EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 15/12/22

Claimant: Ms M Griffiths

Respondents: 1 Scarista Ltd
2 KKR Private Credit Opportunities Partners LP
3 Alcentra Ltd

Representation:
Claimant: in person
R1 Mr K Wilson (Counsel)
R2 Mr J Susskind (Counsel)
R3 Ms L Robinson (Counsel)

JUDGMENT

The claims against the Second and Third Respondents are struck out.

REASONS

1. The above judgment followed an OPH to consider the Second (R2) and Third (R3) Respondents' (R3) applications for strike out or deposit of the claims against them.

The claims

2. The ET1 claimed harassment, discrimination, "victimisation as a result of whistleblowing", and breach of contract. The Claimant (C) had ticked the boxes for "race", "religion or belief", and "sex" discrimination. The ET1 also referred to automatic unfair dismissal, constructive dismissal, unlawful deduction from wages, and "any other claims which may come to light".

3. On 17 August 2022, in a hearing before me, C's claims of religion/belief discrimination, victimisation, and harassment were dismissed upon withdrawal.

4. At this juncture C's remaining claims were "detriment in employment contrary to section 47B ERA 1996, automatic unfair dismissal contrary to section 103A ERA, direct race discrimination, direct sex discrimination, and breach of contract."

5. On 7 October 2022, C withdrew her claims for breach of contract.

6. On 25 November 2022, C withdrew her claim for direct sex discrimination against R2 and R3.

7. It is agreed that R2 and R3 were not C's employer (at least in the ordinary sense of the word[1])

[1] C contends that R2 and R3 were her employers for purposes of her whistleblowing detriment claim under the extended definition in section 43K(2)(a) ERA 1996

and that R1 was (and pursuant to the re-instatement order is) her employer. Hence R2 and R3 cannot be liable under section 103A. The remaining two claims which C wishes to pursue against R2 and R3 are detriment contrary to section 47B ERA 1996 and race discrimination.

8. At the hearing on 17/8/2022 I had discussed with C what her race discrimination claim consisted in and she had told me it was a direct race discrimination claim. In the CMO issued that day I recorded what she told me as follows: "*The direct race discrimination claim is that because of her nationality (French/European) C was subjected to less favourable treatment than British people in that she was (i) dismissed and (ii) when dismissed, dismissed summarily with PILON and not consulted with or treated in a more considered manner."* She made no reference before me on that occasion to an indirect race discrimination claim or the application of a PCP relating to the enforcement of Russian sanctions.

9. On 17/8/22 I directed C by 26/8/22 to provide further particulars, interalia of the following: '*Whether the direct race discrimination claims are being pursued or withdrawn, and if they are not withdrawn, the names of her comparators; Whether C wishes to pursue her claims generally against the Second and Third Respondents or whether those claims are withdrawn, and if they are not withdrawn, exactly what is being claimed against these Respondents and why.*"

10. The particulars she provided on 26/8/22 included the following: *"Race discrimination claim. I rely on the fact that my colleague Hugh O Donnell who was also European seems to have been subjected to the same treatment (dismissal) and that Equiom continues to employ Graham Marsh and retain the services of Roddy Balfour, both of which are British. I also rely on the fact that Graham Marsh was subject to more favourable treatment than me during my employment.'*

11. To last sentence of these particulars is an extension of C's direct race discrimination case as described to me and recorded in the CMO dated 17/8/22 because it refers to pre-dismissal disparities of treatment between C and Graham Marsh.[2]

12. C's further particulars also stated: "*At this stage I am continuing the claim against all 3 Respondents for the following reasons: In his Witness Statement and as recorded in the Interim Relief judgement David Foster stated that my dismissal was ran past Equiom's future shareholders- KKR and Alcentra. As per paragraph 4 X above under the "breach of contract section", in practice Equiom appears to be ran by KKR and Alcentra who seem to be involved with operational decisions.*[3] *I was told by Equiom that one of the breach of contract I*

