EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Mapembe	**v**	Slough Borough Council

Heard at: Norwich

On: 8, 9, 10, 11 and 30 January 2024
In Chambers: 26 and 27 February 2024

Before: Employment Judge M Warren

Members: Mr A Scott and Mr K Mizon

Appearances
For the Claimant: In person
For the Respondent: Mr Bishop, Counsel

RESERVED JUDGMENT

1. The Claimant's claims of unfair dismissal and race discrimination fail and are dismissed.

2. The Order for Interim Relief made on 24 June 2021 ceases to have effect.

REASONS

Background

1. Mr Mapembe was employed by the Respondent as an Engineer from 6 November 2017. His employment was terminated with effect from 26 May 2021, allegedly by reason of redundancy, (a matter of dispute between the parties). An order for Interim Relief was made, (by Employment Judge Gumbiti-Zimuto) on 24 June 2021 and accordingly, Mr Mapembe's Contract of Employment has continued from the date of termination through to the date of this Judgment.

2. Early Conciliation was between 22 March and 3 May 2021.

3. These proceedings were issued on 19 May 2021, Mr Mapembe claiming unfair dismissal contrary to s.98 of the Employment Rights Act 1996, ("ERA"), automatic unfair dismissal for Trade Union membership or Trade Union activities, automatic unfair dismissal for having made a protected disclosure and direct race discrimination.

4. The ET3 Response and Grounds of Resistance were filed on 1 October 2021.

5. Employment Judge Gumbiti-Zimuto refused an application for Reconsideration of the Interim Relief Order on 5 November 2021.

6. The Interim Relief Order was varied by Employment Judge Gumbiti-Zimuto on 24 June 2022 so as to reduce the rate of pay to zero, (because Mr Mapembe was unfit to work due to ill health) although the pension contributions were to continue.

7. The case was managed at a Preliminary Hearing before Employment Judge Gumbiti-Zimuto on 22 June 2023, which included provision that the List of Issues was to be agreed between the parties.

8. The Final Main Hearing of the matter scheduled for 6 June 2023 was postponed.

9. This matter came before Employment Judge Shastri-Hurst on 19 September 2023. She refused an application by the Claimant for variation of the Interim Relief Order, (Reasons dated 13 October 2023).

10. The matter was put forward for Final Main Hearing over four days on 21 November 2023. Hitherto, Mr Mapembe had been advised and represented throughout by solicitors and on each occasion, had appeared with counsel. On 16 November 2023, his solicitors informed him that they would no longer be representing him. Employment Judge Annand granted Mr Mapembe's application for a postponement, to enable him to obtain legal representation. A Strike Out application by the Respondent was refused. The case was re-listed for the dates of this hearing, by CVP.

11. Mr Mapembe has not arranged legal representation.

12. There were difficulties at the outset of this hearing. Mr Mapembe was unable to access the Hearing Room other than by telephone only. He identified this as a problem with his laptop. He said that he was arranging for somebody to urgently repair his laptop. We adjourned to the following day whilst we read into the case. On Day 2, Mr Mapembe was still unable to access the CVP Hearing Room. We made arrangements for a physical room to be made available to him at the Watford Employment Tribunal. Mr Mapembe said that he would not be able to afford to travel to Watford. The Respondents made arrangements for necessary IT equipment to be made available to him at a Community Hub in Slough. Using the facilities provided by the Respondents, Mr Mapembe was then able to access the Hearing Room and we were able to make a start at 1:30 on Day 2, 9 January 2024.

13. At the outset of Day 3, 10 January 2024, Mr Mapembe attended in the presence of his son. I explained that it would be inappropriate for another person to be present with Mr Mapembe, who was in the middle of giving evidence. It transpired that Mr Mapembe's son was proposing to represent him going forward. He told us that he was a lawyer, although not qualified. It was apparent that Mr Mapembe had been speaking to his son overnight about his case. Regrettably, I had not warned Mr Mapembe before the overnight adjournment that he should not speak to anybody about the case during the adjournment. We proceeded with Mr Mapembe Junior, (he confirmed he was happy for us to describe him as such) acting as representative for his father.

14. We were unable to complete the evidence by the end of Day 4 and therefore adjourned part heard to 30 January 2024. We heard oral evidence and closing submissions, then adjourned to consider our Reserved Judgment on 26 and 27 February 2024.

The Issues

15. An Agreed List of Issues was produced at a time when Mr Mapembe had the benefit of legal representation. It is odd, given that both parties had the benefit of legal representation. It is set out below by way of cutting and pasting.

Reason for the Dismissal

1. What was the reason, or principal reason for the dismissal? Was it:
    a. Because C was member of a union or was involved in union activities?
    b. Because of C's Race?
    c. Because C had made a protected disclosure?
    d. By reason of redundancy?
    e. For some other substantial reason?

Trade union membership or trade union activities (s.152(1)(a)&(b) TULR(C)A 1992

2. Was C a member of the GMB? **s.152(1)(a)**
3. Had C had taken part in GMB activities at an appropriate time? **s.152(1)(a)**
    - Sing Wai-Yu verbally pestered C to reveal number and names of employees who were members of GMB.
    - C had taken part in training for 1 week (Mon-Fri) at Reading GMB Offices from 30th Sept – 4th Oct 2019. C will maintain that Kim Hothi pressurised him and asked him whether employees reported their managers to me and whether C could fight for them against their managers.
    - On 2nd Oct 2019, Sing Wai-Yu emailed C asking 2how many Union members are there in the Office?". C pointed out this was staff confidential information.

Direct Race Discrimination

4. C is Black African
5. C relies on the following direct comparators: C relies upon Indian friends/relatives of Kam Hothi (KH) as comparators. When in the Office, KH treated her fellow Indian friends/relatives differently from C. For example, they could come in any time they wanted or leave when they wanted (C was monitored about this). Favouritism to fellow Indian friends/relatives of KH extended to recruitment opportunities for them and conduct of personal issues in the Office eg using friends as babysitters in the Office during council business hours.

Redundancy

6. Redundancy Situation
   a. At the relevant time had the requirements of R:
      i. for employees to carry out work of a particular kind, or
      ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

   ceased or diminished or were they expected to cease or diminish?
   b. Did the R hire someone to replace C?
7. Consultation
   a. Did the R conduct a fair consultation?
   b. If not did this fact render the C's dismissal unfair?
8. Fair Selection for Redundancy
   a. Was C chosen because of his race?
   b. Was C chosen because he was member of a union or was involved in union activities?
   c. Did the R choose a fair selection criteria?
   d. If so, did the R apply the selection criteria fairly?
9. Suitable Alternative Employment
   a. At the time of the dismissal were there suitable alternative vacancies that C could have been placed in?

b. Did the R meet the requirements to facilitate C finding suitable alternative employment?

