EMPLOYMENT TRIBUNALS

Claimant: **Mrs Princess Shelia Elliott**

Respondent: **Barnet & Southgate College**

JUDGMENT having been given at the hearing and reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, reasons are set out as follows.

REASONS

The case

1. The claimant claimed whistle-blowing (or protected disclosure) detriments, disability discrimination, race discrimination and breach of contract. The respondent denied liability. At a hearing of 8 May 2019 Employment Judge Palmer identified the relevant claims and drafted a list of issues. By the final hearing the claimant withdrew her complaint of disability discrimination.

The law

1. The relevant applicable law for the claims considered is as follows.

Whistle-blowing detriments

2. The Public Interest Disclosure Act 1998 ("PIDA") provided for special protection for "whistle-blowers" in defined circumstances. The purpose of the PIDA is to permit individuals to make certain disclosures about the activities of their employers without suffering any penalty for having done so. The aim is to give protection to workers (which is wider than employees) who disclose specified forms of information using the procedures laid out in the Act. That protection is achieved through the insertion of relevant sections into the ERA which focuses on providing protection to workers in cases of action short of dismissal which has been taken against them, as well as dismissal itself, following their disclosure of information.

3. S47B(1) Employment Rights Act 1996 ("ERA") deals with non-dismissal detriments. It states that:

> 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.

4. In order to gain protection from an alleged unlawful detriment, s43B ERA provides that the protected disclosure in question must be a "qualifying disclosure"; that the claimant must have followed the correct procedure on disclosure; and that the claimant must have suffered the detriment as a result of it.

5. Under s43B(1) ERA a qualifying disclosure means one that, in the reasonable belief of the claimant, is made in the public interest and tends to show one or more of the following:
   (a) a criminal offence has been committed or is likely to be so;
   (b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject;
   (c) a miscarriage of justice has occurred or is likely to occur;
   (d) the health and safety of any individual has been, is being or is likely to be endangered;
   (e) environment has been, is being or is likely to be damaged;
   (f) information tending to show any matter falling within any of the above has been, is being or is likely to be deliberately concealed.

   In this instance, we are dealing with s43B(1)(b) ERA and also s43B(1)(d) ERA.

6. The whistle-blower must establish a reasonable belief that the information disclosed tends to show 1 or more of the s43B(1)(a)–(f) category. The belief can be reasonably held and wrong belief. Reasonable is subjective followed by an objective test: see *Babula v Waltham Forest College [2007] EWCA Civ 174*.

7. There must be a *disclosure* of *information* and not just a mere general allegation or an expression of opinion. A disclosure could convey information as part of an allegation and thereby be covered by the act: see *Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325*. Therefore, the disclosure must be sufficiently factual and specific: *Kilraine v LB Wandsworth [2018] EWCA Civ 1436*.

8. The ERA sets out the ways in which a disclosure may be made in order to gain protection. These are:
   a. disclosures to the worker's employer or other responsible person: s43C ERA;
   b. disclosures made in the course for obtaining legal advice: s43D ERA;
   c. disclosures to a Minister of the Crown: s43E ERA; and
   d. disclosures to a "prescribed person": s43F ERA. The list of prescribed persons is set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 and includes people such as the Information Commissioner, the Civil Aviation Authority, the Environmental Agency and the Health and Safety Executive.

   Where the worker cannot follow the above procedural lines of communication, disclosures that are made are permitted to other people:
   e. in "other cases" which fall within the guidelines laid out in s43G ERA. Essentially these are instances where the worker reasonably believes that the employer will subject him to a detriment if he follows the procedure noted in s43C; or where there is no "prescribed person" and the worker reasonably believes that evidence may be concealed or destroyed; or where disclosures have been made to the relevant people before. The reasonableness of the worker's actions are decided

by reference to matters such as the seriousness of the relevant failure, whether the disclosure is made in breach of the duty of confidentiality, etc;

f. in cases of "exceptionally serious" breaches: s43H ERA.

S43C ERA is the relevant provision in this case, but s43F ERA is also alleged.

9. Detriment is not defined in the ERA, however, it is a concept that is familiar in discrimination law. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to him had, in all the circumstances, been to his detriment. An unjustified sense of grievance cannot amount to a detriment, but it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of: see *Lord Hope in Shamoon v Chief Constable of the RUC* [2003] IRLR 285 per Lord Hope at [34] and [35]. Lord Scott held that the test must be considered from the point of view of the Claimant, thus: "…*if the victim's opinion that the treatment was to his or her detriment was a reasonable one to hold, that ought, in my opinion, to suffice*…" *Shamoon* per Lord Scott at [105].