[2] The only particulars which C has given of the alleged disparity of treatment (unrelated to dismissal) of her and Graham Marsh is in paragraph 9 of her further particulars of claimed whistleblowing detriments, which reads as follows: "*Not being consulted over a Christmas event being organised for the London intermediaries despite having been recruited to be close to the London intermediary community. My colleague Graham Marsh was able to invite 70-80 individuals to this event whilst I was told to limit my invitations to a handful.'*

[3] Paragraph 4X includes the following: "*How can I have trust and confidence in the company when I had clear indication that the company was not being run by the Executive Committee but instead future shareholders I did not sign up to work with? Key operational decisions seemed to be made by KKR and Alcentra – to the extent that, as per David Foster's Witness Statement for the Interim Relief hearing, my dismissal was run past them – when I had never even heard of Alcentra in my life, it is not who I signed up to work for and as far as I understand it was not even a shareholder at the time of my dismissal, but rather a "future shareholder / shareholder subject to regulatory approval"? When I enquired about the 0.5% equity I was expecting I was told: "We appreciate this is a change of the intention set out to you when you joined us (...) please accept that we are to a certain extent, in the hands of our shareholders and other stakeholders as to how quickly this can be progressed" then later " in your case there was every intention to allocate equity as is reflected in the DSA [Director Service Agreement] (...) until such*

experienced (clause 6.4.) was "in the hands of Equiom's (future) shareholders".[4] *; and that Equiom's (future) shareholders were behind one of the detriments I experienced (see paragraph 15 under detriment)*[5]*. Judge Burns confirmed at the Interim Relief hearing he could see a link between the Second and Third Respondents and my claims*[6]*. If KKR and Alcentra are able to demonstrate that they were not involved in any of the decision making behind events that impacted me, I will drop my claims against them."*

13. In response to the above pleadings and particulars R2 and R3 launched their applications which are before me today.

14. In written submissions served on 12/12/22 for purposes of the OPH today, C gave further details of her race discrimination claim against R2 and R3 as follows: '*Very succinctly in respect of the race discrimination claim my case is as follows: shortly before I was dismissed, I was repeatedly asked by the first respondent to confirm my nationality and whether I held any other nationalities. I am French and hold no other nationalities. I had spoken up about our approach to Russian sanctions in our Private Wealth Committee meeting and did not support the approach that was being suggested. I believe the repeated requests for my nationality were related to the Russian sanctions – in particular, as quoted from an official EU website: " EU Sanctions apply within the jurisdiction (territory) of the EU, to RY nationals in any location; to companies and organisations incorporated under the law of a Member State" Source https://www.eeas.europa.eu/eeas/european-union-sanctions_en#10706 This meant that a European national, such as me who is French or my former colleague Hugh who was Irish, could not deal with Russian clients even if located in a jurisdiction where the Russian sanctions did not apply. My case is that R1, under the control/instructions of R2 and R3 were approaching the Russian sanctions in a way that discriminated against certain senior employees, in particular E.U nationals"*

15. I do not agree with C's interpretation of the wording quoted by her in the previous paragraph, but assuming for present purposes she is correct, this is a proposed indirect race discrimination claim with a PCP of not being under the obligation in EU law not to deal with Russians.

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time as the change of ownership is completed there is no equity to allocate and no indication of what may be available and to whom".

