Case Number: 2300338/2014

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Ms Tatiana Stockman

Respondent: Phoenix House Limited

Held at: London South On: 20 & 21 April 2017

Before: Employment Judge Freer
Members: Ms R Bailey
Mr G Shaw

Representation:
Claimant: In person
Respondent: Mr C Milsom, Counsel

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1) The Claimant's claims of detriment in employment on the ground of having made a protected disclosure and victimisation both relating to the detriment of the duration of a final written warning issued on 16 August 2013 are out of time and the Tribunal has no jurisdiction to consider them.

2) The Claimant's claims of detriment in employment on the ground of having made a protected disclosure and victimisation relating to the detriment of by a letter dated 25 November 2013 inviting the Claimant to a meeting at which her future employment was to be discussed are both successful.

REASONS

1. This hearing is to consider a matter partially remitted by the Employment Appeal Tribunal from a judgment and reasons of the Employment Tribunal sent to the parties on 24 April 2015. The decision of the Employment Appeal Tribunal was made on 17 May 2016 and the remission issues were discussed and confirmed with the parties at a Preliminary Hearing on 27 February 2017 and are contained in an Order sent to the parties on 16 March 2017.

2. They are as follows:

> "The ET is solely concerned with the alleged detriments of:-
>
> (a) The duration of the written warning (being twelve as opposed to six months) issued on 16 August 2013;
>
> (b) By letter of 25 November 2013, inviting the Claimant to a meeting at which her future employment was to be discussed. The ET has already determined that the decision to dismiss at that hearing was not significantly influence by any earlier disclosures/protected acts [para 314 of the ET Reasons].
>
> Time limits
>
> (1) The claim with regard to the imposition of the 12-month warning is prima facie time-barred. Is there a continuing act? Should time be extended having regard to the extension provisions of s48(3) ERA 1996 and 123 EqA 2010?
>
> PIDA
>
> * For reasons given at paragraphs [261] - [271] of the ET Reasons, the sole potential disclosures under s43A ERA 1996 is the grievance to Ms Karen Biggs of 30 May 2013.
>
> (2) Was there a reasonable belief both that the information was true and that the information tended to show one of the circumstances prescribed by s43B ERA 1996?
>
> (3) Insofar as there was a protected disclosure, were the acts of detriment cited above on the grounds of the protected disclosure pursuant to s47B(1) ERA 1996? To the extent that recourse to a "reverse burden of proof" is required, what primary facts has the Claimant established to support a prima facie case of detriment? These matters are to be addressed having regard to paragraphs 29 to 32 of the EAT decision.
>
> Victimisation
>
> * There are two potential protected acts following the ET's judgment:-

(a) The formal grievance of 30 May 2013;

(b) The Claimant's evidence at the grievance appeal hearing.

(4) Were the detriments set out above because of the Claimant's protected acts? To the extent that recourse to a "reverse burden of proof" is required, what primary facts has the Claimant established to support a prima facie case of victimisation? These matters are to be addressed having regard to paragraphs 29 to 32 of the EAT decision".

3. The Tribunal has received written and oral submissions from both parties relating to the remitted matters. The parties confirmed at the earlier Preliminary Hearing that no further evidence was to be introduced and the Tribunal would rely on the material provided to it at the previous full merits hearing.

4. The Tribunal was provided with a further bundle of documents containing the essential documents relating to the initial Employment Tribunal decision, the EAT proceedings and submissions of the parties.

5. The Respondent provided a bundle of authorities which the Tribunal has considered and taken fully into account.

6. The Tribunal makes the following findings and conclusions on the remitted issues:

7. In **Blackbay Ventures Ltd -v- Gahir** [2014] ICR747 the EAT held:

> "It may be helpful if we suggest the approach that should be taken by Employment Tribunals considering claims by employees for victimisation for having made protected disclosures.
>
> 1. Each disclosure should be identified by reference to date and content
>
> 2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.
>
> 3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.
>
> 4. Each failure or likely failure should be separately identified.
>
> 5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to

> show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.
>
> 6. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43 B1 and under the 'old law' whether each disclosure was made in good faith; and under the 'new' law whether it was made in the public interest.
>
> 7. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.
>
> 8. The Employment Tribunal under the 'old law' should then determine whether or not the Claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest".

