Claimant intentionally breached the code of conduct by failing to keep an eye on delays and had interaction problems"

249. The Respondent admits this insofar as it is a summary of part of the contents of Ms Reddick's report, rather than a verbatim quote.

250. We find that this was not a detriment but rather a conclusion that Ms Reddick was entitled to come to.

251. We do not find that this conclusion on the part of Ms Reddick was caused by the protected disclosure for similar reasons to those given above in relation to alleged detriments (f) and (g).

Unfair criticisms in Mrs Slade's witness statement

252. m. Ms Slade making "unfair criticism and comments" in her witness statement prepared for the investigation, specifically that "the Claimant had problems with communication and did not carry out what he was requested to do" and "ma[king] out that the Claimant was not persuasive or influential enough and

that he wanted to avoid confrontation with others" (the Respondent denies that Ms Slade made any criticisms or comments which were "unfair");

253. Mrs Slade did not know about the protected disclosure at that stage. This claim therefore does not succeed.

121 meetings/appraisals

254. n. Ms Slade failing to hold one-to-one meetings or formal appraisals with the Claimant after 30 July 2020 (the Respondent denies that no one-to-one meetings were held between Ms Slade and the Claimant after 30 July 2020, and avers that formal appraisals were generally done in April/May each year).

255. This allegation pre-dates the first protected disclosure made on 8 September 2020 and therefore cannot succeed.

Because of disclosure

256. (8) Was the Claimant subjected to any of the "detriments" because he had made the "protected disclosure"(s)?

257. This is dealt with above under the analysis of each individual detriment.

RACE AND/OR RELIGION OR BELIEF DISCRIMINATION: S13, EQUALITY ACT 2010

Less favourable treatment

258. (9) For both the Claimant's claim for race and religion or belief discrimination:

259. (9.1) Was the Claimant subject to the following less favourable treatment :-

260. (a) Being suspended; (b) Being removed from duties; and (c) Being considered for dismissal for gross misconduct.

261. The Claimant was subjected to suspension, being removed from duties and being considered for dismissal for gross misconduct.

262. We find that the treatment of suspension, being removed from duties and being considered for a gross misconduct dismissal was less favourable than a hypothetical comparator might have expected.

Because of race and/or religion or belief

263. (9.2) Was such less favourable treatment because of the Claimant's protected characteristic of race and/or religion or belief?

264. In this case there is no suggestion that any of the Respondent's employees made an overt reference to the Claimant's race or religion or belief such as to suggest that these protected characteristics had influenced his treatment.

265. We take account of the fact that there is often not overt evidence of discrimination. We have considered carefully whether there are circumstances or facts from which we might draw the inference that the Claimant's race or religion/belief was a cause or part of the cause of his treatment.

266. We have not identified evidence or facts from which an inference might be drawn that race, religion or belief were a cause of that treatment.

267. The Tribunal found that the Claimant did not establish a prima facie case face of direct race and/or religion or belief discrimination – i.e. he did not satisfy the initial burden on him to establish facts from which a Tribunal could reasonably conclude in the absence of an explanation that discrimination had occurred.

268. The claims of discrimination cannot succeed.

269. (9.3) The Claimant relies upon the following comparators :-

270. (a) Woman of Afro origin (namely Mrs Kelly). (The Claimant is of Indian origin and of Islamic faith) ; and

271. (b) A white male Caucasian (namely, Finnerty) .

272. Given our finding above about about hypothetical comparator, we did not need to consider these actual comparators. Had we needed to consider these comparators, we would have found that they were not in materially the same circumstances, which to our mind were very specific to the Claimant himself and the communication or alleged lack of communication with his immediate manager.

273. The claims of unlawful direct race and religion/belief discrimination fail.

Comment – unfair treatment

274. For the reasons given above, each of the Claimant's claims have not been made out.

275. Although these are not elements of our decision, we make a comment that we feel that the Claimant had right to feel aggrieved due to the circumstances whereby the two year contract which had been discussed at his recruitment was not reflected in documents.

276. More significantly we felt that the Claimant was treated unfairly in being subject to a suspension and gross misconduct disciplinary process for matters which to our judgment seemed to be at worst communication breakdown against the backdrop of multiple problems caused by the exceptional circumstances of the Covid-19 pandemic. It seems to us that the Claimant had provided a regular flow of information to his manager about difficulties in dealing with the LPM teams and detailed evidence about progress. He was new to the organisation. There must have been some onus on Mrs Slade herself as his manager to satisfy herself that progress was being made toward the deadline on 30 September. In that context the decision to subject him to suspension and face a gross misconduct charge was surprising.

277. The suspension and nature of the disciplinary process and in particular the suggestion that it was gross misconduct plainly caused him a great deal of anxiety and was in our view largely unnecessary.

_____

Employment Judge Adkin

Date 13 May 2022

WRITTEN REASONS SENT TO THE PARTIES ON

13/05/2022.