Some Other Substantial Reason

10. Did R undertake a business reorganisation?

11. Was that reorganisation of a kind such as to justify the dismissal of C?

Protected Disclosures

12. Did C make a protected disclosure:
    a. Did C disclose information:
        i. In his meeting with the CEO in July 2019?
        -By a Report of breaches of Data Protection Act/GDPR (eg breaches of Council IT policy re password security) and CDM Regulations 2015 (breaches of statutory duties), financial mismanagement and also recruitment malpractices with serial bullying conducted by Kam Hothi (KH) and protected by Senior Management. These matters were later the subject of a Report under the Local Government Act 1999 on the 9th June 2022.
        ii. In his grievance in April 2020 and follow up of 14th July 2020
        -By C's protected disclosures as set out in his Written Grievance of 20th April 2020 and Appeal Grounds to Grievance dated 14th July 2020 (see attached documents)
        -By making Protected disclosures which follow on from Report to CEO in 2019 and are ongoing breaches of statutory duties, Health & Safety at work breaches, bullying and harassment plus victimisation from management after having raised complaints/disclosures.
    b. Did C believe that any disclosure was made in the public interest? If so was such a belief reasonably held?
    c. Did C believe that the disclosure tended to show any of the matters in s.43B(1) ERA 1996?
    d. If C did hold such a belief, was it be reasonably held?

13. If C made a protected disclosure, was the disclosure made in good faith?

Evidence

16. We had before us a Bundle containing witness statements, for the Claimant from:

    16.1. Mr Mapembe (two Statements);

    16.2. Mr P Brooker;

    16.3. Mr S Khan;

    16.4. Mr E Ochi; and

    16.5. Mrs M K Rattu.

17. For the Respondents, we had witness statements from:

    17.1. Mr S de Cruz;

    17.2. Mr R West;

    17.3. Ms J Senior;

    17.4. Mr S Dhuna; and

    17.5. Ms K Hothi.

18. We had a properly paginated and indexed Bundle of documents running to page number 816.

19. As previously indicated, during an adjournment at the outset of the case, we read the witness statements and read or looked at in our discretion, the documents referred to. We explained to the parties that we would not read all of the documents in the Bundle, just those to which we were referred.

20. We did not hear evidence from Mr Brooker, Mr Ochi and Mrs Rattu as it seemed to us that their witness statements did not contain evidence relevant to the issues.

The Law

Redundancy and Unfair Dismissal

21. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA). Section 98 (1) and (2) of that Act set out 5 potentially fair reasons for dismissal, one of which is redundancy.

22. Redundancy is defined in section 139(1) of the ERA as follows:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) …

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, …

have ceased or diminished or are expected to cease or diminish."

23. Judge Peter Clark in Safeway Stores Plc v Burrell [1997] ICR 523 identified a simple three stage test, (at paragraph 24) as follows:

    (1) Was the employee dismissed? If so,

    (2) Had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,

    (3) Was the dismissal of the employee (the applicant before the industrial tribunal) caused wholly or mainly by the state of affairs identified at stage 2 above?

24. If an employer is able to satisfy the Tribunal that the reason that the employee was dismissed was one of those potentially fair reasons, the Tribunal must go on to apply the test of fairness set out at section 98(4):

    "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

    (b) shall be determined in accordance with equity and the substantial merits of the case."

25. The seminal case to assist us in deciding whether the decision to dismiss by reason of redundancy satisfies the test of fairness set out at section 98(4) is Williams & others v Compare Maxim ltd 1982 ICR 156 EAT, which clarified that the Tribunal should ask itself whether, *" the dismissal lay within the range of conduct which a reasonable employer could have adopted".* In that case, factors were identified which might help us in answering that question:

    - Whether the selection criteria were objectively chosen and fairly applied

- Whether employees were warned and consulted about the redundancy
- Whether, if there was a union, the unions view was sought
- Whether any alternative work was sought

26. Commenting on redundancy and procedure in the House of Lords in the case of Polkey v A E Dayton Services 1988 ICR 142 Lord Bridge said:

    "the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation".

27. Glidewell LJ in R v British Coal Corpn ex parte Price 1994 IRLR 72 para 24 said of "consultation" that it:

    "…*involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".*

28. In summary, he said that fair consultation means:

    - When the proposals are still formulative
    - Providing adequate information
    - Giving adequate time to respond
    - Giving conscientious consideration to the response

29. Where employees in a redundancy situation are applying for new and different roles, the decision by the employer will be forward looking. In Morgon v The Welsh Rugby Union DB 28/01/11 there were 2 people facing redundancy who applied for a new wider role, the question was, which one met the new job description? That assessment inevitably and permissibly, involved an element of Judgment.

30. The Tribunal should not concern itself with the commercial merits of the employers decision to make redundancies; it is not for us to tell employers how to run their operations, (see James W Cook & Co (Wivenhoe) Ltd (in Liquidation) v Tipper [1990] ICR 716 and Campbell v Dunoon and Cowal Housing Association [1993] IRLR 496)

31. We must look at the circumstances of the case in the round. Failure to act in accordance with one or more of the principles in Compair Maxam does not necessarily involve the conclusion that the dismissal was unfair. Whether in the circumstances of any particular case, an employer has acted reasonably in taking or not taking any step or failing to follow any procedure, renders a dismissal unfair is a matter for the Tribunal to decide in the light of all the circumstances of the case, in reaching the conclusion as to whether or not the dismissal was reasonable within the meaning of s

98(4). (See Grundy (Teddington) Ltd v Summer & Salt (1983) IRLR 98 EAT)

Dismissal for Some Other Substantial Reason

32. The fifth potentially fair reason for dismissal set out at Section 98 of the EAR is, if the reason is not one of the other four, “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held”, (s98(1)(b)).

33. This is a, “catch all provision”, recognising that the list at s98(2) cannot capture every situation in which a decision to dismiss is potentially fair. From the very wording of s98(1)(b), it is self-evident that the reason must be:

    33.1. Not the same reason as one of the other potentially fair reasons, although it may contain elements of the other reasons;

    33.2. “Substantial”, which means that it must not be frivolous or trivial, and

    33.3. A reason that potentially justified dismissing an employee holding the position the claimant held.

34. If such a reason is established, the Tribunal must go on to apply the test in Section 98(4) as set out above.

35. Sometimes, a dismissal resulting from a business reorganisation may not give rise to a redundancy situation. It may however, amount to some other substantial reason. To be a reason of a kind that might justify dismissal, there must be sound, good business reasons for the reorganisation, see Hollister v National Farmers Union [1979] IRLR 238.

36. The test of fairness in s98(4) still has to be passed and whilst every case must turn on its facts, one would usually expect to see a process of warning and consultation similar to that one would expect to see in a redundancy dismissal.

Automatic Unfair Dismissal for Trade Union Activities

37. The Trade Union and Labour Relations (Consolidation) Act 1992, section 152 (1) (a) & (b) provides as follows:

    “(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee —

    (a) was, or proposed to become, a member of an independent trade union, . . .

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . ."

Automatic Unfair Dismissal for making Protected Disclosures

38. Mr Mapembe says that he was dismissed for making protected interest disclosures. Section 103A of the ERA provides that:

"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."

39. What amounts to a protected disclosure is defined in the ERA at Section 43A as a qualifying disclosure. That in turn is defined at Section 43B as:

"… 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 – …

a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered, or

(e) that the environment has been, is being or is likely to be damaged.

40. In summary:

40.1. There must be a disclosure of information;

40.2. The worker must reasonably believe that the disclosure is in the public interest, and

40.3. The worker must reasonably believe that the disclosure tends to show one of (a) to (e).

41. The requirement is for the disclosure of information; i.e. conveying facts. It is not enough to make an allegation, see Cavendish Munro v Geduld UKEAT/0195/09. The mere expression of an opinion does not tend to show that the Respondent is likely to be in breach of any legal obligation, see Goode v Marks & Spencer Plc UKEAT/0442/09. However, there is a need for care; information can be disclosed within an allegation. The concept of "information" is capable of covering statements which might

also be characterised as allegations. The correct question is to ask whether the disclosure contained information of sufficient factual content and specificity that it is capable of showing one of the matters listed in section 43B(1). This is a matter of evaluative judgment in light of the facts and the context in which it was made. See Kilraine v London Borough of Wandsworth [2018] ICR 1850 CA.