10. In respect of causation, as is clear from the statutory language of s47B(1) ERA, it must be shown that any detriment was caused by some act or deliberate failure to act by the employer. Further, that there is a causal connection between the act relied on and the protected disclosure, specifically that the act was '…*done on the ground that*…' the claimant had made a protected disclosure. Thus, it is not sufficient for a claimant to show that he had made a protected disclosure and suffered a detriment as a result of an act done by the employer, there must be a clear causative link between the detriment or dismissal alleged and the disclosure before protection is given: see *London Borough of Harrow v Knight [2003] IRLR 140*. The question at this stage will be what was the *reason* for the respondent's act or deliberate failure to act? In this context the Tribunal's attention is drawn to *Fecitt v NHS Manchester [2011] EWCA Civ 1190*, and in particular paragraphs 43-45, which includes "…*s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*…" *Fecitt* per Elais LJ at [45]. It is for a respondent to show the ground on which any act was done: s48(2) ERA. *Fecitt* held that it was for the employer to prove that the disclosure "*in no sense whatsoever*" played any part in the detriment.

11. S17 Enterprise and Regulatory Reform Act 2013 ("ERRA") introduced the requirement that the disclosure must be in the public interest. The public interest test requires a genuine belief that this disclosure is made in the public interest and that such belief is objectively reasonable (from the whistle-blowers' prospective): *Chesterton Global Limited & Verman v Nurmohamed & Public Concern At Work [2017] EWCA Civ 979*. Motive is different from belief. A claimant alleging whistle-blowing should have the opportunity to explain whether they had a subjective belief that they were acting in the public interest at the time of making a disclosure: *Ibrahim v HCA International Limited [2019] EWCA Civ 2007*.

12. S18 EERA removed the requirement that the disclosure must be made in good faith; although it amended s49 ERA to allow Tribunals to reduce compensation by up to 25% where a protected disclosure was not made in good faith. The burden for showing bad faith rests on the respondent: s48(2) ERA.

<u>Discrimination and protected characteristics</u>

13. Under s4 Equality Act 2010 ("EqA"), a protected characteristic for a claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin. The claimant identified her racer or ethnic origin as Black African and compared herself to individuals who are not Black African.

Direct discrimination

14. S13(1) EqA precludes direct discrimination:

> *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.*

15. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA. There is no identified comparator in the claimant's case; therefore, if the claimant is able to identify detrimental or less favourable treatment we apply a hypothetical comparator.

The burden of proof and the standard of proof

16. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

17. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

    a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

    b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

18. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

19. So, the burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The Court of Appeal, in *Madarassy v Nomura International plc*

[2007] EWCA Civ 33 at paragraph 56. The court in *Igen* 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. It was confirmed that the claimant must establish more than a difference in status (e.g. race or sex) and a difference in treatment before a Tribunal will be in a position where it *could conclude* that an act of discrimination had been committed.

20. Even if the Tribunal believes that the respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the claimant's race. In *B and C v A [2010] IRLR 400 EAT* at paragraph 22:

> The crucial question is on what evidence or primary findings the tribunal based its conclusion that the claimant would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based; no such situation had ever occurred, and the tribunal refers to no admission by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular, it is second nature to executives to follow appropriate procedures, and the explanation offered by The claimant for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, all the surrounding circumstances, to give rise to that suspicion.

21. It is not sufficient to shift the burden onto the respondent, that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. In *St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ 921* at paragraph 44:

> The respondent's bad treatment of the claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the respondent's similar treatment of the claimant in the other instances in which the claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Hayward, the respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the respondent to prove that he had not committed an act of race discrimination.

22. In the case of *Nagarajan v London Regional Transport [2000] 1 Mr Chircop 501*, Lord Nicholls stated at 512-513:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phases, as well as subtle distinctions, are better avoided. So far as possible. If racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

23. Employment Tribunal's adopt the civil standard of proof, which is on the balance of probabilities, i.e. more likely than not.

Indirect discrimination

24. Indirect discrimination occurs when there is equal treatment for groups but the effect of a provision criterion or practice ("PCP") imposed by an employer has a disproportionate adverse impact on one group and that cannot be justified in the circumstances. The definition of indirect discrimination is set out in in s19 EqA:

> (1) A person (a) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it would be a proportionate means of achieving a legitimate aim.