FOR THE TRIBUNAL OFFICE

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 shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

APPENDIX – LIST OF ISSUES

AUTOMATIC UNFAIR DISMISSAL – PROTECTED DISCLOSURE – S.103A ERA

(1)Did the Claimant make the statements alleged and, if so, when? The Claimant relies upon the following two alleged statements only:

a. **"Alleged Disclosure One"**: A disclosure to Ms Slade in a one-to-to meeting on

   30 July 2020 that *"he contemplated raising disclosures formally about the Leasehold Property Managers (another team) not checking service charges accurately and promptly"* (the Respondent denies that the Claimant said this); and

b. **"Alleged Disclosure Two"**: The statements contained within his grievance on 8 September 2020 (the Respondent admits that the Claimant made statements in his grievance on 8 September which amounted to *"protected disclosures"* within the meaning of s.43A ERA).

c. "**Alleged Disclosure Three**" The one to one notes (and specifically, the 1st ,

   2nd 3rd sentences of page 1 of these notes) dated 1st July 2020 to Ms Slade

d. **"Alleged Disclosure Four"**: For the team meeting of 6 July 2020, the Claimant provided a full set of minutes of the 6 July 2020 to Ms Slade and the rest of the Service Charge Team. The specific parts of the notes which the Claimant alleges amount to a protected disclosure are (under his name , points 2 (b), 2 (c) , and
   3.

e. **"Alleged Disclosure Five"**: The Claimant's e mail of 24 August 2020 taken as a whole, which the Claimant alleges amounts to a protected disclosure. In this email, the Claimant disputed his removal from the position of a Service Chnarge manager , and provided Ms Slade with factual statistics of property managers being behind the reviewing schemes. The Claimant also mentioned s 20 B of Landlord and Tenant Act 1985 .

(2) Did the alleged statements constitute the disclosure of *"information"* within the meaning of

s.43B(1) ERA (the Respondent admits this in relation to Alleged Disclosure Two)?

(3) Were the alleged statements *"qualifying disclosures"* within the meaning of s.43B(1) ERA (the Respondent admits this in relation to Alleged Disclosure Two)? The Claimant relies upon:

(a) S.43B(1)(c) ERA in relation to Alleged Disclosure Two and asserts that Alleged Disclosure Two tended to show that the Respondent had breached its legal obligation due to the accuracy (or inaccuracy) of service charges charged to residents.
(b) S.43B(1)(b) ERA in relation to Alleged Disclosure One and asserts that Alleged Disclosure One tended to show that the Respondent had failed to comply with the following obligations under the Landlord and Tenant Act 1985 (the "ACT") relating to service charges and these apply to all the alleged disclosures ; and (c) S 43 B (1) (b) for Alleged Disclosure 3, 4 and 5.

In relation to a breach of a legal obligation, the Claimant alleged that the Act was breached in the following way:-
(i) s 20B, the Act: This requires the service charge notices to be issued on time. The Claimant alleges that the Respondent did not comply with this; and
(ii) s 19 , the Act: reasonableness of service charges Because the Respondent was not checking if the charges were reasonable , the customers would receive inaccurate bills and be overcharged;

(4) It is agreed that if the alleged statements were *"qualifying disclosures"*, they were *"protected disclosures"* within the meaning of s.43A ERA because the statements were made to the
Claimant's employer within the meaning of s.43C(1)(a).

(5) Was the Claimant dismissed because of the alleged statement(s) (if they amounted to *"protected disclosures"*)?
It is agreed that the Claimant's employment terminated on 6 January 2021. The Respondent asserts that the Claimant's employment terminated on this date because this was the end of the
Claimant's fixed term contract ("**FTC**"). The Claimant asserts that his FTC was due to end on 6 December 2021 (the Respondent denies this).

DETRIMENTS – PROTECTED DISCLOSURE – S.47B ERA

(6) Did the Claimant make *"protected disclosures"* within the meaning of s.43A ERA and, if so, when? The Claimant relies upon the same alleged *"protected disclosures"* as alleged in his
'Automatic Unfair Dismissal' claim.

(7) Was the Claimant subjected to the treatment which he alleges and, if so, does that treatment constitute *"detriment"*(s) within the meaning of s.47B(1) ERA? The Claimant relies upon the following alleged *"detriments"* only (quotes taken from the Grounds of Complaint):

a. being removed from his contractual role of 'Service Charge Manager' from 24 August 2020 (the Respondent admits that the Claimant was transferred from this role to a different role on 24 August 2020);
b.Ms Slade not holding a *"pre-investigatory meeting"* and/or carrying out only the *"the minimum"* by way of *"pre-investigatory meeting"* between 25 August 2020 and 6