[4] Clause 6 of C's employment contract relates to remuneration and benefits and although clause 6.4 itself was not provided in the OPH bundle, what C is referring to here is her claimed entitlement to 0.5% in the equity of R1

[5] Paragraph 15 refers to "*being told on the 4th of July 2022 that the crypto proposition I had worked on tirelessly for a year, at the request of David Foster was no longer something I should focus on."*

[6] In paragraph 12(IX) of the interim relief judgment against R1 on 17/8/22 I stated as one of the reasons why I found then that C had a "a pretty good chance" of succeeding in her section 103A claim: "*There appears to be a link between the KKR joining or planning to join R as shareholder and C's dismissal. C and other employees were told on 9/6/22 that KKR was going to invest heavily in the Respondent "subject to regulatory approval". David Foster's witness statement states that he notified the new shareholders of C's impending dismissal on 16/6/22. I accept C's submission that this was odd and unusual behaviour at the very least. By then C had made it clear that she was well-informed, inquisitorial and persistent in making well-focused complaints about the detail of the Respondent's regulatory short-comings - ie she was exactly the type of senior employee who might be seen as a potential risk to the finalisation of the KKK investment which itself was dependent on the removal of regulatory obstacles*.". At the hearing on 17/8/22 I was not informed that the "notification of the new shareholders' was carried out pursuant to a lock-out agreement to which R2 and R3 were parties, as has been explained today, and which puts the point in a somewhat different light.

16. It is not a claim which was mentioned in the ET1, or at the hearing on 17/8/22 or in the further particulars which C served on 26/8/22 in which she was required to explain exactly what her claims were against R2 and R3 and why.

17. Both Counsel for R2 and R3 submitted that C's claims should be construed within the limitations outlined in her ET1 or failing that in her further particulars she provided in August, and that she should not be permitted to extend her claim to include the indirect race discrimination claim. They submitted that it is unreasonable and unfair to other parties and undermining of the Tribunal process for any Claimant to fail to properly plead or particularise and then seek to make amends only after Respondents have incurred costs and spent time applying in relation to the case as it has been brought.

18. Both the extensions to her race claim referred to above require leave to amend. No formal application to amend is before me but C is a litigant in person and the claim is at an early stage.

19. I do not allow - as against R2 and R3 - the first extension - which if allowed would have brought in as a direct race claim the alleged disparity of treatment of Graham Marsh during his and C's employment, and I do not allow it inter alia because the only particularised example of this is in relation to the number of guests which C was allowed to invite to an R1 Christmas party, which decision it would be highly unlikely that R2 and R3 would have had anything to do with.

20. I do not allow - as against R2 and R3 - the second extension - which if allowed would have brought in an indirect race claim based on C's ability to deal with Russians. The reasons for this include the timing of the emergence of this proposed claim, in the context of the procedural history, as well as the fact that, for the reasons given below, I have concluded that this claim, as well as the original direct race claim against R2 and R3, would have no reasonable prospect of success.

21. In reaching these amendment decisions I have applied the Selkent principles.

22. I therefore find that the claims against R2 and R3 which are properly before me are as follows:

23. The direct race discrimination is that they directly discriminated against C simply because of her French nationality and that the unfavourable treatment was her dismissal and manner of dismissal.

24. The whistleblowing detriment claim is that because of the claimed protected disclosures (as to which see paragraphs 10(i) (ii) and (iii) of the Interim Relief Judgment dated 17/8/22), R2 and R3 subjected C to detriment namely (i) stopping her getting equity as part of her contractual remuneration from R1 (ii) causing an instruction to be given that she should no longer focus on a crypto proposition and (iii) causing or requiring her dismissal by R1.

Conduct of the OPH

25. C suggested that the OPH had been convened to consider applications to strike out the whistleblowing claims but not the race discrimination claims.

26. R3 had applied on 14/11/22 for "the claim" to be struck out. The letter of application went on to refer specifically to the breach of contract claims and whistleblowing claim but not to a race claim, as apparently R3 took the erroneous view at that point that there was no such claim against it.

27. C replied to this application on 25/11/22 and in so doing made it clear that she was claiming race discrimination against R3 and advancing her reasons opposing the strike-out of such a claim.

28. On 2/12/22 R2 applied for the claims generally against it to be struck out.

29. On 5/12/22 I issued a notice that "*There will be an OPH on 15 December 22 by CVP starting at 10am allowing one day to consider the Second and Third Respondents' applications for strike out or deposit of the claims against them*".