25. To bring a claim of indirect discrimination, the claimant must show that she belongs to a particular protected group. She must also show that she is put to the disadvantage to which the protected group to which she belongs is put. A PCP must then be identified which is applied to the claimant and has, or would have, the adverse impact on the claimant. The PCP must be apparently neutral; if it is premised on a rule that is itself discriminatory, the claimant is likely to be one of indirect discrimination: *James v Eastleigh Borough Council [1990] ICR 554*.

The evidence

26. We (i.e. the Employment Tribunal) were provided with detailed witness statements from the claimant. Mrs Elliott. The respondent provided statements from: Mr Ian Rule, who was the respondent's former interim Director of Finance and Corporate Operations; Ms Toni Beck, the Director of Quality and Learner Experience; Ms Rose Turner, Interim Director of Curriculum Development; and Mr Phil Pepper, Head of Human Resources and Organisational Development. Witnesses were cross-examined by the other party and the tribunal asked questions for clarification.

27. We also considered a hearing bundle consisting of 1,398 pages. At the outset of the hearing, the Judge emphasised to the parties that, as a matter of course, we would not read all of the documents contained in a Hearing Bundle. He stated that we would read documents referred to us by a representative or party or which had been cross-referenced in a witness statement. He said we may read additional documents that have not been referred to us; however, he emphasised that if a party thought a document was relevant and important, then he or she should bring that document to our attention.

Findings of fact

28. We made the following findings of fact. We did not resolve all of the disputes between the claimant and the respondent, we merely concentrated on those disputes that would assist us in determining whether or not the claimant had been subjected to a

whistleblowing detriment, discriminated on the grounds of her race or subject to a breach of contract. We have set out how I have arrived at such findings of fact where this is not obviously or where, we determine, this requires further explanation.

29. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis (and drew appropriate inferences) on the absence of documents that we expected to see as a contemporaneous record of events and also on the absence of evidence which give an interpretation of what occurred. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard them with a degree of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation.

30. The claimant commenced employment with the respondent on 4 September 2017.

31. On 7 December 2017 Mr Ian Rule was appointed as Interim Director of Finance.

32. The claimant resigned on 21 December 2017, but she subsequently withdrew his resignation. [HB97-98].

33. On 31 December 2017 Mr Stephen Forester, the Finance Director left the respondent's employment.

34. The claimant took 5 days as time off in lieu of notice which was authorised by Mr Forester between 12 January 2008 and 16 January 2018.

35. On 18 January 2018 the claimant advised Mr Rule that she was recording work against TOIL (i.e. time off in lieu) [HB113]. Mr Rule said that he would support her about minimising evening work but "I'm not content to simply agree that all evening work is taken as TOIL- other managers don't get that" [HB113]. The claimant then asked for a copy of the relevant policy and Mr Rule responded:

> Hi, my understanding is that the policy is a bit loose but yes, it's understood that managers are entitled to TOIL. By loose, I mean that we expect that people will put in more than they take out because that's what managers do – paid a salary to take responsibility for an area as much as for a given amount of time worked.
> So, it's fine that you take time off – my reaction was more to the apparent formulaic approach you seem to be now taking, which is different to what I've seen before. Probably better to discuss in person, but email in haste so you don't worry on it.

36. On 29 January 2018 the claimant messaged Mr Rule, she said that she had worked 2 weeks in a row and they needed to discuss TOIL [HB118]. Mr Rule replied that "…TOIL will be OK".

37. From 9 March 2018 to 19 March 2018 there were discussions about extending the claimant's probation [HB148, 145, 163-164]. The claimant met with Mr Rule in respect of the probation action plan on 23 April 2018 [176-191].

38. On 23 April 2018 the claimant informed Mr Rule that she had done evening duty 7 times and that she would like to take this TOIL sometime before the end of the academic year [HB192].

39. The claimant made a disclosure to Mazars (the respondent's auditors) by telephone on 16 May 2018 and this was followed by 2 further disclosures by anonymous letters on 17 May 2018 [HB269] and 28 May 2018 [HB288].

40. On 12 June 2018 the claimant resigned again. This was her forth protected disclosure. The claimant claimed 20 hours overtime as well as accrued but untaken holiday [HB366-367]. There was conversation between claimant and Mr Rule, which claimant relied upon as a detriment. Mr Rule accepted the claimant's resignation. He did not threaten the claimant, so that was not a determent. The claimant made a fifth disclosure which was sent to Mr Rule, David Byrne and it respondent's governors [HB 376-380].