8. With regard to the sole potential disclosure, paragraph 263 of the Employment Tribunal's original reasons state:

> "That grievance letter is at pages 314 to 317 of the bundle. The Tribunal concludes that paragraphs 27 onwards contain enough information to amount to a protected disclosure. The Claimant refers to a breach of the Health and Safety at Work Regulations 1999 and unlawful harassment under the Equality Act 2010. The matters raised in paragraphs 27 onwards provide the information to those complaints, rather than them amounting to mere allegations".

9. That finding is not a matter of challenge and it is against that protected disclosure that the Employment Tribunal will consider the remitted issue regarding whether or not, at the time the disclosure was made, the Claimant held a reasonable belief both that the information was true and that the information tended to show the circumstances prescribed by section 43B of the Employment Rights Act 1996.

10. It was agreed at the Preliminary hearing that the reference to the matters raised being in the public interest was not an issue remitted by the Employment Appeal Tribunal.

11. It was also agreed by the Respondent that the correct approach is for the Tribunal to consider whether the Claimant subjectively believed those matters and if so, whether that belief was objectively reasonable. See **Babula –v- Waltham Forest College** [2007] IRLR 346, a decision made before the statutory amendments took effect on 25 June 2013 that removed the requirement that a qualified disclosure to an employer had to be made 'in good faith' and made 'public interest' part of the definition of a qualifying disclosure. The Court of Appeal held that an employment tribunal has to make three key findings: (i) whether or not the employee believes that the information they are disclosing meets the criteria set out in one or more of the subsections in s43B(1)(a)-(f); (ii) to decide objectively whether or not that belief is reasonable; and (iii) whether or not the disclosure is in good faith. This approach still holds good where (iii) is removed and the issue of being in the public interest is considered under (i) and (ii).

12. As the Court of Appeal held:

> "The word "belief" in section 43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the "belief" must be "reasonable". That is an objective test. . . .Further more . . . I find it difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knows or believes the factual basis for the belief is false"

13. Also in **Korashi -v- Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, the EAT held:

> "There seems to be no dispute in this case that the material for the purposes of s43B(1)(a)-(e) would as a matter of content satisfy the section. In our view it is a fairly low threshold. The words "tend to show" and the absence of a requirement as to naming the person against whom a matter is alleged put it in a more general context. What is required is a belief. Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold. No doubt because of that Parliament inserted a filter which is the word "reasonable".

14. The Tribunal has reconsidered the terms of the Claimant's written grievance dated 30 May 2013 and concludes, particularly from paragraph 27, that there were four elements being raised by the Claimant: (i) the Claimant considered that she was being unlawfully harassed on the basis of unprofessional remarks made about her by Mr Lambis and other colleagues; (ii) the Claimant considered that she was being unlawfully harassed on the basis of unfair treatment of her by Mr Lambis; (iii) there was no genuine reason for the restructure of the Finance Department; and (iv) the Respondent had infringed the Health and Safety Act by not protecting her from the alleged harassment.

15. This correlates with the Respondent's understanding of the grievance, where the "Overview Formal Meeting 28 November 2013" note states:

> "TS raised a grievance on 30th of May 2013 stating that: She has been unlawfully harassed by George Lambis, Director of Finance; She has been subjected to a systematic campaign of harassment by George Lambis; She has not been advised who to contact in the event of being harassed; she no longer wishes to work with George Lambis; there was no genuine reason for the restructure in the finance department; and the real reason for the restructure was her poor relationship with George Lambis".

16. With regard to whether the Claimant believed that the matters raised by her in the grievance to Ms Karen Biggs of 30 May 2013 tended to show a contravention of a legal obligation 43B(1)(a) and/or a breach of Health and Safety 43(1)(d), the Tribunal refers to paragraph 265 of its original reasons where it found:

> "The Tribunal concludes from the evidence it received the Claimant genuinely believed the matters raised. She was genuinely upset at the time".