30. In the circumstances I find that the applications were clearly understood by C to be directed against all her extant claims against R2 and R3 and that adequate notice of the OPH today was given.

31. I heard evidence from Lord Balfour for C, and then from Mr O Gill (a representative of KKR Credit Advisors (EMEA) LLP) and from Mr A Walker, MD of R3. I was referred to documents in a 359-page bundle and to written skeleton arguments from each of the Respondents, and to a submissions statement from C served on 12/12/22.

32. Lord Balfour was cross-examined by Ms Robinson for about ten minutes. I allowed C one hour each to cross-examine each of the Respondents' witnesses. Final submissions were limited to 45 minutes from each party. The hearing ended at about 18h30

Relevant Law

Generally

33. A claim may be struck out where it has no reasonable prospects of success: rule 37(1)(a) of the Employment Tribunal Rules 2013.

34. In considering strike-out the claims should be taken at their highest.

Discrimination

35. It is well-established that discrimination claims should not be struck out before hearing the evidence, "*except in the most obvious and plainest cases*" (Anyanwu v South Bank Student Union [2001] UKHL 14; [2001] ICR 1126 (HL) "Anyanwu" at §24). However, even in Anyanwu,

it was noted they are not immune from strike out because *"[t]he time and resources of the employment tribunals ought not to taken up by having to hear evidence in cases that are bound to fail"* (see Anyanwu at §39).

36. Since Anywanwu, more recent authorities have emphasized the importance of the Tribunal adopting a pragmatic approach when considering strike out of discrimination claims. In Chandhok v. Tirkey [2015] ICR 527 ("Chandhok") at §20, Langstaff P (citing Anyanwu) noted that discrimination claims could be properly struck out, among other things): "*where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which* (per Mummery LJ in Madarassy v Nomura International plc [2007] ICR 867 , para 56): "*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."*

37. Similarly, in Ahir v. British Airways Plc [2017] EWCA Civ 1392 ("Ahir") at §16, Underhill LJ stated: "*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment."*

38. In Ahir at §19, Underhill LJ also noted that "*where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it"*. In Ahir at §21, Underhill LJ noted that the appellant's "*case theory"* was "*not only speculative but highly implausible*". Thus, at §23, Underhill LJ held that it was "*wholly unsurprising*" that the employment judge struck out the appellant's case, bearing in mind its "inherent implausibility" and that fact that the "*the appellant could point to no material which might support*" or provide a basis for it.

39. It is therefore clear that, if a respondent's pleaded case sets out an "*ostensibly innocent sequence of events*", it is not enough merely for a claimant to make an assertion of unlawful treatment without identifying potential supportive evidence or a proper basis for this, all the more so if that assertion is *"speculative", "highly implausible" or "inherently implausible*."

40. For purposes of the race discrimination claim against R2 and R3, C relies on the following parts of the Equality Act 2010, it being her case as reasonably construed that R2 and R3 knowingly instructed caused or induced R1 to discriminate against her.

"Section 111 Instructing, causing or inducing contraventions
(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).
(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.
(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything

which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—
(a) …..
(b) by C, if C is subjected to a detriment as a result of A's conduct;

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

……..

Section 112 "(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention)…

41. It is agreed that these provisions would permit R2 and or R3 to be liable for race discrimination applied by R1 to C provided that, and only provided that, R2 and R3 had "knowingly helped" R1 in applying that discrimination.

Whistleblowing law

42. I assume in C's favour that a similar conservative approach as that applicable to discrimination claims should be adopted towards applications to strike-out whistleblowing detriment claims.

43. C relies on section 47B ERA 1996:

47(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.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

44. C relies on section 43K of the 1996 Act which includes

"43K.— Extension of meaning of "worker" etc. for Part IVA.
(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—
(a) works or worked for a person in circumstances in which—
(i) he is or was introduced or supplied to do that work by a third person, and
(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them, and any reference to a worker's contract, to employment or

to a worker being "employed" shall be construed accordingly.
(2) For the purposes of this Part "employer" includes—
(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged [...]"