42. The disclosures need not be factually correct, nor amount to a breach of the law, provided that the claimant reasonably believed them to be so, see Babula v Waltham Forrest College [2007 IRLR 346. The words used in relation to breach is, "tends to show" not, "shows". A qualifying belief may be wrong, but may be reasonably held.

43. The expression, "reasonable belief" must be considered having regard to the personal circumstances of the discloser, in particular their "inside knowledge", what they know about the field in which they work, about their employer, about the subject matter to which the disclosure relates. The test is subjective as to what belief the discloser had and objective, in terms of the reasonableness of that belief, in context. See Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.

44. The claimant must also reasonably believe that the disclosure is in the public interest; there must be genuine subjective belief at the time of the disclosure and such belief must be reasonably held. In Chesterton Global Ltd (T/A Chestertons) v Nurmohamed & Others [2017] EWCA Civ 979, the Court of Appeal held that there were no absolute rules in deciding whether a disclosure was in the public interest; the essential point was that the disclosure has to serve a wider interest than the personal or private interest of the discloser. Relevant factors would include for example, the numbers in the affected group, the nature of the interest affected, the extent to which they were affected, the nature of the wrongdoing and the identity of the alleged wrongdoer. That said, the number affected is not determinative; it is not a case of merely one other person being required to make it in the public interest. However, the larger the number affected, the more likely it is that it will engage public interest.

45. There is no requirement in the statute that the claimant's motive for making the alleged disclosure must be that it is in the public interest to do so, although as Underhill LJ observed in Chesterton Global Ltd, it would be rare if a disclosure was believed to be in the public interest, that did not form at least part of the motive.

46. A protected disclosure must, (per section 43A) be made to one of a number of specified persons set out at sections 43C to 43H. Section 43C provides for disclosure to the claimant's employer.

Unfair Dismissal and the Burden of Proof

47. In an ordinary case of unfair dismissal, the burden of proof as to showing a potentially fair reason for dismissal lies with the employer. If the employer is able to show a potentially fair reason for dismissal, then the burden of

proof as to the test of fairness is neutral. The situation is slightly different where the reason for dismissal asserted by the employee is one which is automatically unfair. The authority on this is Kuzel v Roche Products Limited [2008] IRLR 530, Mummery LJ put it thus:

> *"When an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason."*

48. So, we look to the Claimant for some evidence that the real reason for dismissal is not that asserted by the Respondent. If he does that, we look to the Respondent to discharge the burden of proof that the reason for dismissal was the potentially fair reason contended for.

49. It will be rare for there to be direct evidence of an employer dismissing an employee because of a disclosure. A tribunal may therefore draw inferences from findings of primary fact as to the real reason for the dismissal, (see Kuzel above).

Direct Race Discrimination

50. The relevant law is set out in the Equality Act 2010.

51. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

52. Race is one of a number of protected characteristics identified at s.4.

53. Race is defined at s.9 and includes colour, nationality, ethnic and national origins.

54. Direct discrimination is defined at s.13(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".*

55. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The Claimant must show that he has been treated less favourably than

that real comparator was treated or than the hypothetical comparator would have been treated.

56. How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? There is no difference in meaning between the term, “because of” in section 13 and “on the grounds of”, under the pre-Equality Act legislation, (see Onu v Akwiwu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40).

57. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

58. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”:

> *“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 phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating 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 phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”*

59. The treatment of non-identical comparators in similar situations can also assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) (8 June 2000) at [7].

60. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work. However, an unjustified sense of grievance does not amount to a detriment.

Discrimination and the Burden of Proof

61. Section 136 deals with the burden of proof:

> *"(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.*

62. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

Credibility of Evidence

63. We had to treat Mr Mapembe's evidence with a degree of caution.

64. We had two witness statements from Mr Mapembe, including a short earlier statement signed by him on 15 June 2022. In this hearing, he confirmed the content of that statement to be true. The Respondent had applied for variation of the Interim Relief Order. The original basis of the application was firstly, that they had not received notice of the original proceedings and had therefore not had the opportunity of opposing the application in the first place and secondly, that this is not a case in which an Interim Relief Order should have been made. For the hearing of that application, Mr Mapembe submitted the above mentioned witness statement of 15 June 2022. It is not clear from the reasons given by Employment Judge Gumbiti-Zimuto whether Mr Mapembe gave evidence on that occasion, it looks as if he did not. Subsequently in 2023, Mr Mapembe applied for variation of the IRO on the grounds that he was fit to work. He produced his medical records. In his witness statement, he said that the effect of the bullying to which he had been subjected was poor mental health, as a consequence of which he had been unable to work since June 2021 and he remained unable to work as of June 2022. Amongst the medical evidence, is a letter from his GP, (page 598) which says that he completed his treatment on 16 December 2021, his therapist had reported that he had overcome his difficulties. In the words of his GP, "therefore there is no medical evidence to suggest that he has been unfit to work during this time frame". This is confirmed by an entry in the GP's Records for 3 November 2022, (at page 605.) The entry there reflects information provided by the GP in the above mentioned letter. At

paragraph 4 of his June 2022 witness statement, he said that he was continuing to receive counselling. On the basis of the medical records, that is not true.

65. Mr Mapembe's explanation in cross examination was that English is not his first language and what was in his witness statement was based upon legal advice he received. That is not a credible explanation. Mr Mapembe's first language is not English, but his English is good and as Mr Bishop points out, his Degree level qualification in Engineering was attained in the English Language. What he said in his witness statement of June 2022 was not true.

66. Mr Mapembe suggested that he was the only black person on the team in which he worked. That was not true. Mr Parys Barnett was Afro-Caribbean and black.

67. Mr Mapembe suggested that the unions had not been consulted or involved in the reorganisation. That was patently incorrect.

68. Mr Mapembe suggested in his witness statement at paragraph 7, that Ms Hothi was not his line manager on 26 March 2019. When taken to Mr Dhuna's email of 13 March 2019, (page 103) he had to accept that he had been told by Mr Dhuna earlier that Ms Hothi was his line manager.

69. One of the allegations appearing in the List of Issues and made a number of times during the course of these proceedings, including before Employment Judge Gumbiti-Zimuto on the Interim Relief Application, is that the Respondent had advertised Mr Mapembe's role while he was still working for them. When he was taken to the advertisement, he acknowledged that it was not his role and that the organisation advertising the vacancy was a private organisation, not a Local Authority. That is obviously the case. He acknowledged that he knew that it was not.

70. When examining the email correspondence arranging for the Formal Notice Meeting to be rearranged at Mr Mapembe's request, it was suggested to Mr Mapembe that his approach to this correspondence had been motivated by the fact that he was contemplating issuing Tribunal proceedings. He answered that he was not thinking at that stage that his case might end up in the Employment Tribunal. Yet on 22 March 2019, he commenced Early Conciliation, which is obviously a precursor to the issue of proceedings. He subsequently agreed that what he had said was not correct.