17. The Tribunal confirms that it concludes the Claimant subjectively believed the disclosures made, both in terms of fact and also that this information tended to support a failure to comply with a legal obligation 43B(1)(b) and/or a breach of Health and Safety 43B(1)(d) relied upon.

18. The remaining issue therefore is whether that subjective belief held by the Claimant was objectively reasonable.

19. Further guidance of what amounts to an objectively reasonable belief in the context of a qualifying disclosure can again be found in **Korashi** (above).

> " This filter [of reasonableness] appears in many areas of the law. It requires consideration of the personal circumstances facing the relevant person at the time. . . To bring this back to our own case, many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their "reasonable" belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing.

20. Having regard to the comments in **Korashi** and the reference to the contextual knowledge of 'insiders', the Tribunal concludes that it was not objectively reasonable for the Claimant to consider that there was no genuine reason for the restructure of the finance department.

21. However, the Tribunal concludes that the Claimant's reference to unfair treatment includes the matter raised in paragraph 28 of the grievance that: "I replied that Mr Mansukh Mistry… has noticed that I have been treated unfairly by George Lambis. Mansukh Mistry was called in and confirmed what he had said last week in the office". Mr Mistry was asked to confirm his view by Mr Betha, which he did as found as fact by the Tribunal in paragraph 122 of its original reasons: "Mr Betha spoke with Mr Mistry and he confirmed his own view that Mr Lambis did sometimes not speak to the Claimant".

22. On that basis, the Tribunal concludes that that it was 'objectively reasonable' from the Claimant's position at that particular time to consider that the information was true and "tended to show" that she had been the recipient of unlawful harassment in the form of unfair treatment by Mr Lambis as confirmed by an independent member of staff. Also, that it was 'objectively reasonable' for the Claimant to conclude that this information "tended to show" she had not been protected from this treatment and her health and safety was or was likely to be endangered.

23. Accordingly, when considering the remitted matter of whether there was a 'reasonable belief', the Tribunal concludes that the Claimant held a reasonable belief that both the information was true and that the information "tended to show" one of the circumstances prescribed by section 43B of the Employment Rights Act 1996.

24. The law in relation to causation is helpfully set out in the case of **Fecitt -v- NHS Manchester** [2012] ICR 372, CA:

> "Once an employer satisfies the tribunal that he has acted for a particular reason - here, to remedy a dysfunctional situation - that necessarily discharges the burden of showing the prescribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the principles in *Igen -v- Wong*. . . .
>
> Suffice it to say that I agree with the submissions of Ms Romney, counsel for the claimants, that liability arises if the protected disclosures are a material factor in the employer's decision to subject that claimant to a detrimental act. I agree with Mr Linden that *Igen -v- Wong* is not strictly applicable since it has a European Union context. However, the reasoning which has informed the European Union analysis is that unlawful discriminatory consideration should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing. . . . In my judgment the better view is that section 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. If Parliament wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so."

25. **Hewage –v- Grampian Health Board** [2012] UKSC 37 confirmed the position regarding the burden of proof reversal provisions:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

26. The Tribunal has also been referred to the case of **The Chief Constable of Kent Constabulary -v- Bowler** [2017] UKEAT/0214/16 paragraphs 17 to 31 with regard to the burden of proof and detriment (in a victimisation claim, but the principles also hold good for protected disclosure detriments):

> "Determining whether the treatment that B is subjected to amounts to a detriment involves an objective consideration of the complainant's subjective perception that he or she is disadvantaged, so that if a reasonable complainant would or might take the view that the treatment was in all the circumstances to his or her disadvantage, detriment is established. In other words, an unjustified sense of grievance does not amount to a detriment; the grievance must be objectively reasonable as well as perceived as such by the complainant"

27. Any matter of knowledge of the protected disclosure/protected act is not an issue remitted back to the Employment Tribunal.

28. With regard to the letter dated 25 November 2013 inviting the Claimant to a meeting at which her future employment was to be discussed, the Tribunal concludes that Ms Bond took the decision to call and arrange that meeting. It was not a meeting that had been decided upon and Ms Bond was simply organising it.

