EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs A Makinde	and	NHS Greenwich CCG

Held at Croydon on 11, 12 & 13 September 2017

Representation **Claimant:** Mr Makinde, Claimant's husband
Respondent: Ms L Farris, Counsel

Employment Judge: Harrington
Members: Ms R Hawley, Ms C Oldfield

JUDGMENT

The Claimant's claims of unfair dismissal, public interest disclosure (dismissal) and direct race discrimination are not well founded and are dismissed in their entirety.

REASONS

Introduction

1. By an ET1 received by the Tribunal on 2 March 2017, the Claimant brings claims of:

1.1 Unfair Dismissal;

1.2 Public Interest Disclosure: unfair dismissal;

1.3 Race Discrimination.

2. At the full hearing of these claims, the Claimant was represented by her husband, Mr Makinde and the Respondent by Ms Farris of Counsel.

3. At the start of the hearing, the Claimant raised the fact that English was her second language. I asked her whether she was able to proceed with the hearing without an interpreter. The Claimant confirmed that she was fully able to understand everything and was therefore able to proceed with the hearing. The parties confirmed that the issues arising in the complaints were as follows:

Unfair dismissal

3. What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) of the Employment Rights Act 1996.

4. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? The Claimant's challenges to the fairness of the dismissal are as follows:

   4.1 That there was an unfair process;
   4.2 That the outcome was predetermined;
   4.3 That the Claimant's dismissal was outside of the band of reasonable responses.

5. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

6. If the dismissal was unfair, did the Claimant cause or contribute to her dismissal by reason of her conduct?

7. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And / or to what extent and when?

Public Interest Disclosure: Unfair Dismissal

8. What did the Claimant say or write?
The Claimant refers to a face to face meeting with Ian Fisher in May 2016 during which she reported an incidence of malpractice. The Claimant describes the alleged disclosure in the following way,

'The report relates to an invoice (Invoice 01008000549103) received from Computer Futures (employment agency) for the sum of £30,000 for the placement of Andrew Coombe.

I told him the following:
1. There was no budget for any such service.
2. There was no contract for that sum for that service.
3. I had spoken to the Budget Holder (Dianne Jones – Director of Integrated Governance) who was not only aware of the invoice not meeting legal obligations but was insistent on me sending her the invoice for payment authorisation.'

[103]

9. Was information disclosed which in the Claimant's reasonable belief tended to show that a person had failed to comply with a legal obligation to which he was subject?

10. Did the Claimant reasonably believe that the disclosure was made in the public interest?

11. Was the making of any proven protected disclosure the principal reason for the dismissal?

Direct Race Discrimination

12. Has the Respondent subjected the Claimant to the following treatment falling within section 39 of the Equality Act 2010 namely, dismissing her?

13. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon a list of all employees at the Respondent who have raised a subordinates pay in the same way as she did [410].

14. If so, are there primary facts proved from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic namely the Claimant's race? The Claimant describes herself as Black African.

15. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

16. The Tribunal heard evidence from the Claimant and from Diane Jones, Nick Marsden, Tim Widdowson and Joanne Murfitt from the Respondent. Each of the witnesses provided a signed witness statement. The Tribunal was referred to an agreed bundle paginated 1 - 573; references to that bundle appear within square brackets throughout this judgment.

The Facts

17. The Claimant was employed as a Management Accountant by the Respondent from 23 February 2009 until her dismissal on 12 January 2017.

18. The Claimant worked within the Respondent's Finance Directorate. At all relevant times, the hierarchy within the Finance Directorate was as follows: Mr Ketual Vachhani, a Financial Analyst, was line managed by the Claimant. The Claimant was line managed by Mr Bob Franke, Senior Management Accountant and, in turn, Mr Franke was managed by Mr Seelan Gunaseelan, Associate Director of Finance. The head of the Directorate was Mr Ian Fisher, Interim Chief Finance Officer.

19. On 1 February 2016 at 12.40 hours, the Claimant sent an email to the Payroll department directing them to process the attached change in

contract form [246]. That form referred to Mr Vachhani. Within the form, completed by the Claimant, it was recorded in the relevant drop down box that there was a *'Change of Position'* and that the appropriate pay band for Mr Vacchani was band 7. The additional comments section of the form was completed as follows,

'Internal restructure of Finance team to recognise additional duties. Kindly map to Band 7 spine 28.'
[248]

20. Shortly afterwards, at 14.18 hours, Mr Franke sent a similar email to payroll referring to the Claimant and requesting that her pay be raised from Band 7 to Band 8a [241]. Attached to this email was a change in contract form which had been completed by the Claimant. Within the additional comments box, the following was recorded,

'Internal restructure of Finance team to recognise additional duties. Kindly map to Band 8A spine 37.' [242]

21. In the event, the Payroll department actioned both of these requests resulting in the Claimant's annual salary increasing by £7,900 and Mr Vachhani's annual salary increasing by approximately £5,000.

