EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Miss J Rodriguez		London Borough of Hammersmith & Fulham

Heard at: London Central Employment Tribunal (sitting in the Rolls Building)

On: 23, 24, 25, 28, 29, 30 September 2020

Before: Employment Judge Adkin
Ms H Craik
Mr D Shaw

Representations

For the Claimant: (Day 1 am only Mr W Brown solicitor); then Claimant
For the Respondent: Mr R O'Dair, Counsel

JUDGMENT

(1) The claim of protected disclosure dismissal brought under section 103A of the Employment Rights Act 1996 is dismissed on withdrawal.

(2) The claim of race discrimination fails and is dismissed.

(3) The claim for unlawful deduction of wages succeed in part and is dismissed upon withdrawal in part:

a. Claims for non-payment of contractual consultation period, holiday pay, car allowance, health insurance, 1 week arrears of pay, 4 weeks notice pay are dismissed upon withdrawal.

b. Claim for sick pay is successful for the period 17 April-24 April 2019 for an amount to be quantified.

c. Claim for pension contributions, for amounts to be quantified comprised of:

i. unpaid employer contributions during employment by Mitie Property Management Limited for the period December 2018 – 16 April 2019 for which liability transfers to the Respondent;

ii. unpaid employer contributions during the period 17 – 24 April 2019 under the Local Government Pension Scheme.

REASONS

1. By a claim form presented on 2 October 2019, the Claimant brought claims of race discrimination, automatic unfair dismissal because of protected disclosures (section 103A ERA 1996), unlawful deductions from wages and notice pay, arising from her employment which commenced on 5 March 2018, with Mitie Property Management Limited and which transferred to the Respondent on 17 April 2019.

Withdrawals

Withdrawal of protected disclosure claim

2. On the night before the first day of the hearing Mr Winston Brown, the solicitor then acting for the Claimant wrote the following at 21:14

> "I confirm that the claimant is only pursuing claims of race discrimination and unlawful deduction of wages/breach of contract (pay claims)."

3. This was sent by email to the Tribunal and copied to the Respondent.

4. This appeared to suggest that the protected disclosure claim was being withdrawn and accordingly this morning as part of preliminary matters I clarified with the Claimant's solicitor Mr Brown whether or not this claim the protected disclosure claim was being withdrawn and I had the following exchange with him:

> "J. Are you content that this is withdrawn, we can dismiss the protected disclosure claim?
>
> B. yes"

5. The Tribunal did not make an order immediately dismissing the claim.

6. Discussion then moved on to the consequences of the claim specifically with regard to timetabling and the evidence to be called by the Respondent. Mr O'Dair identified that he would now not have to call all of the Respondent's witnesses, mentioned that he would have to spend some time modifying his cross examination and flagging up that there was likely to be a costs application arising from the claim that had been withdrawn.

7. The was then a three hour adjournment to allow the Tribunal to read documents. We focussed on the remaining claims.

8. At 13:17 Mr Brown emailed the Tribunal and Respondent with the following:

> "Following instructions confirmed yesterday the claimant confirmed that she would only be pursuing claims of race discrimination and certain pay claim. After a late start we spent this morning clarifying the claims to be dealt with by the tribunal.
>
> The parties adjourned at around 12pm. Immediately after that break the claimant informed me that she is unhappy with the way her case is being put despite her instructions of yesterday and her consent to my representations before the tribunal this morning. I have given the claimant time to reflect on what she wishes to do and she has done so in the company of her union rep who is also accompanying her today. I also made clear that if the claimant were to change her instructions at this stage I would not be prepared (nor I feel able) to continue to represent her case. I have now received a call from the claimant that she is adamant that she wishes to proceed with the detriment case and automatically unfair dismissal claim and further that she will now conduct her case herself. I am aware that the tribunal canvassed dismissing the whistleblowing claims on withdrawal but I am unaware if this has been done yet. I would ask that no further actions in that regard are taken until the parties can appear before the tribunal at 2pm today. I apologise to the tribunal and other side for the inconvenience caused but do not feel I can assist any further beyond appearing to confirm the contents of this email which I will do at 2pm.
>
> I have also reminded the claimant that the respondent has flagged up their intention to pursue costs against her and she is aware of that possible outcome if she loses her case."

<u>The law</u>

9. The Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 provides:

> WITHDRAWAL
>
> End of claim
>
> 51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

> Dismissal following withdrawal
>
> 52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—
>
> (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
>
> (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

10. *Harvey on Industrial Relations & Employment Law* contains the following summary of the law:

> "A tribunal has no jurisdiction to set aside a notice of withdrawal of a claim (*Khan v Heywood and Middleton Primary Care Trust* [2006] IRLR 345, [2006] ICR 543, EAT; [2006] EWCA Civ 1087, [2006] IRLR 793, [2007] ICR 24). According to Wall LJ (at para [79]) referring to the wording in r 25(3) of the 2004 Rules: 'I agree with the chairman of the tribunal and the judge that the words "brought to an end" mean what they say. Those particular proceedings have indeed been brought to an end and cannot be revived against a respondent.' The same is true of the words '[the claim, or part,] comes to an end' in SI 2013/1237 Sch 1 r 51."