45. The authority Sharpe v Worcester Diocesan Board of Finance Ltd [2015] ICR 1241 at [7] held that "*Section 43K(1)(a), on its true interpretation requires a person to have a contract with the person of whom he is said to be a worker*" and at [8] ("*In the absence of a contract between the parties, neither section 43K(1)(a) or (b) can apply*." I refer to this as "the Sharpe principle"

46. C referred me to the authority Dr Day v HEE and others 2017 EWCA Civ 329 at paragraph 29 in particular which appears to cast doubt on the Sharpe principle, but which did not expressly overrule it.

    Facts which are not in dispute (or at least which appeared to me not to be in dispute, and which, if still dispute, are in my view highly likely to be found by the FMH tribunal).

47. C has sued as R2 "KKR Private Credit Opportunities Partners LP". There is in fact no such legal entity.

48. 6 KKR entities (as listed in paragraph 8 of Mr Gill's witness statement) and R3 became secured lenders to the Equiom group (of which R1 is part) in 2019 when they supported the acquisition of Equiom by Varde Partners and Lloyds Development Capital who were the equity owners. [7]

49. If this claim was to proceed sensibly against KKR, those 6 KKR entities would have to be substituted as R2 (1-6). (I refer to them hereafter as "R2". If I had reached different conclusions about the merits I would have made an order to this effect. In the event I have not.)

50. As a result of financial difficulties, the Equiom group underwent a financial restructuring in early 2022. This was done in tandem with R2 and R3.

51. By no later than March 2022, R2 and R3 were exercising a degree of de facto control and influence over the conduct of R1's affairs. For example, when C raised a complaint about the equity in R1 which she thought she was entitled to, she received the following reply from R1's H.R. on 23/3/22: "*we are also not yet in a position to know what the new shareholders intentions are for allocation. We appreciate this is a change to the intentions set out to you when you joined us and undertake to let you know as soon as we can. Please accept however that we are, to a certain extent, in the hands of our shareholders and other stakeholders as to how*

[7] According to Mr Susskind's instructions the various KKR entities are in fact companies incorporated in Ireland.

quickly this can be progressed". The "new shareholders" was a reference (albeit an inaccurate one at the time) to R2 and R3.

52. In the course of that restructuring, and pending its completion, certain of its Equiom's parent entities entered into a "lockout" agreement with Equiom's lenders including R2 and R3 on 7/4/22.

53. R2 and R3 were both "Junior Lenders" under the agreement.

54. Clause 10.2(c) of the Restructuring Lock Up Agreement required the Equiom parties to "*consult with the Junior Lenders for not less than five Business Days prior to appointing, dismissing or replacing any director or senior management personnel of any member of the Group*." Clause 10.2(d) provided: "*None of the Parent or the Borrower (a reference to the Equiom entities including R1) shall appoint, dismiss or replace any of its directors or senior management personnel without the prior written consent of the Junior Lenders*.'

55. There was a meeting in Equiom's Jersey office on 6/6/22 hosted by Equiom's Executive Committee and also attended by Mr Walker plus Brian O'Connell (a more junior colleague) on behalf of R3. Mr Gill joined by telephone on behalf of R2. The matters discussed included the fact that R1 was planning to carry out redundancy dismissals in its Business Development Team. (BDT)

56. Mike Thomas, who had been appointed director of R1 at R3's request in early 2022, was appointed interim CEO of R1 and Farah Ballands, a restructuring consultant employed by R3, also took a leading role in R1 at about this time.

57. On the 8/6/22 June there was an online "townhall" where R1 employees were introduced by Ballands to R2 and R3 as "*our new shareholders subject to regulatory approval*".