41. The following day, i.e. 13 June 2018 the respondent accepted the claimant's resignation in writing. She was requested to submit any outstanding claims for expenses and overtime to Mr rule for authorisation [HB 369].

42. On 14 June 2018 Mr Rule responded to the claimant's claims in respect of TOIL [HB 427]:

> … I would say that TOIL has always been informal. My personal opinion is that Sheila worked long hours because she made work so difficult, notwithstanding there was a lot to do already. We don't, as far as I know, pay other managers for overtime. She never/rarely discussed hours in advance to get my approval. So, you can decide what to do with that. Also, she got into the habit of turning up at 10am or after, which I took as her preferred working pattern and didn't object as I knew she was working (unspecified) late hours.
> For what it's worth, she never did present me with anything to approve for staffing, despite my many requests to do so…

43. On 18 June 2018 Phil Pepper, Head of Human Resources and Organisational Development wrote to the claimant [HB482-483]:

> … With regards to your request for payment of TOIL and overtime, for which you have sent further supporting information, I can confirm that it is College policy that TOIL and overtime are only accrued once it has been discussed and agreed in advance with your line manager. However there appears to be no evidence to support this 'discussion and agreement in advance'. I have also check with your line manager and he confirms that there was no prior discussion or agreement to TOIL or overtime. As a result, no payment will be made to you for TOIL or overtime.

44. The claimant's employment with the respondent ended on the 12 July 2018.

Determination

<u>The whistleblowing complaints</u>

45. At the outset of the hearing, the respondent accepted that the disclosures made at issue 6.1, 6.2, 6.3, 6.4 and 6.5 were both protected disclosures and qualified disclosures. The respondent accepts that these were both qualified disclosures and protected disclosures. The respondent contended that its relevant officers did not know of disclosures 6.1, 6.2 and 6.3. The protected disclosure at 6.5 was obviously made

after the claimant's resignation so this could only be relevant to issues 14 and 16. The disclosures at 6.6 and 6.7 did not satisfy s43C ERA or s43F ERA, so can be discounted.

46. From March 2018 there were questions from David Byrne, the Principal, and Mr Rule, her line manager, over the claimant's performance. Mr Rule appeared to be balanced in his assessment of the claimant as he noted "She works hard and her instincts are often sound" [HB145]. This is significant as this is a type of detriment that is usually asserted but it came before the protected disclosure. It was important to our understanding of relationships.

47. The first detriment alleged was in respect of the aftermath of the meeting on 12 June 2018 when the claimant contended Mr Rule called her and stated that the Principal and he did not want the claimant to return to work and that they would prefer to tell others that she was on gardening leave. The claimant said Mr Rule asked that she did not discuss his resignation with any members of staff, as well as the auditors, the governors the funders and that if she did, she "will not find it funny". This was the threat contended, as repeated in the claimant's account in meeting of 9 July 2018 [HB616] and her complaint of 18 June 2018 [HB459]. In her evidence to the Tribunal the claimant said that Mr Rule whispered to her the threat not to discuss the breaches in the college' s financial regulations. This is materially different from the detriment alleged.

48. So far as we could see the meeting prior to this exchange was intended to be an uncontroversial business meeting at one of the subsidiary college properties. They discuss financial matters and during the course of discussion issues arose over additional debts and stock write-offs. The Principal was concerned with a stock write-off that the claimant had made and Mr Rule fell that his concern was unnecessary. It would have been easy for him to criticise the claimant in there was any bad-feeling but Mr Rule felt that the criticism would be undeserved.

49. The claimant resigned earlier that day. She had resigned on previous occasions and withdrew those resignations as she believed respondent would put matters right. Mr Rule resolved to accept the claimant's resignation and discussed this with the Principal prior to the meeting. So, the meeting was tense. The claimant had raised issues regarding financial matters and reporting. Mr Rule said that the claimant had not got a grasp on the wider picture, and we accept this because she was not part of the senior leadership team. After the meeting Mr Rule offered the claimant a lift to the station; she declined and there was an exchange.

50. Mr Rule's version of events is significantly different. He said he confirmed to the claimant that the college had accepted her resignation and that she would not be expected to work her notice and that she would receive formal confirmation soon. Mr Rule said he told the claimant he did not know what she had told the team and that if she decided to tell them that she had resigned, that was fine, but that she should not share her opinions over perceived wrongdoing over financial affairs. He then preceded to ask the claimant not to contact the team, as he did not want them upset or drawn into the claimant's argument.