22. On 17 February 2016 the Claimant was notified by Payroll that the changes to her contract had been implemented [247]. On 22 February 2016 the Claimant forwarded the relevant correspondence regarding both her own payrise and that of Mr Vacchani to Tim Widdowson, Head of HR Business Partnering, South Sector for the North and East London CSU. The email directed Mr Widdowson that the paperwork needed to be attached to the Claimant's and Mr Vacchani's relevant personnel files [243, 247]. Mr Widdowson did not consider the documents in any detail but simply filed them as requested by the Claimant.

23. It is of some importance that the Claimant has told us in evidence that before corresponding with Payroll, she contacted Mr Widdowson in HR for guidance as to the process to be followed for pay rises. The Claimant told us that there were emails sent by her to Mr Widdowson. When giving evidence, Mr Widdowson expressly denied that there was any such contact. In his witness statement he described the Claimant asking for a blank contract change form but that she had not asked him how to go about getting an upgrade. Having considered the evidence on this issue in detail, the Tribunal prefers Mr Widdowson's account on this matter. The Tribunal considers it likely that if there had been email correspondence from the Claimant to Mr Widdowson, it would have been provided to the Tribunal. We have seen no such correspondence. The Claimant did not give evidence as to what was said to her by Mr Widdowson by way of advice as to the process. The Tribunal considers that if she had received any such advice, it would have formed part of her evidence. Further, on balance, the Tribunal

found Mr Widdowson to be a straightforward and clear witness with a good recollection of the relevant matters. We found that, generally, the Claimant's evidence was less clear and, on occasion, less credible. For example, when giving evidence the Claimant referred to wanting to see that there was a budget for any pay upgrades although she confirmed that she hadn't got budget holder approval for the upgrades she instigated nor was she aware that approval was necessary. Further, when explaining her use of the phrase 'internal restructure' in the forms sent to payroll, the Claimant told the Tribunal that she was referring to her own personal restructure rather than the organisation doing a restructure.

24. During April 2016 the Claimant had cause to query an invoice she was processing in her role within the Finance Directorate. The invoice was in the sum of £30,000 and tendered by Computer Futures. In broad terms, the invoice related to a fee that was said to have been incurred by the Respondent upon the recruitment of an agency worker; Computer Futures being the relevant agency. In an email dated 27 April 2016 [93] Mr Levy from Computer Futures referred to the individual worker, Mr Coombe, and the fact that he had initially been providing services to the Respondent via Computer Futures. Having been recruited by the Respondent to work directly for them, it was said that a *'transfer fee'* was now payable. Mr Levy attached a copy of the relevant contract to his email.

25. On a date between 27 April and 6 May 2016 the Claimant met with Miss Diane Jones and discussed the issue of the invoice. Miss Jones was, at all relevant times, the Director of Integrated Governance and the invoice was raised against the budget which she controlled.

26. The Tribunal heard conflicting evidence about the exchange between the Claimant and Miss Jones. The Claimant describes giving Miss Jones a detailed explanation of the reasons she believed that no transfer fee was due to Computer Futures and that Miss Jones was very hostile towards her telling the Claimant,

    'She couldn't care less if there was no allocation in the budget so I should make sure the invoice gets paid.' (see Claimant's witness statement, paragraph 16)

27. Miss Jones recalls being approached by the Claimant at her desk and there being a brief discussion about the invoice during which she explained to the Claimant how the invoice came about and that she had been challenging the invoice since November 2015. About an hour later, the Claimant approached Miss Jones again whilst Miss Jones was meeting with Mr Widdowson. It was at that stage that Miss Jones describes the Claimant raising her voice and shouting at her that she should not have signed the contract. Mr Widdowson confirms that the Claimant was aggressive in her behaviour and started shouting at Miss Jones. He recalls Miss Jones having to tell the Claimant 'very

firmly' that the matter was being dealt with (see Mr Widdowson's witness statement, paragraph 34).