29. The terms of the invite letter are set out by the Tribunal in paragraph 173 of the original reasons:

> "In a letter to the Claimant dated 25 November 2013 Ms Bond states: "I am writing further to our recent meetings and the mediation sessions. You are now required to attend a formal meeting on Thursday, 28 November 2013 … the meeting has been scheduled to consider if:- the working relationship between yourself and Phoenix futures has broken

> down to such an extent that it is irretrievable. If it is decided that the working relationship is irretrievable the possible outcome of this meeting will be that you are dismissed with notice. However this decision will not be made until you have had the opportunity to make suggestions as to the way forward."

30. The Tribunal set out in its original reasons why the content of that letter was objectively unreasonable and cross-refers to paragraphs 216, 217 and 220 of the decision:

> "216. On an objective consideration of the circumstances, the Tribunal concludes that the short notice of the meeting, the absence of advance written notification of the basis for the cause for concern and only being informed at the dismissal meeting of the basis for the Respondent's position, thereby failing to afford to the Claimant a reasonable opportunity to address the complaint, places the dismissal process outside the range of reasonable responses.
>
> 217. The Tribunal concludes in the circumstances of this case that an objective reasonable employer would not provide to an employee in the Claimant's particular circumstances and accused of an irretrievable breakdown in the working relationship which could result in dismissal, less basic rights that it would under its own Disciplinary Policy.
>
> 220. This was not an **Ezias** type situation where it was pointless in the circumstances to comply with procedure relating to advance notification of the basis for the allegation and the consequential affect on the fairness of the meeting. The Claimant was invited to the meeting to consider whether the working relationship had irretrievably broken down and if the Respondent considered that it had not, to make suggestions as to the way forward. Had the details of that proposition been provided in reasonable time for the Claimant to be provided with a reasonable opportunity to address that detail, there was potentially a constructively fair discussion to be held between the parties".

31. The Tribunal also refers to paragraph 226:

> "226. Ms Zacharias was clearly informed why management considered that the working relationship had irretrievably broken down, that is how she was able to put those views to the Claimant at various stages during the course of the meeting".

32. That is reflected in the briefing note at page 461 of the bundle which states:

> "LZ to introduce all present and to note the meeting is being held in relation to Phoenix *being now of the opinion* that the working relationship between her Phoenix futures has broken down to such an extent that it is irretrievable".

33. The Tribunal concludes that that at this stage Ms Bond, as Head of HR, had input into that document and the information received from Ms Zacharias, given

Ms Bond decided upon the meeting and as confirmed by Ms Zacharias in her cross-examination.

34. The Tribunal cross-refers to paragraph 309 of the decision where it sets out paragraph 74 of Ms Bond's witness statement:

> "309. Ms Bond gave her account in her witness statement of why the letter was written (paragraph 74) and this account was not challenged in evidence by the Claimant. Ms Bond states: "As a result of the mediation failing I had to assume that the Claimant still had a clear distrust of senior management including the Chief Executive. In her meetings with me and the Chief Executive the Claimant had expressed opinions that suggested to me that she had no respect for her employer and she still completely believed that her grievance was well founded. . . . I decided on this course of action because I had serious concerns about the reality of the Claimant returning to the workplace". The meetings with the Chief Executive at this time must refer to the grievance and disciplinary appeals".

35. The Tribunal finds that Ms Bond did not know the reasons why the mediation had been unsuccessful at the time this letter was written.

36. The Tribunal concludes with regard to the Claimant's protected disclosure claim that to invite the Claimant to a meeting where her future employment would be considered is, on an objective view, a detriment and it was "materially influenced" (by an extent that was more than minor or trivial) because the Claimant had made a protected act of unfair treatment through her written grievance.

37. The arrangement of the meeting and the invite to it was a decision made by Ms Bond. The Tribunal concludes that she did not make this decision simply on the basis that a grievance had been made or solely because if an assumed distrust of management by the Claimant. The decision was made because of the content of the grievance. The Tribunal does not consider this conclusion to be inconsistent with paragraph 309 above. As written: "and she completely believed that her grievance was well-founded". The content of that grievance amounted to a protected disclosure as found by the Tribunal. It is a matter that quite clearly influenced Ms Bond's decision in a material way, certainly in a way that was more than minor or trivial.