11. The question in this case therefore becomes whether or not the claim has been withdrawn. Harvey offers the following:

> "Where a party abandons or withdraws a claim or part of a claim at a hearing, the tribunal, particularly where the claimant is a litigant in person or has a lay representative, must take great care to ensure that he or they know precisely what they are doing, that they understand what is being said, that there is clarity about it, and, if the claimant is unrepresented, that he understands some of the consequences that may flow from it (see *Segor v Goodrich Actuation Systems Ltd* UKEAT/0145/11 (10 February 2012, unreported), at para 11). As Langstaff J stated in *Segor*: 'As a matter of principle we consider that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous'. If these criteria are satisfied, however, the concession or withdrawal will be binding and will not ordinarily be permitted to be re-opened on appeal (see Asif v Elmbridge Borough Council UKEAT/0395/11, [2012] All ER (D) 137 (Oct))."

12. Unfortunately for the Claimant the Tribunal found that the exchange with Mr Brown, was clear, unequivocal and unambiguous, particularly in the context of the earlier email. This means that in our judgment the withdrawal has taken effect and the claim cannot be re-activated (*Khan*).

Reconsideration

13. Shortly after our judgment on withdrawal was given, the Claimant invited the Tribunal to reconsider it on the basis that she had tried to signal her concern about the withdrawal of the protected disclosure claim at the conclusion of the morning's hearing.

14. It is fair to say that the Claimant had tried to say something at the conclusion of the morning's session before the adjournment for reading. I had directed her to speak through her representative. After a short conversation with Mr Brown it was agreed that they would talk outside so that he could take instructions.

15. The Claimant says that she wanted to raise that she didn't want to withdraw the protected disclosure claim.

16. The Tribunal, in considering this application, looked at the timeline as far as we were able. The hearing had started at approximately 10.45am due in part to delays caused by our sitting in the Rolls Building for the first time. The exchange with the Claimant's solicitor Mr Brown confirming withdrawal was very early on after introductions. There was a 20 minute adjournment at 11.10-11.30am to allow the representatives to speak about the claim for pension loss and sick pay which Mr O'Dair felt was difficult to understand and for the representatives to take instructions on a couple of points.

17. We think it was sometime around 11.35am before the longer adjournment until 2.30pm that the Claimant seemed to want to address the panel directly.

18. We have concluded that by this stage the claim had unambiguously been withdrawn and it was too late. We therefore considered that the original decision on withdrawal should stand.

Dismissal

19. Once I explained the content of rule 52 to the Claimant, now acting in person, indicated that she did wish the right to bring a further claim, and asked us not to dismiss the withdrawn claim.

20. Mr O'Dair opposes the suggestion that the PID claim should not be dismissed. He makes the points that there is no other jurisdiction in which such a claim could be brought and that there is no legitimate reason not to dismiss the claim.

21. We have considered the points raised by both parties carefully. On balance we consider that we should dismiss the withdrawn claim. Failing to dismiss this claim would be likely to give the Claimant the idea that there is another basis on which to pursue her claim in another court or alternatively bring a fresh claim in the Employment Tribunal. We cannot see what basis she might bring a fresh claim since it would be out of time and impossible to maintain it was not reasonably practicable to have brought a claim in time given that in fact she did bring a claim in time.

22. Accordingly the claim of automatically unfair dismissal because of a protected disclosure is dismissed.

Withdrawal of parts of the unlawful deduction of wages claim

23. A further point on withdrawal arose much later in the hearing.

24. On the first morning of the hearing, Mr Brown, then acting for the Claimant confirmed that the pay claim solely comprised sick pay and pension contributions, and that the other pay matters contained in the Schedule of Loss [page 88] (non-payment of contractual consultation period, holiday pay, car allowance, health insurance, 1 week arrears of pay, 4 weeks notice) were not pursued. It was agreed at this stage that Mr Brown and Mr O'Dair would speak further regarding sick pay and pension so that the latter could understand these claims more fully.

25. On the second day of the hearing, the Tribunal confirmed with the Claimant, now acting in person, that it was only the sick pay and pension contributions that were being pursued. Explicit reference was made to the Schedule of Loss at page 88 and she agreed to this. Given the fate of the protected disclosure claim which had been withdrawn the previous day and the Tribunal declined to "reactivate", it must have been absolutely clear to the Claimant that this was the end of her claim in respect of these other matters. Nevertheless in her closing submissions the Claimant tried to resurrect the claim for car allowance. As we explained to her, this had plainly been withdrawn on the first morning and (insofar as there could be any ambiguity) confirmed on the second morning.