28. During a later investigation, conducted in September 2016, Ian Fisher, CFO, was asked about this incident and commented as follows,

'I recall Aderiyike challenging Diane Jones and there was a screaming match in the office with both of them shouting at each other; as the office is open plan it is easy to hear.' [161]

29. On balance the Tribunal accepts this noted recollection of Mr Fisher and the conclusion within the grievance investigation report [156] that both the Claimant and Miss Jones were agitated and raised their voices at each other when the issue of the invoice was discussed. The Claimant was aggrieved at the size of the invoice and Miss Jones was aggrieved at the continuing need to consider the matter.

30. On 6 May 2016, following the exchange between the Claimant and Miss Jones, the Claimant met with Ian Fisher. The Claimant's account of this meeting is that she told Mr Fisher about the irregularities with the Computer Futures invoice and that she was uncomfortable with the Respondent paying such an invoice at a time of massive budget deficits, in the absence of an approved budget line and a valid signed contract. The Claimant also says that she told Mr Fisher it was her belief that Miss Jones had taken no action to mitigate against the payment of the fee during the recruitment exercise for the relevant job.

31. The Claimant's written account of the meetings is as follows,

'I told him the following:

1. *There was no budget for any such service.*
2. *There was no contract for that sum for that service*
3. *I had spoken to the Budget Holder (Dianne Jones – Director of Integrated Governance) who was not only aware of the invoice not meeting legal obligations but was insistent on me sending her the invoice for payment authorisation.*

I also gave him a copy of the invoice.

He promises to consider it.' [103]

32. On that day, Mr Fisher wrote to Ms Jones by email at 12.38 hours,

Diane
I understand Aderiyike has discussed this invoice with you.
I understand it relates to fees for placement of Andrew Coombe.
I would be pleased to understand the procurement process and contractual arrangements which led to an expected finder's fee of £30,000 (net) for this post.

For the avoidance of doubt, I would be interested in whether you feel the fee is appropriate and if not, actions being taken to reduce expectations.
I have spoken with Annabel and she or I will intervene if you feel unable to pursue this to a more appropriate outcome.
Happy to assist.
Regards,
Ian
[94]

33. The Respondent refers to Mr Fisher's description of the meeting with the Claimant. Mr Fisher recalled,

'I discussed the incident with Aderiyike at her 1:1 (notes to be provided). She didn't feel Diane was taking her seriously. I told Aderiyike that she had potential to progress but that it was her attitude that was stopping her moving forward.'
[161]

34. The Tribunal is satisfied that during the meeting with Mr Fisher the Claimant contended that there was no budget for the invoiced sum, there was no contract and that she had spoken to Diane Jones [103].

35. In reaching these findings the Tribunal has considered with care the entirety of the Claimant's evidence including both her statement and oral evidence given under cross examination. The Tribunal has also noted the contents of Mr Fisher's email which was sent following the meeting [94]. Within that email Mr Fisher enquires of Miss Jones as to the procurement process and contractual arrangements which led to the £30,000 fee. The Tribunal is satisfied that this supports the Claimant's account that she had raised doubts about the contract during her meeting on 6 May 2016.

36. In or around mid May 2016, when carrying out a budgetary review, Mr Fisher had concerns in the figures for the salaries of the finance staff. He identified that both the Claimant and Mr Vachhani had significant increases in their salaries. This issue was raised by Mr Fisher during a finance meeting on 16 May 2016 and after that meeting, Mr Fisher raised the matter with Mr Gunaseelan. Mr Gunaseelan emailed Mr Fisher on 27 May 2016 [188A] providing details of the increased salaries and referring to the fact that the increases had commenced in February 2016. On 31 May 2016 Mr Fisher raised the matter with Mr Widdowson by email [188A]. In that email, he records that he has not authorised the increases as the budget holder and that Mr Franke has been unwilling to advise as to the reason for the rises in pay. He specifically asked Mr Widdowson for advice as to how the matter should be taken forward. In the event, the matter was referred to the Fraud Team ('TIAA') and was accepted as an investigation. The investigation was conducted by Melanie Alflatt, Counter Fraud Specialist Manager [194].

37. The Respondent's Senior Management Team ('SMT') were involved in discussions as to how the matter was to be managed. The SMT was formed of Annabel Burn, Chief Officer, Gina Shakespeare, Turnaround Director, Miss Jones and Mr Fisher. In the event, the Claimant was suspended on 6 June 2016. The evidence in respect of how the decision to suspend the Claimant was reached and by whom is contradictory. In her statement (see paragraph 22, witness statement of Diane Jones) Miss Jones refers to a meeting of the SMT at which the allegations of misconduct were raised by Mr Fisher and the decision to suspend the Claimant was considered, with the SMT agreeing with Mr Widdowson's HR advice that both Mr Franke and the Claimant should be suspended. However the Tribunal notes that there is no written record of this meeting taking place or indeed what was discussed at the meeting. When questioned further on this matter, Miss Jones described an ongoing process during which members of the SMT discussed the matter and advice was received by Mr Widdowson, rather than an individual meeting attended by the whole SMT at which the decision to suspend the Claimant was taken.