58. On 16/6/22 Mr Gill on behalf of R2 and Mr Walker on behalf of R3 received a pro forma consultation notice from a firm called Latham and Watkins, at the request of Equiom, regarding the intended dismissal of C. This attached some basic facts about C's employment including "*Melanie's job title is "Head of Client Solutions - Private Wealth". The proposal is to make MG redundant without having to follow a selection process since she is the only employee in that org category. She does not qualify for statutory redundancy pay since she has been employed for less than two years*." The information stated that she was based in the UK and did not make any reference to C's nationality or French background. Shortly afterwards Mr Gill replied by email "OK". There is no documentary evidence that Mr Walker replied in writing.

59. C did not know either Mr Gill or Mr Walker or Mr O'Connell - she had never met them and had had no prior dealings with them. Before her dismissal she had never heard of the existence of R3.

60. Various other employees of R1 were dismissed or departed from their employment in R1 at about the same time as C was dismissed including Gavin Devitt, Kevin Bardon, Steve O Sullivan, Hugh O Donnell and Mark Porter. It is not suggested that all these were EU nationals or whistle-blowers.

61. On or around 26 August 2022 R2 and R3, became the new majority investors in the Equiom Group, following receipt of the relevant regulatory approvals for the transaction. At the same time R3 became a majority shareholder and took effective formal control of R1.

    The main fact in dispute for purposes of the OPH.

62. This concerned the degree of particular scrutiny and oversight which Mr Walker on behalf of R3 gave to C's proposed dismissal on 6 June 2020.

63. Lord Balfour gave evidence for C as follows: "*in early June 2022 I had a telephone call with David Foster at that time head of equity on private wealth and based in Jersey. …Mr Foster start of the conversation by saying it was "a tricky day in Jersey" and I quote approximately "we have Alcentra over here and they are going through the staff list with a toothcomb checking on the need for and effectiveness of each member staff. I want to tell you that although she doesn't work here, they are asking me about Melanie too"… The reason he highlighted Melanie was that she had been employed originally in 2020 with her high-level private banking background to be my successor on clients and professional relationships… the conversation stuck in my mind because after the earlier bouts of staff lost it was evident that the investors taking on Equiom's substantial debt were likely to be aiming for further cost-cutting and which could very likely upset my succession, as turned out to be the case…*"

64. In his oral evidence Lord Balfour explained that it was quite normal and to be expected when a restructuring is taking place at the behest of creditors, that the creditors will want to make a careful check of the staff list and of other expenses of the debtor to see if economies (described by him as "*penny-pinching*") could be made.

65. I found Lord Balfour to be a credible witness. Although what he was told by Mr Foster is hearsay, (and I make no final finding about this so as to bind any FMH TribunaI,) it seems likely to me that what Mr Foster was telling Lord Balfour was a reasonably accurate account of part of Mr Walker's (and/or Mr O'Donnell's under Mr Walker's supervision) activities in Jersey on 6/6/22, which included going through employee details, including those of C "*with a toothcomb*".

66. Mr Walker in his oral evidence denied that he had done so and said he had taken no interest in the identity of the R1 employees whose proposed dismissals were discussed on 6/6/22, and he denied having had any actual knowledge of the existence of C until he received the email (which he claims he did not reply to) on 16/6/22. He was unable to account for or explain why Mr Foster should have given this claimed account to Lord Balfour.

67. However, to some extent Lord Balfour's evidence does more to hinder than to help C's case generally. The difficulties from C's point of view are two-fold;

68. If Lord Balfour's evidence was to be accepted, it would suggest a degree of scrutiny of C by R3 on 6 June 22, but that scrutiny of C was of her merely as one on a list of all other employees - not only of EU nationals - and not only of whistle-blowers).. ("*Alcentra are here going through the staff list with a toothcomb checking on the need for and effectiveness of each member of staff*."). This is the opposite of singling-out the Claimant for some prohibited reason.