38. With regard to the point raised by the Respondent in submissions that Ms Bond was not concerned about the Claimant taking the Respondent to an employment tribunal, that was made by way of cross-reference to paragraph 51 in Ms Bond's witness statement. They are comments made by Ms Bond after the meeting on 30 September 2013, but before the mediation from which Ms Bond made her assumptions and arranged the disciplinary hearing. The Tribunal concludes that Ms Bond's comments relating to employment tribunals has no material impact on the conclusion that arranging for the Claimant to attend the meeting was "materially influenced" by the fact the Claimant had made a protected act.

39. With regard to the submission relating to placing the remitted claims in context of the wider complaints made by the Claimant that were unsuccessful, the Tribunal does not accept the proposition advanced. It is certainly not unusual in employment tribunal claims for many allegations to be raised by a claimant, of which the majority are concluded to be unfounded. However, that does not tend towards a conclusion that there is not, or will not be, any substance or merit in a small number of those allegations. The Tribunal reaches the same conclusion relating to the 'arbitrary victimisation' submission raised by the Respondent. This also does not militate against the possibility of detrimental treatment/victimisation by Ms Bond. It is not uncommon in Tribunal discrimination claims for an employer to lose patience during a process and commit an act of unlawful victimisation even though the surrounding events did not amount to discrimination.

40. The steps taken by Ms Bond as submitted were simply her complying with the Respondent's procedural requirements. The Tribunal did not make a finding at paragraph 147 of its reasons that Ms Bond decided to downgrade the allegation to misconduct from gross misconduct. Ms Logan's earlier letter of 5 June does not refer to gross misconduct. In any event, it was the period after mediation had been unsuccessful that the Tribunal makes its main findings.

41. The Tribunal has taken all the circumstances into account and concludes that those matters raised in submissions by the Respondent do not alter its decision.

42. With regard to the length of the final written warning, the Tribunal refers to paragraph 31 of Ms Bond's witness statement in which she states:

> "After consideration, Mandy decided to issue the Claimant with a first written warning. She decided that the warning would be for 12 months as this was in line with the new policy that had just been agreed and implemented in the organisation [page 532]. There was a discretion to do this within the old policy and I did suggest to Mandy that the warning could be for 12 months as this would mean it was in line with all future warnings within the organisation. It was not Mandy's suggestion".

43. The Tribunal therefore concludes that it was Ms Bond who suggested the 12 month warning and as Head of HR that advice had a very substantial affect on Ms Taylor's decision.

44. The Policy before the Tribunal is at page 532 of the bundle and is dated March 2013, preceding the events under review. As set out at paragraph 290 of the Tribunal's reasons the Policy states that a record of a warning will be placed on file and "It will *normally* cease to have effect after six months".

45. When it was pointed out to Ms Bond in cross-examination that the reference to page 532 was a reference to the old Policy and did not support the view she had put forward in her witness statement, Ms Bond changed position to say that the new Policy "was written and about to be launched".

46. As found in the original decision at paragraph 291, the Tribunal concluded the general statement that "all future warnings within the organisation" would be for a period of 12 months "surprising for a Head of HR as one might reasonably expect the period of sanction to reflect the nature of the disciplinary offence (as the Respondent's policy clearly envisages)".

47. Also, Ms Bond stated in oral evidence that "she had never given a warning for six months and was always used to applying a twelve-month period" and this was offered as a reason for providing her advice to Ms Taylor.

48. The Tribunal concludes that this does not sit comfortably with the contention by Ms Bond that she was relying on a 12 month period in line with the new disciplinary policy.

49. The Tribunal finds that it is not credible that Ms Bond, particularly as Head of HR, advised the use of a 12 month sanction period because that it what she was used to doing in the past and/or with reference to a non-implemented disciplinary procedure.