38. In the notes of his interview on 19 September 2016, Mr Fisher referred to discussing the matter with Annabel Burn and finding out on 7 June 2016 that the Claimant had been suspended the day before [162].

39. The Tribunal is satisfied that the SMT sought HR advice on the issue of suspension and that the matter of whether the Claimant should be suspended was generally discussed between the members. Whilst there is some doubt as to whether the decision was taken at a specific meeting, we do accept that it was a decision taken by the SMT and that the members of the SMT agreed that suspension was appropriate. For the avoidance of doubt, we do not find that the decision to suspend the Claimant was taken by Miss Jones alone.

40. At about 5.30pm on 6 June 2016 Miss Jones met with the Claimant to inform her about the allegations, the pending investigation and her immediate suspension. She handed the Claimant a letter [191-192]. In that letter, signed by Miss Jones, the allegations are set out as follows,

'1. That in February 2016 you upgraded a colleague to their next grade and uplifted their spinal point on the scale beyond that outlined in Agenda for Change (6.21 pay on promotion). Furthermore, you did not apply the NHS job evaluation process.

2. That you deceived the CSU payroll department by advising them, via an email communication including a change form, that the amendment was due to a restructure. This constitutes gross misconduct, as set out in the CCGs Disciplinary Policy & Procedure'
[191]

41. On 7 June 2016 Miss Jones wrote to the Respondent's IT service desk as follows,

'Can you please stop IT access and email log in for Aderiyike Makinde who is based at Greenwich CCG.' [462]

42. This email generated a response from the IT team to the Claimant on 13 June 2016 [464]. In that response reference was made to the Claimant being marked as a *'leaver'* from the organisation. The Tribunal notes that the email written by Miss Jones about the Claimant's IT access was markedly different to that written by her with regards to Mr Franke's IT access. On or around 3 June 2016, Miss Jones emailed the IT team referring to a temporary suspension of Mr Franke's access to emails and intranet '*until further notice'* [460].

43. On 15 June 2016 the Claimant submitted a written grievance [136] formally complaining about the conduct of Miss Jones. The letter was sent to the HR director and copied to Ms Burn, Mr Fisher, Mr Taylor (representative of the staff and wellbeing group) and Mr Widdowson. The Claimant's concerns centred around Miss Jones not being her line manager but having taking it *'upon herself to commence an investigation into my conduct'*. The Claimant described Miss Jones as *'judge, jury and executioner in this investigation'*. She referred to the process and that it should be carried out fairly and independent of any parties likely to be prejudice and concluded with the following comments,

'In the interests of fairness and to maintain the integrity of your investigation so as not to leave yourself open to future litigation, I implore you to take necessary steps to address my grievances and ensure that the current investigation is not tainted by personal vendettas and one-upmanship.'
[136]

44. On 21 July 2016 the Claimant attended two meetings: an informal meeting to discuss her grievance [138] and an investigation meeting with Melanie Alflatt [205].

45. On 22 July 2016 [141] a letter was sent to the Claimant confirming her request to move the consideration of her grievance to the formal stage. Linda Baker, Interim HR Business Partner, investigated the Claimant's grievance interviewing, amongst others, Miss Jones [158]. On 31 August 2016 the Claimant was interviewed by Linda Baker [167] and on 27 October 2016 she attended a grievance meeting chaired by Mr Fisher [172]. By an outcome letter also dated 27 October 2016, Mr Fisher concluded that there was no evidence of victimsation by Miss Jones against the Claimant [173-174]. Amongst his conclusions was a finding that the CCG had been clear in its request for a suspension only of the Claimant's NHS email account. As set out in paragraph 41 above, Miss Jones had not actually used the language of suspension in

her email to the IT helpdesk but rather requested that access be stopped.