71. At one point it was suggested to Mr Mapembe that his wife and son would have assisted him in drafting his Claim. He denied that. His wife and son are both described as Lawyers and it is not credible for Mr Mapembe to suggest he received no assistance from them at all.

72. For these reasons as we have said, we approach Mr Mapembe's evidence with caution where there was conflict of evidence, looked for written corroboration.

73. In contrast, we found no reason to doubt the honesty and credibility of the Respondent's Witnesses.

Findings of Fact

74. Mr Mapembe describes his ethnic origins as black African, of Tanzanian heritage.

75. Mr Mapembe worked for the Respondent as a Senior Engineer in its department known as the Highway and Transportation Services Department. His job description is at page 195 of the Bundle. His job title was Senior Engineer Highways Development. He was responsible to the Team Leader of Highways Development. He was responsible for design or design approval, contract preparation and contract management and site control of developer and council improvement highway schemes. His duties included the managing and supervision of developer works. He was required to have a good understanding of health and safety requirements to carry out the duties required under the Construction Design and Management Regulations.

76. The Respondent produced an Organisational Change Policy and Tool Kit, in consultation with trade unions in January 2018. This begins in the Bundle at page 740. Within that policy, a job matching procedure is set out which explains in its introduction, (page 797)

> "A job matching process is required when posts in the proposed new organisational structure are new or revised / altered from existing posts in any way. The purpose of the job matching process is to determine how changed existing posts are and how employees should be placed in the new structure. E.g. confirm if employees should be matched or ring fenced and / or provided with restricted competition for a post in the new structure."

77. The Organisational Change Policy also contains a redeployment procedure, which begins at page 801 providing that:

> "Employees facing redundancy due to organisational change should be redeployed wherever practicable to do so. In such situations an interview should be arranged with the employee to discuss the situation and explore the possibilities."

78. The Respondents have a Grievance Policy and Procedure, both produced in January 2018 after consultation with the unions, which begins in the Bundle at page 757.

79. At some point, we are not entirely sure when, about two years before Mr Mapembe was dismissed, he became an Accredited Representative for the GMB Union. There was no evidence before us to this effect, but we accept Mr Mapembe's oral evidence that this was so. He underwent Accreditation Training with the union between 30 September and 4 October 2019.

80. In the List of Issues, Mr Mapembe alleges that a Sing Wai-Yu verbally pestered him to reveal the number and names of employees who were members of the GMB; that after his training Ms Hothi, (his manager) had pressured him and asked him whether employees reported their managers to him and whether he could fight for them against their managers, and that on 2 October 2019 Sing Wai-Yu had emailed him asking him how many union members there were in the office. Mr Mapembe repeated these allegations in his witness statement at paragraphs 31 – 35. Ms Hothi did not deal with the allegation in her witness statement. No evidence was produced from Sing Wai-Yu and no evidence was produced from the Respondents to contradict these allegations. We find that these events did occur. Mr Mapembe confirmed in the hearing that these allegations are not relied upon as allegations of detriment, but as detail of his trade union activities, for which he says he was dismissed.

81. In late 2018 or early 2019, line management of Mr Mapembe changed from Mr Dhuna to Ms Hothi. Mr Mapembe has at times argued or asserted that he was not informed of this change in line management. In cross examination he acknowledged that Mr Dhuna told him of this change in March 2019.

82. On 13 March 2019, Ms Hothi wrote by email to Mr Dhuna:

> "It has been brought to my attention by a number of my team that the CIF Projects that Renato is delivering are not being done to our Policies and Procedures. Evidence from the Team clearly show that the Schemes designed by Renato are not to Highway specification, he's gone against our Policies and Procedures, he's never supervised any of his works on site and more recently he had instructed the DSO to undertake additional works that has not been paid for by the resident. I have spoken to him on a number of occasions, however he gets very aggressive and will not accept any advice or share any information. He refuses to accept a direct instruction from me and he is rude to his fellow colleagues, more recently I had to ask others to leave a meeting as he point blank refused my request in front of them and became very loud and disrespectful, I had to tell him to lower his voice."

83. Mr Dhuna replied to say that he had also heard from Mr Mapembe and that he proposed to meet them both after pending periods of leave. He wrote that he had made it clear to Mr Mapembe that he should report to Ms Hothi.

84. On 19 March 2019, Mr Mapembe wrote to Mr Dhuna complaining about Ms Hothi, he wrote:

> "This is regarding an update meeting with Kam Hothi today and Kam's inappropriate behaviour towards me. After I finished an update of Schemes, Kam sarcastically sits back and laughing at me saying that *"finally I got grip on you, as your manager this year you have not delivered any scheme. I have been watching you all these days, you are just sitting there doing nothing"…* she wanted to continue with her bullying and belittling me in front of my colleagues… Kam continued to say that I am not fit for this job… Kam

> called one of my colleague Dass Aparajita to be a witness… Then Kam Hothi went to look for Savio and came back claiming that Savio will be coming to see me in a few minutes, I should not leave. I continued to work on my computer in taking some notes, Kam walked past my desk saying it is better that you are writing some notes. After a few minutes Kam came and told me that Savio will take a bit longer to come and if I want to go home I can do so. I thanked her and said I am still in the office. A few minutes later after some time Kam came to my table and asked me to whom am I sending email? I answered that all emails originate from my computer, can be traced by IT if she wants to do so. All information is available under GDPR and I have nothing to hide… I take this behaviour as unacceptable and would like to know why Kam is doing this now."

85. Dass Aparajita had indeed written an email to Mr Dhuna, she wrote:

> "Kam was talking to Renato about workloads. He again started to raise his voice and started to argue with Kam. As he was refusing to listen, Kam asked me to witness the conversation. Kam said to Renato that she was concerned that he has only delivered two or three schemes and she would have to raise this with Sanjay. Renato very bluntly said, *"you can do whatever you want, you can go and tell whomever you want"…* He refused to listen to her…"

86. On 3 June 2019, Mr Mapembe wrote to Mr Dhuna expressing his concerns in relation to the arrangements for Inspections of Works which includes the following:

> "As outlined in the attached email, the process and stages of inspection, cannot be achieved within two visits. Two, ten minute visits to the site cannot ensure proper monitoring of Quality Control, appropriate building materials, work details, relevant standards, specifications, workmanship, schedule and visual inspection throughout the construction life circle. This requires vigilance, requires one to be on site almost all the time, or at least make regular visits. If I were to qualify and sign off any of these works, based on "two ten minute visits", this would translate and amount to a, "shortcut". In a post-Grenfell world, I would be compromising my professional integrity and the reputation of the Council. I simply do not have capacity to undertake the Site Inspector / Clerk of Works duties. In the long run, this could prove cost effective for the Council, as a Clerk of Works can identify problems early and have them rectified with minimal cost and minimal disruption as opposed to the problems manifesting later after hand over. … If the Council can commit to a disclaimer that I can sign off DSO works after two ten minute visits, and that any flaws that manifest later on, cannot be attributed to me, then I will be assured that I won't be held accountable for any of these flaws."