51. So, there was a clear dispute about what was said and about whether Mr Rule threatened the claimant. We prefer Mr Rule's version of events, and we do not believe

in the claimant's account. The claimant changed her story for this hearing which undermined the veracity of her version. The claimant was not clear in her statement and confused in cross-examination of her account of what happened. Mr Rule's evidence was in line with contemporary documents and was clearer than the claimant. Furthermore, Mr Rules account appeared to be more credible. He said that he was not particularly concerned about whether or not the claimant discussed her resignation as he was more concerned about her insinuation of financial irregularity. So we do not find that the threat, as alleged, was made.

52. Mr Rule said he did not use phrase "will not find it funny" but we think the claimant interpreted like that, the point is that a discussion took place. The claimant was uneasy, Mr Rule said claimant had not got a full picture and he did not want claimant charging with accusations and told her to be careful. This was not a threat, it was a note of caution and was justified as he saw the circumstances. It was nothing to do with keeping her resignation secret. That allegation is simply not credible. The secrecy or otherwise of the claimant's final resignation did not come up and it would probably be unrealistic for Mr Rule to think that this further resignation might be kept secret for any length of time.

53. The contemporaneous evidence indicates that there was a high staff turnover and Mr Rule said that he did not want others unsettled by talk of financial irregularities, which was again appropriate in the circumstances; but this was nothing to do with the financial irregularities. So as we reject the claimant's allegations on the facts contended we find there is no detriment and the claimant does not succeed on this point.

54. In any event, in respect of knowledge of whistleblowing disclosures, the first detriment occurred on 12 June 2018. We accept Mr Rule's evidence paragraphs 18 to 20 of his witness statement that he became aware of the first 3 protected disclosures only after the investigation into the whistle-blowing allegations had begun. He was asked to leave the Governor's meeting where the Mazar's report was discussed by Governors. After the claimant's whistleblowing disclosures there was no allegation of any detriment to the claimant for the month from protected disclosures to this purported threat, so if Mr Rule was keen to silence the claimant about blowing the whistle on purported financial irregularities, then he would have acted more promptly, and this is where the claimant's narrative does not add up.

55. Mr Rule was, of course, aware of protected disclosure 6.4, but that disclosure was in relation to health and safety matters. We cannot see how that could possibly be relevant to keeping quiet about her resignation. So, even if there was a threat/detriment, in accordance with *Fecitt* that was in no way connected or influenced to an alleged threat concerning a final resignation.

56. In relation to detriment 11.2, the claimant confirmed at the outset that this detriment was in relation to Mr Rule refusing to authorise payment of the claimant's TOIL. The claimant was not clear when this detriment was alleged to occur; however, according to the letter of Mr Pepper this must have been before 18 June 2018 [see HB483].

57. Ms Beck, who heard the claimant's grievance, said in her witness statement that she was unable to uphold the claimant's contended entitlement to payment for TOIL or overtime because: there had been no management approval for this additional work

prior to it being undertaken as required by the respondent's policy; and as a senior member of staff the claimant was expected, and contractually obliged, to work flexibly in regards to hours, which she did often not starting work until 10am. Ms Beck said that she was able to find evidence for 3 days working on the claimant was outside of normal hours on approved college work known to Mr Rule and a further 2 days of previously agreed TOIL that the claimant had been unable to take because of work commitments therefore she was paid 5 days TOIL.

58. This issue is about Mr Rule not authorising payment of work undertaken over the claimant's contractual 36 hours per week. First, we accept that the claimant worked long hours. The claimant had started a new and challenging job, there was a high turnover of staff and the claimant said lots of staff had left and that had the effect that she had covered aspects of these roles. There were numerous emails highlighting long hours in the hearing bundle. The claimant did not monitor these additional hours; on 23 April 2018 she estimated that she worked 50 to 55 hours per week [see HB176], although 3 weeks later she said separately that she worked 14 hours extra per week [see HB427]. We believe the claimant did not contemporaneously record her additional hours worked because this reflected the ad hoc nature of the issue. She was engaged in a senior and demanding role, which required longer hours and she would have the opportunity to take these additional hours at less busy times. There were parallels in this flexibility with the claimant's working day where she would normally arrive later and left late [see for example HB427].