50. The Tribunal concludes on balance that Ms Bond was aware of the terms of the Respondent's active Disciplinary Policy when she provided her advice to Ms Taylor.

51. There was no credible explanation in oral evidence or on the documents, including in the letter confirming the final written warning, why in the Claimant's circumstances a decision was made to deviate from the Respondent's normal process of applying a six-month sanction period and applied a 12 month period contained in an apparently written, but as yet unimplemented, Disciplinary Policy.

52. Therefore the Tribunal concludes in the circumstances - of the implementation of a 12 month sanction period that was inconsistent with the Respondent's active written Disciplinary Policy; the Tribunal, on balance, not accepting as credible Ms Bond's evidence regarding her rationale for applying a 12 month sanction period; there being no explanation of why it was considered a 12 month period was reasonable in the Claimant's circumstances; no credible evidence of why the normal position in the Respondent Disciplinary Policy was not followed; the fact that the Claimant had made a protected disclosure in a grievance which Ms Bond had been addressing; and Ms Bond's advice to Ms Taylor substantially affected the decision - these are sufficient primary findings of fact from which the Tribunal could conclude that the application of the 12 month warning period was a detriment applied to the Claimant on the ground that she had made a protected act.

53. Accordingly, the burden of proof reverses and falls upon the Respondent. In the absence of credible evidence relating to the Disciplinary Policy and its application, the Tribunal concludes that the Claimant's claim is made out. The Respondent has not proved primary findings of fact which show that the

application of the warning period was in no sense whatsoever to do with the protected disclosure.

54. The Tribunal has carefully considered the authorities about whether or not the burden of proof provisions should be applicable in any particular case and it is the Tribunal's conclusion that this issue is one of the circumstances where it does apply as there is room for doubt as to the facts necessary to establish discrimination and determine the matter, as anticipated in **Hewage**.

55. With regard to the remitted victimisation issues, the two protected acts as found by the Tribunal are a formal grievance 30 May 2013 and the Claimant's evidence of the grievance appeal hearing. It is not under review as part of the remitted matters whether or not these events were protected acts or that they amounted to unfavourable treatment.

56. The Tribunal concludes that the detriment/unfavourable treatment of the duration of the written warning was because of the first protected act of the formal grievance. The Tribunal reaches that conclusion on the same basis as it has above with regard to the protected disclosure. The events refer to the same document.

57. This conclusion, however, does not apply to the protected act of the Claimant's evidence to the grievance appeal hearing as that post-dates the detriment.

58. With regard to the second alleged detriment of inviting the Claimant to a meeting at which her future employment would be discussed, the Tribunal also concludes that this was because of the Claimant's formal grievance, again on same basis as it has with regard to the protected disclosure above.

59. The Tribunal further concludes that this detriment was because of both the formal grievance made on 30 May 2013 and the Claimant's evidence to the grievance appeal hearing. They both relate to an allegation of harassment by Mr Landis and it is that element of the grievance the Tribunal concludes was an influence that was more than trivial in relation to Ms Bond's decision to arrange and invite Claimant to the disciplinary meeting, as explained above in relation to the conclusion on protected disclosures regarding the formal grievance. Having regard to all the circumstances the Tribunal concludes that state of mind remained at after the grievance appeal hearing.

Limitation

60. Pursuant to section 48(3) Employment Rights Act 1996, an employment tribunal shall not consider a complaint of a detriment in employment on the ground of having made a protected disclosure unless iit is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

61. There are two essential limbs to these statutory provisions. First, the Claimant must show that it was not reasonably practicable to present their claim in time. The burden of proof is on the Claimant (**Porter-v- Bandridge Ltd** [1978] IRLR 271, CA). Second, if the Claimant proves the first limb, the time within which the claim was in fact presented must be reasonable.

62. The Court of Appeal in **Palmer and Saunders –v- Southend-on-Sea Borough Council** [1984] IRLR 119 stated:

> "Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [**Singh –v- Post Office** [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

63. The possible relevant factors are not exhaustive. Each case depends upon its own facts.

64. Factors may include matters such as the substantive cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance; whether and if so when, the claimant knew of their rights; whether the employer had misrepresented any relevant matter to the claimant; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

65. The mere assertion by a claimant of ignorance of the right to claim, the time limit, or the procedure for making the claim, is not to be treated as conclusive.