87. In July 2019, Mr Mapembe met with the Respondent's then Chief Executive Officer in accordance with their open door policy. There is no written minute or contemporaneous record of this meeting. We only have evidence from Mr Mapembe as to what was discussed. We find that he raised the matters he summarises in his Witness Statement:

87.1. That he was being subjected to bullying and harassment which was being covered up by senior managers, (a reference to the behaviour towards him by Ms Hothi and the lack of action as he perceived it by Mr Dhuna);

87.2. That there were recruitment malpractices, (a reference to there being favouritism in in-house appointments by Ms Hothi);

87.3. That there were ongoing statutory breaches of data protection, (a reference to a demand being made of him, as he saw it, to share his password with Ms Hothi); and

87.4. Shortcuts that he was being forced to be complicit in, (i.e. his concerns about his being expected to sign off work after two short inspections of the work in question).

88. The chronology then leaps to Mr Mapembe's grievance of 20 April 2020 which begins at page 805. In this grievance:

88.1. He complains about being stressed caused by his having to deal with 46 Councillors and a manager that does not understand engineering, but interferes with engineering decisions, demands changes that do not make engineering sense due to her lack of engineering expertise, ignoring current engineering standards;

88.2. He calls for a stress risk assessment for him personally;

88.3. He states that there have been no stress audits or stress tests, which he asserts has caused injury to his health;

88.4. He complains of harassment by Ms Hothi contrary to s.26 of the Equality Act 2010. He refers to persistent unjustified criticism, the setting of unreasonable deadlines, public humiliation, scapegoating, removal of areas of responsibility and constant negative feedback. He does not identify the protected characteristic to which the allegations of harassment relate;

88.5. He complains the Respondent has failed to irradicate a culture of bullying and harassment;

88.6. He asserts the Respondent has failed to provide a safe system of work;

88.7. He asserts the Respondent is in breach of the implied contractual term requiring the employer to provide support, so that an employee can carry out duties free from harassment, (citing Wigan Borough Council v Davies);

88.8. He asserts the Respondents failed to make it known to its employees that such behaviour is not permitted;

88.9. He states that he no longer wishes to work with Ms Hothi, citing s.44(1)(c) of the Employment Rights Act 1996;

88.10. He cites the case of Waters v The Commissioners of Police for the Metropolis;

88.11. He makes a series of specific allegations against Ms Hothi. In particular he complained about the way she had spoken to him on 19 March 2020, in front of work colleagues;

88.12. He complains that since he has spoken to the Chief Executive Officer, he has been treated as a workplace pariah; and

88.13. He cites s.39 of the Equality Act 2010.

89. Attached to the Grievance was a chronology of specific events which Mr Mapembe said amounted to bullying and harassment by Ms Hothi. For example:

89.1. That on 5 March she said in a team meeting that there were major flaws with the CIF Schemes that he was undertaking;

89.2. That she had deleted information and correspondence from Members and the public from the filing system, (which he said was protected under GDPR);

89.3. That she harassed him to provide her access to his password, which he said would be a breach of GDPR Guidelines, which led to her accusing him of failing to follow a management instruction;

89.4. That she had harassed him to carry out the duties of an Inspector of Works and sign off work after two ten minute visits to site, which he said amounted to a shortcut. She again attributed his refusal as a failure to follow a management instruction;

89.5. Mr Dhuna refused to act upon his expressed concerns about Ms Hothi's behaviour towards him;

89.6. After his meeting with the CEO, he had become the office pariah; and

89.7. That there was nepotism within the department giving as an example somebody being persuaded by Ms Hothi not to apply for a position because it had already been ear marked for somebody else who was a relative or friend.

90. The grievance was investigated by a Mr D Maycock of an outside organisation known as South East Employers, a not for profit organisation providing employment and organisational support to local authorities in the South East of England. The Investigation Report appears in the Bundle beginning at page 145.

91. Mr Maycock did not provide Mr Mapembe with an outcome to his grievance until 7 July 2020, (page 334 of the Bundle). Mr Maycock did not uphold the grievance, but made three recommendations:

    91.1. There should be mediation between Mr Mapembe and Ms Hothi;

    91.2. Whilst there had been concerns about Mr Mapembe's capability, they had not been correctly addressed in the appropriate procedures of the Respondent and those concerns should be appropriately addressed; and

    91.3. There be a review of the processes and procedures.

92. Mr Mapembe appealed against the grievance outcome on 14 July 2020, on the grounds that the grievance had not been properly investigated and that Ms Hothi should be held accountable for her conduct, (page 210). Detailed grounds of appeal are set out in a document attached which begins at 211 of the Bundle.

93. A Grievance Appeal Hearing took place on 20 August 2020. We were not referred to any notes or minutes of that hearing, but an outcome was provided by way of letter dated 3 September 2020, which is at page 225. The appeal was dealt with by a Mr Moone, Service Lead for Housing (People) Services. The appeal was partially upheld, in that there was found to have been a lack of sufficient investigation into Mr Mapembe's allegations relating to the incident on 19 March 2019. In all other respects, the grievance outcome was upheld. Mr Mapembe was informed that Human Resources would be in contact with him in relation to the further investigation into the incident on 19 March 2019.

94. A Ms Kitson, Strategy and Partnership Manager, was appointed to investigate the alleged incident on 19 March 2019 and the recruitment practices of Ms Hothi. She confirmed this to Mr Mapembe in a letter dated 5 October 2020, (page 237). She proceeded to interview a number of individuals and notes of those meetings begin at page 239.

95. In the meantime, between July and October 2020, the Respondent had undertaken restructure planning with a view to saving £5 million on its annual budget. They called this exercise the, "Our Future's Restructure". The exercise was conducted by the Chief Executive Officer, the Director of Transformation and an outside Consultancy known as Gate One.

96. During this planning, Ms Hothi met with Gate One on one occasion, in which she had a discussion about Parking Services, (not Highways).

97. Officers from the union's representing the Respondent's employees were consulted during the planning stages on 16 September and 28 October 2020, (page 256). It was proposed that trade union representatives would be involved in the exercise to match existing employees to the new roles under the proposed new structure.

98. A consultation document was produced that set out the proposals with a view to consultation with all staff and with the unions UNISON, UNITE and the GMB. Outlined in its introduction was that the need for change arose from continued reduction in central government funding, rising demand for its key services, an increase in resident's expectations and, "a desire to grow resilience and independence in our communities". The consultation period was to run from Wednesday 4 November to Monday 21 December 2020.

99. In the meantime, Ms Kitson met with Mr Mapembe. The date of that meeting is not clear, but in the minutes, (page 302) we can see that Mr Mapembe signed the minutes on 30 November 2020.

100. We note that the consultation document set out that the Respondent's staffing levels would be reduced from 1176.46 to 1049.44 full time equivalent under its new proposed organisational structure. It explains that job evaluations would be carried out by a panel of trained job evaluators and Trade Union Representatives, (page 280). The process is further explained at page 288, a familiar process for local authority restructures:

    100.1. A post is matched under the new structure if it is broadly the same as an existing post;

    100.2. If there is more than one post in the existing structure which matches to a single post under the new structure, those in the existing posts will be, "ring fenced" and will have to go through a selection process in competition with each other;

    100.3. Where there are posts under the current structure that are neither matched nor ring fenced, there are new alternative roles in the new structure that will be identified as possible opportunities. Those at risk can express interest for such a vacant role, either one grade up or one grade down from their current role; and

    100.4. Where there is no match and an employee is at risk of redundancy, suitable redeployment opportunities will be considered and vacant posts published once notice has been served.