59. 4 months before the first protected disclosure, the claimant asked for the TOIL policy [HB112]. Mr Rule referred to a loose policy. He said "it is understood that managers are entitled to TOIL,", but then he went to outline a discretionary policy in an ad hoc arrangement. In our interpretation, that does not refer to a clear-cut contractual entitlement. This was the respondent's approach before the whistle-blowing disclosure and they have been consistent throughout. It is not honest for the claimant to say that she did not know the respondent's policy and there is no evidence, nor do we accept, that she challenged this. The claimant's request on 23 April 2023 [HB192] to take TOIL before the end of the academic year acknowledges both that this was a loose arrangement and that she was not entitled to payment in respect of these accrued, unmonitored working hours. Again, this confirms and reinforces a "swings and roundabout" policy (as Mr Rule put it), although we suspect that Mr Rule would concede that the balance was titled much in the employer's favour.

60. After the whistle-blowing disclosure the claimant made a retrospective claim [HB427]. Mr Rule had given TOIL retrospectively before, for example 29 March 2018, but this was before the claimant's final resignation. So it is entirely persuasive that the respondent then adhere to their ad hoc policy that requires pre-authorisation of TOIL. The fact that the respondent did not require the claimant to work her notice period is indicative of their flexibility surround how this accrued work is taken into account. In such circumstances we are not surprised that the respondent did not pay the claimant for these hours in addition to releasing her from work during her 1-month notice period.

61. The TOIL issue arose before the whistleblowing detriments. The only detriment that Mr Rule knew of was her health and safety-related detriment contained in her resignation. The Principal and Mr Rule resolved to accept this resignation (we are not persuaded that they had any other choice), but there is no evidence of Mr Rule taking any offence or reacting negatively towards the claimant around this time.

62. The claimant had been paid a small amount of the additional work she accrued prior to the protected disclosures. Had she claimed a consistent amount and recorded her hours before then matters could have been different. However, after her protected disclosures the claimant insisted upon payment for her unmonitored and unauthorised addition work, which was substantial. The respondent acted consistently and relied upon the contractual arrangement. The claimant's allegations in respect of TOIL could well be a detriment but the claimant was not authorised to work is additional hours. The respondent adhered to it policy and we reject that there was any causal link, such as outline in *Fecitt* above, to the whistle-blowing disclosures.

63. The detriment at 11.3, relates to Mr Rule contacting the Association of Chartered Certified Accountants ("ACCA") with false allegations. The claimant was informed of a complaint on 17 July 2018 by an Assessment Manager of the ACCA as follows:

> As I understand it Mr Rule is your former work colleague and he alleges that you have mounted an unfounded and malicious campaign against him.
> In particular, Mr Rule complains that your conduct amounts to harassment and defamation of character.

64. By this time the temperature had risen hugely.

65. On 18 June 2018 the claimant wrote an angry email to Mr Rule and copied to various senior officials at respondent [HB271-273]. This was said to set the record straight so that Mr Rule did not spread "false rumours" or damage her reputation. The claimant accused Mr Rule of financial irregularities, "dodgy accounting practices" and threatening her after her resignation. Mr Rule responded in a more measured way stating that the claimant had overstepped the mark. He said that her claims were untrue but that the claimant was aware that they would be investigated, and he reaffirmed that she should await the outcome of the investigation before taking further steps. He denied threatening the claimant and said that her allegations had to stop, that she was defaming him and it was illegal [HB271].

66. Despite the claimant being made aware of the steps the respondent were taking in its investigations [see HB428, 515, 271, 547] the claimant would not let this go. The claimant continued to personally attack Mr Rule, accusing him of criminal behaviour, intimidation, and libel. The claimant said that she would report him to the Education and Skills Funding Agency [ESFA] and HM Revenue & Customs [HB452-453]. The claimant subsequently complained to the ESFA about Mr Rule's appointment and rate of pay on 20 June 2018 [HB488-489]. The claimant accused Mr Rule of making false statements and threatening her on 18 June 2018 [HB456-457], twice on 20 June 2018 [HB491, 498].

67. Mr Rule said he felt threatened, professionally at least, and we accept that. In correspondence he said that he would not engage in the email war she sought. He said that this was beyond professional. He attempted to placate the claimant by saying that she did not need to defend herself and that he had not sullied her reputation [HB491-492].