46. Also in October 2016 the TIAA concluded its report [202]. Within the report, reference was made to the fact that there was evidence to show that the Claimant was familiar with the process for seeking an upgrade in salary because she had approached the Head of Finance and CFO previously for approval. Amongst the conclusions, the following is stated,

'*There is evidence to show that the Subject and their Line Manager, Subject 1, were familiar with the process for seeking an upgrade in salary because they had approached the Head of Finance and the Chief Finance Officer previously for approval. Then after having the requests rejected the Subject and Subject 1 took matters into their own hands and in so doing secured a salary increase for the Subject and Subject 3.'* [206]

47. It is apparent that following the conclusion of the TIAA report, a further internal investigation was carried out by Mr Nick Marsden, HR Business Partner SE Commissioning Support Unit. Mr Marsden interviewed the Claimant on 16 November 2016 [304]. Mr Marsden's report dated 29 November 2016 recommended that the CCG should hold a disciplinary hearing to determine whether gross misconduct had taken place [220]. Amongst the evidence collected, Mr Gunaseelan had confirmed that relevant discussions about pay increases had taken place in October 2014 and Feb/March 2015 with Mr Gunaseelan confirming that he had made two previous approaches to Mr Costa on behalf of the Claimant both of which had been refused [213].

48. By a letter dated 30 November 2016, again from Miss Jones [314], the Claimant was invited to attend a disciplinary hearing. In the event the hearing took place on 6 January 2017. The Panel considering the allegations comprised: Miss Jones, Alison Browne and Sarah Wainwright. Miss Jones was the chair. Ms Browne was the Director of Nursing and Quality at Lewisham CCG and Sarah Wainwright was Deputy Director of HR, South East CSU. The Tribunal were referred to the notes of the meeting [318].

49. On 12 January 2017 Miss Jones wrote to the Claimant confirming that the two allegations had been upheld by the Panel and the decision had been reached to summarily dismiss the Claimant for gross misconduct [342-347].

50. The Claimant appealed the decision to dismiss her [348]. Her appeal was considered by Ms Murfitt, Chief Officer, on 9 February 2017. The Claimant did not attend. On 21 February 2017 Ms Murfitt wrote to the Claimant dismissing her appeal [403 - 405].

Closing Submissions

51. Both parties provided the Tribunal with written closing submissions.

52. On behalf of the Respondent, Ms Farris referred to her written submissions and the supporting bundle of authorities. With regards to procedural fairness, Ms Farris referred to the investigations which happened in this case both by Mr Marsden and the TIAA. She described these as unusually thorough and entirely material because they demonstrated that the Claimant could not have done anything to avoid dismissal at the disciplinary stage. Both reports found that the Claimant knew what was required in terms of getting a pay increase but that she had chosen not to follow the required process. Ms Farris submitted that the disciplinary panel were hugely influenced by the TIAA investigation and that they quoted from this extensively, preferring its findings to the Claimant's account.

53. In respect of other matters raised by the Claimant, Ms Farris described the fact that the Claimant's season ticket loan had been stopped as a 'de minimis point' and the request to the stop the Claimant's email account as 'loose language'. If the Tribunal does not accept that the dismissal was fair and reasonable, Ms Farris requested that we make a finding of 100% on Polkey – in other words, if there was a failure in the procedure which rendered the dismissal unfair, it is the Respondent's case that no rectification of that procedure would have changed the outcome. The Claimant would always have been dismissed when she was in any event. Further, the Respondent sought a maximum finding of contributory fault as without the Claimant's own conduct, her dismissal would not have occurred.

54. Ms Farris made further submissions in respect of the public interest disclosure and the claim of the direct race discrimination. In particular, it was submitted that the evidence showed that two BME employees had not been dismissed and that an irregular pattern does not establish that there has been less favourable treatment. It was the Respondent's case that the Claimant was dismissed because of her conduct.

55. The Claimant reiterated that she had been unfairly dismissed and that she believed the main reason for her dismissal was the making of a protected disclosure about '*unlawful disbursement of public money as corroborated by Joanne Murfitt'* (see paragraph 3, Claimant's closing statement). The Claimant further submitted that she had been discriminated against *'based on my race because other managers who had carried out pay upgrades in the same manner as me but who are of white background were not investigated or dismissed.'* (see paragraph 4, Claimant's closing statement). In respect of previous discussions regarding pay rises, the Claimant contended that these should be disregarded as they related to '*distinct reorganisational proposals which were sent to staff during consultations'*. Mr Makinde referred to the fact that if the Claimant had been given full access to

the relevant documents, she would have uncovered the relevant emails to Tim Widdowson and the performance appraisal of Mr Vacchani.

Legal Summary

Unfair Dismissal

56. Sections 98(1) and (2) of the Employment Rights Act 1996 ('the ERA 1996') set out the potentially fair reasons for dismissing an employee. The list includes a reason related to conduct.