101. Mr Mapembe was notified on 4 November 2020 that within the new structure, his role had been deleted, he had not been ring fenced and he was therefore at risk of redundancy. We do not have the document notifying Mr Mapembe of this in the Bundle, but we know there was such a document, as Mr Mapembe refers to it in an email he sent asking questions about it on 10 December 2020, (see below).

102. On 3 December 2020, Ms Kitson provided the outcome to her investigation in a report which begins at page 344. She concludes, (page 356):

102.1. In respect of the incident on 19 March 2020, Ms Hothi had not intentionally sought to humiliate Mr Mapembe however, she admits speaking to him in an open office in front of others;

102.2. There was evidence that there had been ongoing performance issues with Mr Mapembe over a number of years and that he had been difficult and challenging to manage;

102.3. Mediation is not a practical solution;

102.4. She recommended Mr Mapembe receive a formal acknowledgement that the actions toward him on 19 March were inappropriate and the impact of that upon him, that Ms Hothi receive further training to enable her to better manage challenging behaviour and poor performance and that Senior Management give thought to arrangements for the further management of Mr Mapembe in the future;

102.5. There are strong ingrained perceptions of nepotism and a serious culture of mis-trust and difficult working relationships. Various steps are recommended to address this.

103. As alluded to above, on 10 December 2020 Mr Mapembe sent an email to a general staff inbox set up specifically for the purpose of receiving questions from the Respondent's staff in relation to the consultation exercise. Answers were provided on 14 December 2020, (page 368). The further information provided included:

103.1. The CIF Schemes previously managed by Mr Mapembe would be spread, distributed, across various teams of the Council;

103.2. Highways work will be covered by engineers in other departments;

103.3. A number of engineers in different fields will be retained, specific jobs may be commissioned out to external consultants;

103.4. If Mr Mapembe believes that there has been any nepotism, he should report it;

103.5. Line managers have not been involved in the design process; and

103.6. Matching has been done by a panel of HR colleagues and trade unions representatives.

104. On 15 December 2020, Mr Mapembe identified an advert which he said was an advertisement by the Respondent for his role, (page 234). The advertisement was for, "Senior / Principal Highway Engineer – Slough - £48-£55k – LA / Development Schemes", he copied in the link. When one looks at the advertisement that the link led to, it is clearly for a commercial enterprise who have an office in Slough. Mr Mapembe's salary was £40,000 at the time, the advertised role would have represented a significant leap in

salary for the appointee. The role included private healthcare, (a benefit not enjoyed by the Respondent's employees). Mr Mapembe agreed in evidence this was not an advert for his role and he confirmed to the Tribunal he realised that this was not his role when he went for a meeting with his union whilst he was still working for the Respondent.

105. There was a further consultation meeting with the trade unions on 16 December 2020, the minutes are at page 363 of the Bundle. They confirm that the job matching process had been undertaken by Mr Rawlings of UNISON and somebody from the HR Advisors, South East Employers.

106. A response to the Consultation Exercise was published by the Respondent in January 2021, the document begins at page 395 of the Bundle. The anticipated time scale with new contracts issued to matched individuals, would be late March 2021 onwards, with the new structure in place from April 2021. At the request of the unions, the deadline for expressions of interest in vacant posts had been extended from 21 December 2020 to 7 January 2021.

107. Mr Mapembe was written to on 8 March 2021, to invite him to a meeting on 15 March, in order to discuss his individual circumstances. That meeting was postponed and eventually took place on 30 March 2021. In the meantime, on 22 March 2021, Mr Mapembe commenced Early Conciliation with ACAS. At the meeting on 30 March 2021, Mr Mapembe was provided with a letter giving him notice of redundancy, informing him that his employment would come to an end on 26 May 2021. He was told that he would be placed upon the Redeployment Register and considered for any vacancies that became available.

108. Also on 30 March 2021, Mr Mapembe was issued with an outcome from the outstanding aspects of his grievance, i.e. with regard to the events of 19 March 2019. The letter is at page 521 of the Bundle. That is, whilst Ms Hothi had not intended to humiliate him, she had spoken to him in front of others and he should receive a formal acknowledgement that the events on that day were inappropriate and the impact that had upon him. There was evidence of performance concerns but those did not warrant Ms Hothi's actions. There would be recommendations in that regard. The outcome was provided by Mr S Gibson, Executive Director of Place.

109. Mr Mapembe completed an Expression of Interest form. The role that he expressed an interest in was that of Development Manager, (Place – Place Strategy and Infrastructure). It was a Level 9 role, (Mr Mapembe was on Level 8). He agrees it was not a role for which he was suitable. He was though, shortlisted for the role of, "Members Business Partner". He was interviewed for that role on 26 February 2021. The interview panel consisted of three people who were not in any way previously involved or had any dealings with Mr Mapembe or Ms Hothi, (page 478). The outcome was that he was deemed, "not appointable".

110. We note that Mr Mapembe had also expressed interest in the roles of Transport Lead (Place – Place Strategy and Infrastructure), (page 482) and Planning Manager (Place – Place Regulation) (page 484). He agreed that these were not roles for which he was suitable.

111. On 7 April 2021, Mr Mapembe submitted an appeal against his dismissal, (page 529 of the Bundle). In his letter of appeal he stated:

 111.1. The job is still being undertaken by the Council;

 111.2. He was selected because he had raised a grievance;

 111.3. His selection was racially motivated;

 111.4. His role has been advertised;

 111.5. He was targeted because he was a member of a union and a Union Representative;

 111.6. People were retained as a result of nepotism; and

 111.7. The alternative role he was offered was not genuine.

112. Mr de Cruz provided a management response to the appeal, it appears in the Bundle at page 548. A hearing took place on 13 May 2021, chaired by Mr West. The minutes are at page 557.

113. The appeal outcome was provided by letter dated 18 May 2021, (page 570). Mr West's conclusions included:

 113.1. In a council wide restructure to achieve £5 million per year savings, (developed by Gate One, the Chief Executive and the Director of Transformation) there had been consultation with the unions, the matching process had been contributed to, scrutinised and reviewed by the unions, the consultation was with all staff in November and December 2020 and that it was a genuine situation in which Mr Mapembe's role was no longer required.

 113.2. His selection for redundancy was absolutely nothing to do with his grievance. His line manager and others involved in his grievance had no involvement in the process.

 113.3. Any suggestion that the dismissal was racially motivated was refuted.

 113.4. His role had not been advertised.

 113.5. The suggestion that he was dismissed because of his union membership or activities was refuted.

113.6. He agreed that during the interview for the role for which he had applied, it became apparent that it was an administrative rather than an engineering role and was not therefore a role that he wanted.

114. Mr Mapembe's employment with the Respondent came to an end on 26 May 2021. Early Conciliation ended on 3 May 2021. These proceedings were issued on 19 May 2021. Nobody appears to have picked up on the fact that his claim, which is primarily of unfair dismissal, appears to have been issued before the end of his employment.

115. There are organisational charts in the Bundle, at page 592 the Parking Team managed by Ms Hothi before the reorganisation and at page 593, of the Network Team managed by Ms Hothi after the reorganisation. There were 21 posts within the team before the reorganisation and 15 posts afterwards. Although Mr Mapembe said in evidence that he was the only black person in the team, that is not correct, there was a Parys Barnett who is Afro-Carribean and who was retained after the reorganisation. Although there has been suggestion of bias in favour of people who are Sikh, it is apparent from the reorganisation charts, (which records people's ethnicity) those retained and those made redundant are a mixture of people who are Sikh, people who are Muslim, people who are white and people who are black.