68. The claimant chose not to await the outcome of an investigation; she sought to engage in a slanging match with Mr Rule. Mr Rule sought to avoid this, but when the claimant persisted, he reported her to her professional body, and this was in line with his earlier

comments that her behaviour was unprofessional and he regarded it as unjustifiable. So far as the Tribunal could see the claimant was angry and wanted to get back at Mr Rule. We accept that her behaviour was disproportionate. The claimant had reported Mr Rule to outside agencies, so it seems a bit rich to complain of Mr Rich doing likewise, particularly in circumstances where he felt bullied and harassed. There is no merit in this allegation. The claimant sought confrontation, she persisted, and Mr Rule reported her to her profession body for unprofessional behaviour. This had nothing to do with the claimant's whistle-blowing complaints.

Race discrimination

69. The race discrimination complaints are set out at paragraph/issue 28 of the list of issues. There is one claim of direct race discrimination and one claim of indirect race discrimination.

70. At the outset hearing we discussed claims of race discrimination. The details of complaint were clear: "I was openly denied the opportunity to apply for the post of Interim FD" [HB7, 14-27]. This was said to be race and disability discrimination, although the disability discrimination complaint was no longer pursued. In the list of issues Judge Palmer recorded the complaint as pleaded [HB60]. Judge Palmer compelled the parties to inform the Tribunal if the list of issues was inaccurate or incomplete and no such representations were made. Significantly, there was no application to amend this particular claim, although Judge Elliott dealt with a different application to amend the claim on 4 January 2021.

71. At the hearing, the claimant sought to rely upon a later decision, which she said was taken in early 2018 to extend Mr Rule's initial contract without advertisement, which she discovered in May 2018. That is a cause of action, related to an extension, and is in addition to the initial appointment. The respondent is held to account in respect of the original detriment alleged. There should be clarity in the behaviour or conduct that is alleged to be discriminatory. It is simply not fair that the respondent does not have the opportunity to fully prepare for a case that they did not expect to meet. The claimant cannot merely seek to change the basis of the claim to match what she perceives to be gaps in the response evidence if that allegation was not ventilated nor could it reasonably be perceived to form part of the claim. Key witnesses, Mr Forster and Mr Byrne, were not available to give evidence. We regarded it as highly prejudicial and unfair to the respondent to change the goalposts so very late in proceedings, so we do not exercise our discretion to broaden this allegation and we deal with the appointment of the Interim Finance Director and not the continuance of his role.

72. The denial of the opportunity to apply for a post is clearly less favourable treatment. But the claimant was very clear in her evidence that when the respondent first decided to recruit for the Interim Finance Director post, she was not interest and she chose not to apply. The claimant was clear, she knew of the position as set out in her statement at paragraph 2 and 3 and her oral evidence. The Interim Finance Director's role was strategic and the claimant's role as Head of Finance was more operational. The Interim Finance Director's role was a temporary job – the contract engagement value was low overall, but represented £650 per day, so clearly a part-time role on a short-term basis. The claimant said that she was not interested in this role on an interim basis, at least. She said that she would have waited until the substantive role become available.

73. The claimant made no complaint at the time of recruitment. Afterwards, the claimant raised a grievance on 18 June 2018 (after she resigned) [HB445-451] and there was no complaint about this recruitment matter until the Employment Tribunal proceedings. This is relevant and reinforces that she did not want or intend to pursue that complaint.

74. The claimant has subsequently taken issue with the duration of initial contract. There was no evidence that the Interim Director of Finance role expanded beyond the relatively low value contract originally envisaged. It merely lasted longer than originally envisaged because according to Mr Rule's evidence, which we accept, there was an affordability problem, a possible merger involving the respondent and an ensuing recruitment freeze. So far as we could see that was not deliberately planned. However, the claimant's claim expanded into a complaint over the denial of an opportunity for the substantive job as Mr Rule's contract persisted. That was not the claim raised in the Claim Form nor was there any relevant amendment to the claims. This additional claim was not on the list of issues and we are not going to hold the respondent to account merely because the claimant wishes to change the goalposts. The interim appointment was for a few months, but persisted.

75. So according to the claimant's evidence, she was not interested in the original appointment for the Interim Finance Director. So there can be no detriment to her. If there was not detriment then the burden of proving discrimination is not engaged. This claim fails.