September 2020 (the Respondent denies this);

c.being suspended by Ms Slade on full pay from 7-16 September 2020 (the Respondent admits that the Claimant was suspended);

d.Ms Sylvan restricting the Claimant's access to the Respondent's facilities from 7-16 September 2020 (the Respondent admits that the Claimant's access to facilities was restricted as this is standard practice of the Respondent when an employee is suspended as stipulated in the Respondent's disciplinary procedure);

e.the decision by Ms Slade to allocate the Claimant to other duties (working on the

'Service Charge Estimates' project) from 17 September 2020 (the Respondent admits that the Claimant was allocated to other duties);

f. the Respondent holding an unreasonable and sham investigation in the following manner which the Claimant alleges (which the Respondent denies):-

g. Ms Reddick did not refer to any of the one to one notes dated 1st July 2020;

h. The Claimant not receiving any one to one notes with Ms Slade;

i. There was not enough investigation as none of the managers had been interviewed. Only the Claimant was investigated.

j. The Claimant was allegedly asked *"culpability questions"* by Ms Sylvan during the investigation meeting on 14 September 2020 when *"HR should be limited to advising on law and procedure"* (the Respondent denies this) .The Claimant alleges that the following questions were asked :-

- Who did the Claimant confront in his team, suggesting that the Claimant was not proactive enough.
- Did one of the officers slowness contributed to the situation. . There was no consideration by Ms Sylvan and Ms Reddick as to whether Slade had invented reasons because of her hidden agenda of denying that there were any issues with the property managers.

k. The Respondent unreasonably failing to investigate the Claimant's grievance submitted on 8 September 2020. (The Respondent admits that it did not issue an outcome to the Claimant's grievance, but denies that there was a complete or unreasonable failure to investigate);

l. Ms Reddick concluding in her report dated 30 September 2020 that *"a spreadsheet summary which had been sent to Ms Slade by the Claimant should instead have been provided in a different format and that the Claimant intentionally breached the code of conduct by failing to keep an eye on delays and had interaction problems"* (the Respondent admits this insofar as it is an accurate summary of the contents of Ms Reddick's report);

m. Ms Slade making *"unfair criticism and comments"* in her witness statement prepared for the investigation, specifically that *"the Claimant had problems with communication and did not carry out what he was requested to do"* and *"ma*[king] *out that the Claimant was not persuasive or influential enough and that he wanted to*

avoid confrontation with others" (the Respondent denies that Ms Slade made any criticisms or comments which were *"unfair"*);

n. Ms Slade failing to hold one-to-one meetings or formal appraisals with the Claimant after 30 July 2020 (the Respondent denies that no one-to-one meetings were held between Ms Slade and the Claimant after 30 July 2020, and avers that formal appraisals were generally done in April/May each year).

(8) Was the Claimant subjected to any of the *"detriments"* because he had made the *"protected disclosure"*(s)?

RACE AND/OR RELIGION OR BELIEF DISCRIMINATION: S13, EQUALITY ACT 2010

(9) For both the Claimant's claim for race and religion or belief discrimination:

(9.1) Was the Claimant subject to the following less favourable treatment :-

(a) Being suspended;

b) Being removed from duties; and

c) Being considered for dismissal because of dismissal for gross misconduct.

(9.2) Was such less favourable treatment because of the Claimant's protected characteristic of race and/or religion or belief?

(9.3) The Claimant relies upon the following comparators :-

(a) Woman of Afro origin (namely Mrs Kelly).(The Claimant is of Indian origin and of Islamic faith) ; and

(b) A white male Caucasian (namely, Finnerty) .

The Claimant does not know what their religion is so this will be provided as part of amended Grounds of Resistance.

REMEDY

(10) To what compensation, if any, is the Claimant entitled?

(11) Should any award for compensation be increased or decreased because of unreasonable failures by the Claimant or the Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

(12) Should any award of compensation be reduced due to any unreasonable failure by the Claimant to mitigate his loss?

JURISDICTION – LIMITATION

(13) In relation to being removed from his role as a service charge manager from 24 Aug 2020 and Ms Slade allegedly not holding pre investigatory meeting, and or carrying out only the minimum , between 25 Aug 2020 and 6 Sept 2020, have these been presented outside the applicable primary time limits?

(a) The Respondent admits that the Automatic Unfair Dismissal (protected disclosure) claim has been presented within time;
(b)The Respondent avers that any discrimination claim in relation to alleged acts or omissions prior to 4 September 2020 has been presented outside the primary time limit prescribed by s.123(3)(a) EqA.; and
(c) The Respondent avers that any Detriment (protected disclosure) claim in relation to alleged acts or omissions prior to 4 September 2020 has been presented outside the primary time limit prescribed by s.48 ERA.

(14) If so,

(a) In relation to the discrimination claim(s), have the claims been presented within such other period as the Tribunal thinks just and equitable; and
(b) Iin relation to the Detriment (protected disclosure) claim, was it reasonably practicable for the Claimant to have presented the claim within time and, if not, was the claim presented within such further period as was reasonable?