116. Finally, it is worth acknowledging that Mr West frankly acknowledged in his evidence that the restructure was a disaster. It led to many people leaving the employment of the Respondent out of choice and a collapse of the Respondent Authority. A Report into the reorganisation was prepared for the Secretary of State, by an organisation called Best Value Commissioners. It is scathing in its review, describing the reorganisation as,

> "Totally unfit for purpose and resulted in the speedy destruction of Officer capacity and competence with many remaining individuals now in posts they have no experience in and whole Teams being made redundant which were essential to delivery of statutory services."

<u>Conclusions</u>

The Estoppel Argument

117. Mr Bishop submits that Mr Mapembe should be estopped from putting his case in any way other than that this was not a genuine redundancy situation and he was unfairly dismissed because of his whistle blowing. He says that must be so because it is the only basis upon which the Interim Relief Order could have been made.

118. Mr Bishop correctly submits that Interim Relief is not available in a case where there is a genuine redundancy and where the claimant says he was unfairly selected for that redundancy for one of the proscribed reasons for which Interim Relief is available. <u>McConnell and Anor. v Bombardier</u>

Aerospace / Short Brothers Plc. (No.2) [2009] IRLR 201, is authority for that proposition.

119. When Mr Mapembe issued his claim he was unrepresented. He begins the statement that was attached to his Claim Form with,

> "I was chosen for redundancy, using unfair selection and discriminatory criteria by managers, who mob bullied me after reporting / whistle blowing".

120. A little later in that same opening paragraph he wrote,

> "The management victimised me by getting rid of me on the pretext of redundancy".

121. If his claim was solely that he was chosen for redundancy in a redundancy situation, using unfair and discriminatory selection criteria, Interim Relief would not have been available for him. If his claim was that he was "victimised" for whistle blowing on the pretext of redundancy, (in other words, not a genuine redundancy) then Interim Relief would be available.

122. Subsequent to submitting his Claim Form, on 23 May 2021, (within the required seven days) Mr Mapembe submitted his application for Interim Relief, citing s.128 and 103A of the ERA 1996. He submitted that it was likely the Tribunal will find that the principal reason for dismissal was his protected disclosures. He sought an order continuing his contract of employment, pursuant to s.129(9) of the ERA 1996. Clearly he had some legal assistance in submitting the application.

123. The application for Interim Relief came before Employment Judge Gumbiti-Zimuto on 24 June 2021. Mr Mapembe was unrepresented. The Respondent did not attend. For reasons that we do not need to go into, the issue of these proceedings had not come to the attention of those who needed to know, within the Respondent organisation.

124. In granting the application, Employment Judge Gumbiti-Zimuto recited in his Reasons at paragraph 11, (in the Bundle at page 29) that the material before him showed that redundancy was not the reason for dismissal because his role continued in substance. He recites that,

> "The Claimant contends that his role was not redundant and the real reason he was dismissed was because of whistle blowing."

125. Mr Bishop's argument is that in so contending, Mr Mapembe has effectively, "nailed his colours to the mast". He is bound by that contention and estopped from putting forward any other argument.

126. Employment Judge Gumbiti-Zimuto records at the end of his paragraph 12,

> "The Claimant has given a coherent and compelling narrative of events. I am satisfied that the Claimant has a pretty good chance of showing that the reason for his dismissal was because he made a protected disclosure."

127. It is worthy of comment as an aside at this stage, that this Tribunal did not have the benefit of a compelling and coherent narrative of events from Mr Mapembe.

128. Employment Judge Gumbiti-Zimuto was asked to reconsider his order for Interim Relief. He refused that application. His Judgment and Reasons begin in the Bundle at page 56, handed down on 5 November 2021. At paragraph 21 of his Reasons, he distinguished McConnell because in McConnell it was conceded that the reason for dismissal was redundancy and the case was about selection for redundancy. Redundancy is not conceded here. The final sentence at paragraph 21 reads,

> "In this case the Claimant is claiming "unfair dismissal by reason of whistle blowing"…"

129. Once again, Mr Bishop latches onto that and asserts that it is a finding by Employment Judge Gumbiti-Zimuto and as a consequence, Mr Mapembe is estopped from arguing otherwise. He suggests that we are bound by the finding. He submits that the Claimant cannot run a case in the alternative, that is mutually exclusive.

130. Returning to the document attached to the Claim Form, what one might describe as the Particulars of Claim, it is clear that Mr Mapembe was submitting his case in the alternative. At page 5 of that document, (page 18 of the Bundle) he refers to an unfair redundancy process. He complains about lack of information on workers in the pool for selection, or how the selection was made, the absence of criteria on scoring and the favouritism shown to family and friends. He also argued at page 7 of his document, (page 20 of the Bundle) that he was selected for redundancy because he was black.

131. Mr Bishop has tried to run this argument before, although the relevant documents are not in the Bundle and do not appear to have been referred to in his submissions. They are in the Tribunal file. The Respondent submitted a Strike Out Application on 9 June 2022. At paragraph 9 they wrote,

> "C chose to claim based on dismissal for his own financial benefit via the IRO, he cannot also run mutually exclusive cases based on redundancy. To do so would mean that he should and could not have applied, let alone succeeded, on an IRO Application, albeit R's case has never been considered."

132. The strike out application was referred to Employment Judge Shastri-Hurst, (regrettably not until 3 November 2023) and on her instructions, a letter was written to the parties which stated that the application would be considered at the outset of the Final Main Hearing, which at that time was scheduled to commence on 21 November 2023. She remarks,

> "A Claimant has the right to present claims in the alternative. Just because the Tribunal found at the early stages of litigation, prior to the Respondent's

> Response and prior to disclosure, that the claim for whistle blowing has pretty good prospects, does not automatically mean that the other dismissal claims have no reasonable prospects of succeeding at all."

133. The case came on for Final Hearing before Employment Judge Annand and two Members on 21 November 2023. They granted an application for postponement by Mr Mapembe because a few days earlier, his Solicitors had withdrawn, leaving him unrepresented. However, the Tribunal dealt with the strike out application. They refused it. In their Reasons at paragraph 28, Employment Judge Annand wrote,

> "It is not unusual for Claimant's to put forward two claims in the alternative, or indeed for Respondents to defend the Claim on alternative grounds. If one Claim (or Response) fails, the party then relies on the other in the alternative. In Whitburn v Royal Devon and Exeter NHS Foundation Trust EAT0188/15, Mr Justice Kerr observed:
>
> > *"Where one of two alternative ways of putting a case must necessarily fail, while the other may succeed, the fact that one or other is doomed to fail says nothing about the merits of whichever one is not doomed to fail."*

134. We respectfully agree. Mr Mapembe is entitled to put his case in the alternative. We do not accept Mr Bishop's submissions, without supporting authority, that the finding by an Employment Judge at an Interim Relief stage is binding on the Tribunal that finally determines the outcome of the case, or that a Claimant is estopped from presenting in the alternative, the case which formed the basis of the Interim Relief Order.

Was there a genuine redundancy situation?

135. The Respondent had a genuine need to make significant financial savings. £5 million per year was its target. We see this from the quote from the consultation document of 4 November 2020 as set out above, (from page 276 of the Bundle).

136. As we have also noted above, the head count was reduced from 1,176 to 1,049 full time equivalent. That is 127 full time equivalent fewer posts.