76. The claimant's complaint of indirect race discrimination was confused, and we spent some time at the outset of the hearing trying to work out the PCP. We accept Mr Bromige's submissions at paragraphs 20 to 23 that the claimant has attempted to construct a PCP out of context, that is self-serving. This does not fit within the legal framework, and we tried to give a purposive construction to fit within the intention of the legislation. The claimant's PCP was in respect of not advertising on a platform called Contract Finder. The claimant identified herself as black African and compared herself to individuals who were not black African. Contract Finder is a platform for individuals to bid for public sector contracts. It is not a recruitment platform nor is it the type of platform where we would expect the respondent to contemplate as a source for specialist strategic Finance experts. The platform could apply to anyone, but there is no evidence at all that Contract Finder would overcome the disadvantage that a black African candidate might experience.

77. The respondent was not obliged to advertise on the platform Contract Finder, and the evidence of Mr Pepper was that they simply did not think about this. He said an interim post would rarely be advertised and because Mr Rule had undertaken the role previously and completed it to a high standard meant that the respondent would not have advertised anyway. Mr Pepper's evidence was that a substantive role would likely to be advertised in the TES, the Guardian, FA magazine or similar. That would not have disadvantaged a suitably qualified black African candidate. Contract Finder was not viewed as a likely source. Mr Rule was unfamiliar with the Contract Finder site. Therefore, the respondent did not make any conscious or positive efforts to ignore Contract Finder. The fact that the claimant did not mention the site and nor did anyone else means that the omission by the respondent not to advertise via Contract Finder did not amount to a PCP.

78. Given that the claimant has not provided any evidence of any particular disadvantage suffered by her particular racial group, or her individually, there is no evidence of actual disadvantage caused by not advertising on Contract Finder. So, our analysis ends there and the claim of indirect race discrimination cannot be made out.

Breach of contract

79. We are familiar in employment matters in looking at various sources of contractual interpretation and we do not have rigid rules of contractual interpretation might exist in other jurisdictions. We are well used to dealing with a variety of sources that might give rise to a contractual obligation: written particulars, job advert, job description, correspondence, etc. We deal with implied terms in very limited circumstances and only to make the contract work effectively. An implied term of a contract cannot give rise to any additional entitlements unless that was the clear intention of both parties. Oral terms often create uncertainty, particularly if there is a dispute over whether there was an explicit agreement, and if so, what exactly was agreed. Our role is interpretive. We are not permitted to import terms or rewrite the terms of agreement that either party might regard merely as *reasonable*.

80. In the circumstances of this case our starting point is the claimant's contract of employment. [HB23-32], although we note that the version contained within the hearing bundle is not signed. Clause 2.2 refers to the job description. Clause 4 refers to a normal working week of 36 hours. But this makes no provision for overtime pay.

81. TOIL is provided for in the contract, at clause 6.3, but this is in the section marked Holidays and is limited to statutory bank holidays. The claimant's job description [HB38-39] makes no provision for TOIL or payment in respect of TOIL. Neither the claimant's job application nor the notes of her interview refer to any promises in respect of TOIL.

82. The claimant contended that she received TOIL from Mr Forster in late 2017 and from Mr Rule in January 2018. The respondent does not dispute but say that this is in line with the respondent's policy, which stated that TOIL needed to be agreed with the line manager.

83. The claimant said she agreed TOIL with Mr Rule but there is a dispute about quantum. But the claimant relies upon an agreement that TOIL can be taken, but that this was open-ended, i.e. if you work extra then take it as time off in lieu. This was not dealt with in the claimant's statement in any detail and where there is a dispute, we expect detail. We have gone through all relevant emails, and these do not say what the claimant contends. There is no dispute about working hours. There is no evidence about a contractual variation; There is no agreement or promise from Mr Rule, or anyone else, for allowance or payment for additional working hour without express authorisation. Indeed, the situation is the reverse. Mr Rule was consistent; he set out the rules on 18 January 2018 [HB112-113] and 14 June 2018 [HB427]. TOIL was ad hoc, informal, and therefore discretionary. The Tribunal cannot turn a discretionary arrangement into a contractual guarantee just because the claimant may have worked those hours and we have some sympathy with her desire to be paid for her hardwork.

84. In any event, there is nothing to suggest that the TOIL could be capitalised, i.e. converted from time off in lieu to a payment of wages. This is what the claimant sought

over and above the respondent's release of the claimant from working her notice period. There is no contractual obligation for TOIL in the circumstances of this claim so therefore there can be no breach of contract.

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Employment Judge Tobin
2 May 2023

REASONS SENT TO THE PARTIES ON

2 May 2023

GDJ
FOR THE TRIBUNAL OFFICE