57. Section 98(4) of the ERA 1996 deals with the fairness of dismissals. It reads in part as follows:

(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 understanding) 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 the equity and the substantial merits of the case.'

58. In respect of the meaning of 'reasonable' we refer to the guidance from the EAT in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17. The EAT stated that the correct approach in answering the questions posed by Section 98(4) of the ERA 1996 was as follows:

(a) The starting point should always be the words of section 98(4) themselves.

(b) In applying this section the Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether the members of the Employment Tribunal consider the dismissal to be fair.

(c) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(d) In many though not all cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another.

(e) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within a band then the dismissal is fair. If the dismissal falls outside the band it is unfair.

59. It is not for the Tribunal to substitute its own personal decision in this case. Rather, the Tribunal must consider whether the Respondent acted reasonably and whether the decision to dismiss the Claimant in all of the circumstances fell within the band of reasonable responses. As was detailed by Lord Denning MR in **British Leyland (UK) Ltd v Swift** 1981 IRLR 91, CA, the correct test is was it reasonable for the employer to dismiss the employee,

    'If no reasonable employer would have dismissed him then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness within which one employer might reasonably take one view and another quite reasonably take a different view.'

60. In assessing the fairness of the dismissal, the Tribunal must assess the nature and effect of any alleged procedural failing in the context of the disciplinary process as a whole (**Taylor v OCS Group** [2006] EWCA Civ 702, **D'Silva v Manchester Metropolitan University** [2017] UKEAT/032816).

Public Interest Disclosure

61. A qualifying disclosure is a disclosure of information which, in the reasonable belief of the disclosing worker, is made in the public interest and tends to show, on the facts of this case, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (see section 43B ERA 1996). The worker must communicate information rather than simply make an allegation which does not convey facts (see **Geduld v Cavendish Munro Professional Risks Management Ltd** [2010] ICR 325).

62. Dismissal on grounds of having made a protected disclosure is automatically unfair. The protected disclosure must be the reason or principal reason for the dismissal.

Race Discrimination

63. Under section 39 of the EqA 2010, an employer must not discriminate against an employee by subjecting him to any other detriment and must not discriminate against an employee by dismissing him. Under section 13 of the EqA 2010, a person discriminates against another if because of a protected characteristic (in this case, race) the person is treated less favourably than the employer treats or would treat others.

64. The burden of proof in respect of these provisions is contained in section 136 of the EqA 2010. That provides that 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. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is therefore for the Claimant to prove facts from which the

Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed a discriminatory act. If the Claimant does that, the Tribunal shall uphold the complaint unless the Respondent proves that it did not commit that act.

65. It is recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant burden of proof and the guidance in respect thereof set out in **Igen Ltd v Wong and Others** [2005] IRLR 258, confirmed by the Court of Appeal in the case of **Madarassy v Nomura International PLC** [2007] IRLR 246.

66. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis by the Tribunal, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Court of Appeal reminded Tribunals that it was important to note the word 'could' in respect of the test to be applied. At this point, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. The Tribunal must assume that there is no adequate explanation for those facts. It is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an explanation for the treatment.

67. Guidance from the Court of Appeal in **Madarassy** emphasised that the burden of proof does not shift to the employer simply if the Claimant establishes a difference in status (in this case that she is black African) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude on the balance of probabilities the Respondent had committed an act of discrimination. 'Could conclude' must mean that a reasonable Tribunal could properly conclude from all the evidence before it (see **Madarassy**). As stated in **Madarassy**, 'the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination'.

68. If the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of her protected characteristic (race in this case), then the Claimant will succeed. The Court of Appeal said in **Igen** that

at this stage, it is for the Respondent to prove that it did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

Tribunal's Conclusions

69. In deciding this case, the Tribunal gave careful consideration to the entirety of the evidence and submissions presented including the oral witness evidence and the written material to which we were referred.

Unfair Dismissal

70. The Tribunal is satisfied that the reason for the Claimant's dismissal was her misconduct and that the Respondent held that belief in the Claimant's misconduct on reasonable grounds.

71. The Tribunal accepts the documentary evidence and evidence from Miss Jones and Miss Murfitt that the Claimant was dismissed because they concluded she had deceived the payroll department by providing false information in a form, actioned by the payroll department. The evidence of this misconduct was set out in the detailed investigation reports provided to the disciplinary panel.

72. The principal area of challenge raised by the Claimant is that of an unfair process and allegations that the outcome was predetermined and the dismissal was outside of the band of reasonable responses. In essence, the Claimant argues that Miss Jones' ongoing involvement with the Claimant's disciplinary process rendered the dismissal unfair.