137. As part of that restructure, a new structure was implemented for the Parking Team, as noted above when comparing the two organisational charts.

138. The reorganisation in particular involved removal of the requirement for somebody to do work of a particular kind, that of a Highways Development Engineer.

139. Mr Mapembe's job role was not advertised. He was not replaced, or "back filled". The role of Engineer that he undertook on projects was spread amongst others as confirmed in the evidence of Mr de Cruz, (which we accept) and as set out in the email of 10 December 2020 at page 368 of the Bundle.

140. There was a genuine redundancy situation; a diminished requirement to do work of a particular kind.

Direct Race Discrimination

141. The question is whether the decision to dismiss Mr Mapembe was an act of direct race discrimination? He relies upon his ethnicity as black African. Was he treated less favourably than a person in precisely the same circumstances but not black African, would have been treated?

142. The statistics do not support Mr Mapembe's case. Muslims, Sikhs and white British people from his Team were made redundant too. A black person was retained, (albeit we acknowledge, black Carribean rather than black African and we acknowledge that can be a difference that could give rise to less favourable treatment).

143. In the List of Issues, whilst not naming comparators, Mr Mapembe made reference to friends and relatives of Ms Hothi. He was not able to be specific about who he meant. In any event, we find that Ms Hothi was not involved in the process at all. The overall design of the reorganisation, job matching, ring fencing and the determination of job applications, were all outside the sphere of line managers. Ms Hothi had no involvement in those processes whatsoever. For those reasons, we eliminate Mr Mapembe's proposed comparators in the form of Ms Hothi's family and friends.

144. We were unable to identify any facts from which we could properly conclude, absent explanation from the Respondent, that the reason for Mr Mapembe's dismissal was his race. The burden of proof does not shift to the Respondent. We find that a hypothetical comparator, a person in exactly the same role as Mr Mapembe but not black African, with the same experience and abilities, would have been selected for redundancy and would not have succeeded in the job applications or expressions of interest.

145. The complaint of direct race discrimination therefore fails.

Was the reason for dismissal Mr Mapembe's Trade Union Membership or activities?

146. Mr Mapembe was a Member of the GMB and had attended a training course on 30 September to 4 October 2019. The questions asked of him did not amount to activities. There is no evidence of his having engaged in any other trade union activities. We find that he did not.

147. There was no evidence that Mr Mapembe's trade union membership or such minimal activities as there were, (his attending a course or answering some questions) gave rise to any sense that anyone at the Respondent would want to remove him from post.

148. Furthermore, the entire process was as we have noted, handled externally in terms of the reorganisation, job matching and ring fencing. The process involved Trade Union input in the decision making.

149. There is no evidence at all that those who interviewed Mr Mapembe would have any reason to target him because of his trade union membership or activities.

150. Mr Mapembe's membership of the GMB and such activities as he may have undertaken are not the reason or principal reason for his dismissal and his claim in this respect therefore fails.

Was Mr Mapembe dismissed because he had made protected disclosures?

151. There are three instances in respect of which Mr Mapembe says that he made protected disclosures:

151.1. The first is in respect of his meeting with the Respondent's Chief Executive Officer in July 2019. We accept that he met with the Chief Executive Officer and that he spoke in general terms about matters of concern in relation to the way he was being treated as he perceived it, by Ms Hothi, his perceptions of nepotism, of Data Protection irregularities and of what he described as, *"short cuts"*. We find that he did not disclose information, he simply made general allegations that could not be said to amount to the giving of sufficient detail as to meet the definition. For that reason, what he said to the Chief Executive Officer did not amount to protected disclosures.

151.2. The second instance of the alleged making of protected disclosures is in Mr Mapembe's grievance of April 2020. Mr Mapembe did give specific information about the events of 19 March 2020 in his grievance about what he says Ms Hothi had said to him. Such conduct by one's manager, if true, could potentially amount to a breach of the implied term in one's contract of employment to maintain mutual trust and confidence, could amount to discrimination if it were either related for example to one's race or a person of a different race would not have been subjected to that treatment, and could be in breach of the Respondent's obligation to maintain a safe system of work. It could also amount to victimisation, (as Mr Mapembe alleges in his grievance) if it were because of a protected act in his speaking to the Chief Executive Officer in such a way as to amount to allegations of discrimination. These are all legal obligations to which Mr Mapembe alludes in his grievance. The conduct of Ms Hothi was not in fact because of race, or related to race, or victimisation, or a breach of the implied terms to maintain either trust and confidence or a safe system of work. He did not reasonably believe the information provided tended to show a failure to comply with legal obligations. In our judgement, he did not reasonably believe that the disclosures he

made were in the public interest. He made those disclosures in his own personal interest and whilst his motive is not relevant, he did not reasonably believe that it was in the interests of the public to know about his disagreement with Ms Hothi on 19 March 2020. For those reasons, we find that the disclosures made do not meet the definition of a protected disclosure.

151.3. The third alleged instance of making protected disclosures is in the Grievance Appeal of 14 July 2020. That document does not raise anything further. We find that it does not amount to the making of protected disclosures.

152. For the avoidance of doubt, Mr Mapembe has made references to the sharing of passwords contrary to GDPR and, "short cuts" in the requirement that he approve works on the basis of two site visits. We find that he failed to provide specific information so as to meet the definition of a protected disclosure or to establish something that he reasonably believed tended to show a breach of a legal obligation. Mr Mapembe was unable to demonstrate to our satisfaction, that the Respondent's proposal that a shared folder be created, (which is what his reference to sharing passwords alluded to) or that he approve works on the basis of two inspections, amounted to a breach of any Act of Parliament or Regulation.

153. Having found that Mr Mapembe has not made any protected disclosures, his complaint that he was unfairly dismissed for having made such disclosures must therefore fail.

154. However, had we decided otherwise, having regard to the fact that the entire process was handled remotely as explained above, we find that the reason, the only reason, for his dismissal was redundancy. There were no facts from which we could have reasonably concluded, absent evidence from the Respondent, even if the matters he had raised did meet the definition of protected disclosures, that the reason for dismissal was anything to do with the fact that he had raised those matters.

155. For these reasons Mr Mapembe's complaint of unfair dismissal for having made protected disclosures also fails.

Ordinary Unfair Dismissal

156. The list of issues does not contain a reference to ordinary unfair dismissal and the application of the test of fairness set out at s98(4) of the ERA. However, it is implicit in the references to consultation, fair selection and suitable alternative employment. The document that sets out the particulars of his claim filed with his ET3 refers to in a heading, "Unfair Redundancy Process".

157. The Respondent consulted extensively with the unions, from an early stage, when proposals were still formulative. The Respondent informed and consulted with its workforce, including Mr Mapembe, when the

proposals were still formulative. The Respondent consulted individually with Mr Mapembe.

158. Selection for redundancy was objective and fair, arrived at after those apart from the everyday events within the Respondent's workforce had drawn up plans for reorganisation, job matching and ring fencing. Competitions for vacant posts were conducted objectively and fairly by independent interviewers applying fair and objective criteria. Full consideration was given to the availability of any suitable alternative employment before dismissal took effect.

159. For these reasons, the complaint of unfair dismissal contrary to the test of fairness in s98(4) of the ERA also fails.

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Employment Judge M Warren

Date: 28 March 2024

Sent to the parties on: 9 April 2024

For the Tribunal Office.

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