69. Secondly the scrutiny appears to have been carried out to check on the "*need for and effectiveness"* of the staff - ie for purposes of "*penny-pinching*" which Lord Balfour agrees is usual in such situations.

70. Hence the evidence would tend to undermine a finding that either previous whistle-blowing by the Claimant or her nationality were the motivations for any R2/3 scrutiny and any dismissal which flowed from such scrutiny.

Conclusions about the race discrimination claims against R2 and R3.

71. C could succeed against R2 or R3 if she could show that they or either of them knowingly helped R1 to dismiss her because she was French, or (on the proposed indirect discrimination claim) knowingly helped R1 to apply to C a PCP that, in order to remain employed, she should not be debarred as an EU national from dealing with Russians.

72. C's nationality was not included in the proforma consultation information which was sent to either R2 or R3 on 16/6/22.

73. In oral evidence evidence Mr Gill or Mr Walker said that at the time (in June 2022 when the dismissal appears to have been decided on) they really had no interest in the details of C or in her proposed dismissal, hence Mr Gill's very brief answer on 16/6/22 and hence Mr Walker not even bothering to reply at all. C did not put to either in cross-examination that they knew about

her nationality or her position *vis a vis* Russian sanctions, or that as a French national based in London she would be prohibited under EU law from dealing with Russians. When I then questioned them, they denied having had any knowledge of C's nationality.

74. On the other hand, we have Lord Balfour's evidence suggesting that R3 was going through C's (and other staffs's) details with a "toothcomb" on 6 June. If that occurred it would not be impossible that R2 and R3 were aware of C's nationality by 7/6/22.

75. However, as I have already observed, Lord Balfour's evidence does not really support a finding that, even if R2 and R3 were involved, C's race was directly or indirectly the cause of her dismissal.

76. The material which C has now put forward about Russian sanctions is set out in paragraph 14 above. This material was not mentioned in C's ET1, nor in her further particulars in late August (in which I had directed her to set out her case exactly), and emerged only in her written submissions served on 12/12/22. To say the least, it is surprising that C in particular, who has already displayed in this matter her conspicuous analytical skills, did not mention it earlier. My impression is that it is an afterthought.

77. She elected not to serve a witness statement and did not give evidence on oath at the OPH.

78. C's written submissions do not give the names of the persons whom she claims asked her about her nationality, nor the dates when they did so, nor do they suggest that the claimed questions were asked in the context of any discussion about Russia or sanctions. So, even if I was to treat the submissions as an indication of the evidence C would give about this at trial, the evidential link between the questions and Russian sanctions is absent. Nor is there any suggestion made in the submissions (nor indeed was there in C's cross-examination of either Mr Gill or Mr Walker) that her answers to such questions had been passed on to or otherwise known by R2 and or R3 at the material time.

79. The claim is therefore a mere assertion and speculation without current evidence that would establish even a prima-facie case. I think it is highly unlikely that anything would turn up in discovery/disclosure that would provide the evidence that is now lacking.

80. I note also that C started her claims by claiming amongst other things not only constructive unfair dismissal, (which on any view was completely inappropriate), but also, as against all

Respondents, discrimination on the grounds not only of race, and sex, but also on the grounds of "religion or belief". Of these claims all but the race claim have subsequently been withdrawn against R2 and R3. This scattergun approach tends to suggest a lack of any real conviction on the part of C that she has been discriminated against because of any particular protected characteristic.

81. The race discrimination claims must be struck out as having no reasonable prospect of success.

Conclusions about the whistle-blowing detriment claims against R2 and R3

82. C as against R2 and or R3 seeks to rely on the extended definition of employer in section 43K(2)(a). She submitted that they substantially determined the terms on which she was engaged by virtue of: "*a) having control over my dismissal; b) having control over any share allocation I would receive; c) being in receipt of confidential information about me; d) dictating the projects I was involved in day to day and e) having the ability to remove and/ or include members of the board, who in turn, would decide on my dismissal."*

83. However, in order for C to be able to rely on the extended definition of employer in section 43K(2)(a) she would have to have been a "*worker falling within subsection 43K(1)(a)".* She did not fall within that subsection because she was not (and does not contend that she was) introduced to work for R1 by either R2 or R3. Hence, even if as she submits, R2 and R3 did substantially determine terms of her work, they were not her deemed employer.