73. The Tribunal has given this argument lengthy and detailed consideration. The Tribunal has noted the Claimant's concerns that it was Miss Jones who apparently instigated the disciplinary process, she chaired the disciplinary hearing and she sent the relevant communication to the Respondent's IT department to stop the Claimant's email access before the Claimant had been dismissed by the disciplinary panel. As accepted by Miss Jones during her evidence, this is a case where it is understandable why the Claimant was concerned about Miss Jones' ongoing involvement in the disciplinary process, particularly when viewed in the context of the Claimant's disclosure about the £30,000 invoice and the Claimant's grievance identifying Miss Jones.

74. The Tribunal observes that it is largely the fact that Miss Jones had an ongoing involvement in this matter, which fuelled the Claimant's concerns about the disciplinary process and the decision to dismiss her. In particular, the decision taken by the Respondent to have Miss Jones chair the disciplinary panel in the context of the Claimant's

disclosure and grievance was questionable. Whilst the Tribunal notes the evidence it heard concerning the lack of available personnel to chair the disciplinary hearing, it was entirely foreseeable that the Claimant would have concerns about Miss Jones' appointment, an appointment apparently made by Ms Murfitt who had not acquainted or informed herself with the detail of the Claimant's grievance.

75. However, notwithstanding this, when examining the claim of unfair dismissal the Tribunal must go beyond these initial observations and consider whether the dismissal was fair including whether the disciplinary process as a whole was fair taking account of the involvement of Miss Jones.

76. Miss Jones was involved with the instigation of the disciplinary process but this was not a role she pursued alone. Rather the suspension of the Claimant was a joint decision reached by the SMT and communicated by Miss Jones. Next, it is correct that Miss Jones chaired the disciplinary hearing notwithstanding the fact that the Claimant had raised a grievance about her. However it is equally correct to note that the grievance had been dismissed and that the Claimant did not appeal this outcome. Further the Claimant did not challenge Miss Jones' appointment to the disciplinary panel when she was informed of this by a letter dated 30 November 2016.

77. The Claimant was not granted access to her emails and documents on the Respondent's computer system. However this was immaterial in the context of the case – the fundamental point is that the Claimant had not received budgetary approval for the relevant pay increases she instigated. Accordingly there were no documents which could have been obtained from the computer system which could have demonstrated that she had followed the correct process. The Claimant also referred to the fact that her season ticket advance was deducted from her pay in July 2016 and was only paid back in August / September 2016 following her complaint. However the Tribunal does not draw any adverse inferences from this act. Mr Widdowson was very clear that it was a genuine mistake and that he had told payroll to pay the loan to the Claimant despite her suspension. The Tribunal accepts this explanation and that Miss Jones' wasn't involved in this matter.

78. The Respondent has referred the Tribunal to the case of **D'Silva v Manchester Metropolitan University** [2017] UKEAT/032816. In the judgment of this case, the following passage from **Taylor** is quoted with regards to the Tribunal's role,

'…it should consider the procedural issues together with the reason for the dismissal as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for

example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.…'
(see judgment, paragraph 44)

79. The judgment of **D'Silva** also referenced the EAT decision in **Adeshina v St George's University Hospitals NHS Foundation Trust** [2015] IRLR 707. In **Adeshina**, the EAT referred to apparent bias and internal disciplinary processes,

'whether there is an appearance of bias may be a relevant factor in an unfair dismissal case; it will be something that will go into the mix for the Employment Tribunal to consider as part of fairness as a whole, as will the question whether the panel did in fact carry out the job before it fairly and properly,…the only thing that really matters is whether the disciplinary tribunal acted fairly and justly…'

80. After careful deliberation, it is the Tribunal's judgment that the disciplinary panel in this case did carry out its function fairly and properly. Whilst there are factors in this case which could be described as procedural imperfections, for example, the failure to assist the Claimant with accessing her emails and the computer system, the Respondent did act reasonably in treating the reason as a sufficient reason to dismiss the Claimant.

81. To specifically address the Claimant's challenges to the fairness of her dismissal, the Tribunal does not accept that the process was unfair. Further, the Tribunal does not accept that the outcome was predetermined. Having considered the documentary records of the disciplinary hearing and the evidence of Miss Jones, the Tribunal is satisfied that the decision to dismiss the Claimant was a decision reached by the Panel as a whole following its consideration of the relevant evidence. The Respondent held a genuine belief based on reasonable grounds having conducted as much investigation as was reasonable that the Claimant had committed an act of gross misconduct. Dismissal fell within the range of reasonable responses and the same sanction was applied to her colleague.