66. **Schulz v Esso Petroleum Ltd** [1999] ICR 1202, states: "In assessing whether or not something could or should have been done within the limitation period, while looking at the period as a whole, attention will in the ordinary way focus on the closing rather than the early stages".

67. The Court of Appeal held in **Marks & Spencer –v- Williams-Ryan** [2005] IRLR 562 that: **"**when deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances".

68. The Court of Appeal in **Dedman –v- British Building and Engineering Appliances Ltd** [1974] ICR 53, held that: "If a man engages skilled advisers to act for him—and they mistake the time limit and present [the complaint] too late—he is out. His remedy is against them". However, in ***Riley –v- Tesco***

Stores Ltd [1980] IRLR 103, the Court of Appeal also established that the issue of reasonable practicability is an issue of fact and must be determined by examining all the circumstances. Matters relating to advisers are relevant only as part of the general overall circumstances of the case.

69. In discrimination and protected disclosure claims an employment tribunal can consider a claim presented out of time "if, in all the circumstances of the case, it considers that it is just and equitable to do so". This gives a tribunal a wide discretion and to take into account anything which it judges to be relevant. The discretion is broader than that given to tribunals above under the 'not reasonably practicable' formula.

70. Notwithstanding the breadth of the discretion, the exercise of discretion is the exception rather than the rule' (see **Robertson –v- Bexley Community Centre** [2003] IRLR 434,). In **Chief Constable of Lincolnshire Police –v- Caston** [2010] IRLR 327, the Court of Appeal stated that whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case "is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it"

71. The discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by s 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions (**British Coal Corpn –v- Keeble** above).

72. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (*a*) the length of and reasons for the delay; (*b*) the extent to which the cogency of the evidence is likely to be affected by the delay; (*c*) the extent to which the party sued had co-operated with any requests for information; (*d*) the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

73. Although, these factors often serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, provided no significant factor has been left out of account.

74. An extension of time must be argued by the Claimant, it is not an issue that is at large for the Tribunal. See for example **Habinteg Housing Association Ltd -v- Holleran** UKEAT/0274/14 in which it is held: "Reasons have to be capable of being established by the evidence. They need not, as the authority show us, be direct evidence from the claimant but may be inferred, but some evidence there must be. Otherwise, as Beatson J said in the case of **Outokumpu Stainless Ltd -v- Law** UKEAT/0199/07 at paragraph 18: "Where a Claimant does not put evidence before a Tribunal and support of his application [that is, for an extension of time], explaining his delay in saying why an extension

should be granted, how can the Tribunal be convinced that it is just and equitable to extend time?".

75. With regard to the limitation period in the instant case, it is only the first detriment of the written warning issued on 16 August 2013 that potentially is out of time. No issue has been raised in respect of the invite letter of 25 November 2013. It is in time.

76. The Tribunal accepts the submissions made by the Respondent that the implementation of a warning is a one-off event that has continuing consequences, but is not a continuing course of conduct (see for example **Sougrin -v- Haringay Housing Authority** [1992] ICR 650, CA). As distinguished, for example, from a decision to suspend an employee which is a matter that may be reviewed from time to time.

77. In the Claimant's case, she did not forward any arguments or facts relating to why it is just and equitable for the Tribunal to extend time in respect of the victimisation claim. Accordingly the Tribunal concludes that the victimisation claim relating to the written warning is out of time and the Tribunal has no jurisdiction to consider it.

78. Similarly, with the same lack of argument and evidential facts, the Tribunal concludes it is was reasonably practicable for the Claimant to present the protected disclosure detriment claim within the normal statutory time limit.

79. Accordingly, the Claimant’s claims of victimisation and detriment on the ground of having made a protected disclosure relating to the final written warning is out of time and tribunal has no jurisdiction to consider them.

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Employment Judge Freer
Date: 22 May 2017