84. Alternatively, C submitted that R2 or R3 or Oliver Gill and Alex Walker were agents of R1 and so could be brought within the class of potentially liable entities referred to in section 47B(1A)(b). She developed this submission as follows: "*It seems that defining agency is not as straightforward as a layperson might think and, again, fact based. I understand that there are two types of agency: 1) actual, either express or implied and 2) apparent, or "ostensible"- where the principal 's words or conduct would lead a reasonable person in the third party's position to believe that the agent was authorized to act, even if the principal and the purported agent had never discussed that relationship. … I am not entirely clear on the relationship between R1 and R2 &R3 – R2 & R3 seem to be described by R1 to employees and the wider public as "shareholders" but in various correspondence R2 and R3 have used the terms "Junior Lender", "secured lenders", "majority investor", "secured creditors", "owners"- whatever the relationship is, it is fair to assume R2 and R3 either receive money from R1 in the form of interest payments, or expect to receive money in future when they exit the business. There are clearly contracts where they are all parties. So in one way or another R1 are paying R2 and R3 for a service they provide and it is clear it extends beyond the provision of capital. It appears to me, that in practice, R1 is paying R2 and R3 to get them to profitability as soon as possible and in doing so have outsourced decision making to R2 and R3- akin to assigning a project to a consultant, entrusting that consultant with all decision making deemed necessary to achieve the objective. Essentially it seems to me R1 surrendered all control to an agent to avoid bankruptcy."*

85. I regard this submission as having no reasonable prospect of success.

86. It is plain that R2 and in particular R3 and Messrs Gill and Walker on behalf of R2 and R3 intervened in the affairs of R1 in the interests of and on behalf of R2 and R3 to prevent or reduce their losses as secured investors, and in order to advance their own business interests.

87. By March or April 2022 R2 and R3 had intervened and started taking over de-facto control of R1 to ensure that it was run in a manner best suited to advancing and protecting R2 and R3's interests as creditors, which control was formalised by the lockout agreement in April and finalised and by R3 taking over R1's equity in August 2022. In my view the submission that this was because R1 had appointed R2 or R3 to act as its agent would be bound to fail.

88. C did not submit that R2 or R3 were fellow workers employed by R1 as contemplated by section 47B(1A)(a).

89. Therefore, though it is likely that a FMH Tribunal would find that in practice R2 and R3 were to a significant degree "*calling the shots*" regarding the conduct of the internal affairs of R1 in the months running up to and at the time of C's dismissal in July 22, the Tribunal does not have jurisdiction over R2 and R3 for purposes of the whistle-blowing detriment claim, so it has no reasonable prospect and must be dismissed at this stage.

90. In reaching this conclusion it is unnecessary to decide whether the Sharpe principle is still good law.

91. Even if the Tribunal had had jurisdiction in this regard over R2 and R3, I would still have struck out the whistle-blowing claims against them. There is no actual evidence that C's claimed PDs, or that she had made them, were ever communicated to R2 or R3, and the point was not put to Messrs Gill or Walker in cross-examination. When I asked them, they denied having had any knowledge of the claimed PDs.

92. C made it clear that she is simply speculating about this and that she hoped that, if her claims were not struck out, something would turn up at the discovery and disclosure stage which would provide some evidence to support them. Again, I think it is highly unlikely that this would be the case.

J S Burns Employment Judge
London Central
15/12/2022
For Secretary of the Tribunals
Date sent to parties : 19/12/2022