82. As a result of the Tribunal's conclusions in respect of the fairness of the Claimant's dismissal, it is not strictly necessary for us to proceed to consider questions of contribution and **Polkey**. However, for the avoidance of doubt, even if the Tribunal had determined that the Claimant's dismissal was unfair, we are entirely satisfied that it would be appropriate in this case to make findings of 100% contribution and

100% in respect of **Polkey**. The Claimant completed relevant forms to award herself a significant pay rise, failing to get appropriate budgetary approval. She was entirely aware that it was wrong to engineer a pay rise in this way. She entirely caused her dismissal. Further, if there was procedural unfairness in this case, the Tribunal is sure that if a fair procedure had been adopted, due to the nature of the misconduct, the Claimant would have been fairly dismissed in any event.

Public Interest Disclosure: Unfair Dismissal

83. The Tribunal finds that the Claimant did make a protected and qualifying disclosure in her meeting with Ian Fisher on 6 May 2016. The Tribunal accepts the Claimant's account as to what she said and finds that this amounted to a disclosure of information, which in the reasonable belief of the Claimant was made in the public interest and showed that a person had failed to comply with a legal obligation. The Claimant thought Miss Jones had failed to comply with the relevant legal obligations with regards to properly accounting for the spending of public funds.

84. The Tribunal however is not satisfied that the making of the disclosure was the principal reason for the Claimant's dismissal. In reaching this conclusion, the Tribunal has particularly taken into account the following matters: firstly, that the Claimant's misconduct was initially discovered and pursued by Ian Fisher, not Diane Jones. Secondly, that whilst the Claimant's disclosure and the discovery of the Claimant's misconduct was close in time, we find that this was coincidental rather than establishing that there is a link between the Claimant making her disclosure and subsequently being investigated for misconduct. Thirdly, Bob Franke was also dismissed for gross misconduct and he had no connection with the making of the disclosure. For the avoidance of doubt, we do not accept the Claimant's framing of this aspect of the case as Mr Franke being unfortunate collateral damage due to a vendetta held by Miss Jones against her. Fourthly, the Tribunal accepts Miss Jones' evidence that the disclosure had no part to play as to how the Claimant's misconduct was considered and, further, the inclusion of independent members on the disciplinary panel indicates that the Respondent approached the misconduct matter without reference to the disclosure.

85. In addition, the Tribunal did note the fact that the Claimant never raised the suggestion that she had been dismissed because she had made a disclosure, when interviewed by Mr Marsden. It also did not form part of the Claimant's appeal against her dismissal. The Claimant stated that she had written the appeal against her dismissal on '*what I felt'* but this evidently did not include an allegation that the reason for her dismissal was the disclosure she had made to Mr Fisher.

Direct Race Discrimination

86. In respect of the Claimant's claim of direct race discrimination, the Tribunal must first consider whether the Respondent's dismissal of the Claimant was less favourable treatment by the Respondent than it did or would have treated comparators of a different ethnicity.

87. The Tribunal has carefully considered the entirety of the evidence on this issue and is not satisfied that the Claimant was treated less favourably. The Claimant says that she was dismissed because she is black African and she argues that others who did 'the same thing' were not dismissed from their employment and that they were from a different ethnicity. This assertion however is simply not supported by the evidence in this case.

88. The Tribunal is satisfied that the particular cases identified by the Claimant as appropriate comparators are, in fact, not properly comparable and are entirely explained by a difference in the relevant circumstance. For example, Simon Hall was not dismissed although he approved a pay rise for Lauren Burgess but this was because he was a budget holder and a director of the Respondent at the relevant time and therefore was able to approve such a change. This is quite different to the Claimant's case where the director of her directorate was entirely unaware of the pay rise. The documentary evidence referred to by the Claimant does not establish the pattern described by the Claimant. The Tribunal has also noted that Mr Franke was dimissed and he is white British.

89. The Tribunal finds no evidence to support the Claimant's assertion that there was less favourable treatment of her. Rather, the factual matrix of this case supports the conclusion that the Respondent's treatment of the Claimant was because of her conduct rather than her race. Accordingly the Claimant's claim of direct race discrimination fails. The Tribunal has not found facts from which it could conclude in the absence of an adequate explanation, that the Respondent has committed an act of discrimination.

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Employment Judge Harrington
Date: 28 October 2017