26. For similar reasons given above in relation to the protected disclosure claim, we consider it is appropriate to dismiss these withdrawn parts of this unlawful deduction claim.

The Claim

27. The Claimant presented her claim on 13 July 2019.

28. Following the withdrawal of the protected disclosure claim and parts of the unlawful deduction claim, the only remaining issues are as follows:

29. Was the decision to select the Claimant's role for redundancy and the decision to dismiss her materially influenced by the Claimant's race, specifically being non-white.

30. Is the Claimant owed the following sums by way of unlawful deduction from wage:

30.1. Sick pay?

30.2. Pension contributions?

Evidence

31. The Tribunal heard evidence from the Claimant herself. Witnesses for the Respondent were:

31.1. Richard Buckley, Assistant Director for Property and Compliance in Housing (dismissing manager);

31.2. Mark Meehan, Chief Housing Officer (appeal manager);

31.3. Mark Brayford, Assistant Director of Delivery (Housing);

31.4. David McNulty, Assistant Director of Operations (Economy Department);

31.5. Mary Lamont, Head of HR Operations and People and Talent;

31.6. Oliver Samuel Pullen, Asbestos Manager at Gradient Consultants (seconded to Respondent for the period 17 April 2019-21 August 2020);

31.7. James Lock, Asbestos Manager.

Findings of fact

Overview of Claimant's employment and termination

32. The Claimant was employed from Mitie Property Management Limited ("Mitie") from 5 March 2018 as a Quality, Health, Safety and Environment (QHSE) Manager.

33. As a result of a decision taken on 8 October 2018 the Respondent's Council Cabinet decided to terminate the Mitie contract for compliance and repairs of Council properties on a 'no-fault' basis. The effect of this was to take back in-house the responsibility for the QSHE matters including the work carried out by the Claimant. The Tribunal has heard evidence that other elements of Mitie's compliance contract would be performed by different specialist contractors in various areas. The precise detail is not relevant to the circumstances of this claim.

34. The Mitie QSHE work was transferred back to the Respondent on 17 April 2019. It is not disputed that this was a service provision change to

which the Transfer of Undertaking Protection of Employment Regulations 2006 (Service Provision Change) ("TUPE") applied.

35. The Respondent took the decision that the Claimant's role was redundant. This decision was communicated to Claimant in a letter dated 24 April 2019, sent and received by the Claimant on that date, setting out a purported date of dismissal of 17 April 2019, i.e. the date of the transfer.

36. The Tribunal finds that the Claimant's date of termination was **24 April 2019**.

History leading to transfer

37. Richard Buckley took the decision to dismiss the Claimant. He was employed from October 2018 as the Assistant Director for Property and Compliance in Housing. He therefore started in this role at around the time that the decision was taken to terminate the Mitie contract. The asbestos and fire compliance team fell within his responsibility.

38. Mr Buckley's oral evidence to the Tribunal was that initially there was an assumption that the Claimant was transfer across into his team at the point that the Mitie contract ended.

39. On Mr Buckley's account it was only in March or April 2019 that transfer in the case of the Claimant was in doubt.

40. We accept the Claimant's evidence that she was told by Mr Anil Goriah, Health & Safety Manager (his title is discussed further below) at a meeting in March 2019 that Mr Buckley had "done a U turn" on wanting the Claimant to come over.

41. The reason for this change in position is the crux of the claim.

42. The Claimant's claim that this was because of her making protected disclosure (a claim she withdrew) or alternatively her race.

43. Mr Buckley attributes the change to the mapping process carried out by Jennifer Cometson, HR Consultant (TUPE): specifically a lack of matching between the Claimant's role in Mitie and the nearest equivalent in the Respondent, and her lack of a CMIOSH (Chartered Member of Institution of Occupational Safety and Health) qualification.

Friction between the Claimant and the asbestos team

44. It is clear that some significant friction arose between the Claimant and members of a team who were dealing with asbestos cases for the Respondent.

45. On 14 January 2019 the Claimant sent an email to various colleagues attaching an 'Investigation Report' regarding asbestos at Flat 2, 291 Goldhawk Road to various colleagues working on asbestos matters. This report was critical of the Respondent's management of asbestos risks arising

from asbestos being left in open bags amongst builder's rubble. She identified 20 "missed opportunities" to deal with the asbestos risks appropriately.

46. James Lock, who had been in the role of Asbestos Manager only a few weeks at this point, responded to the email later the same day in the following terms:

> "Jeni
>
> I have noted a few large errors in the report in my first read.
>
> I will review and send you corrections on my part.
>
> I have also requested that the rest of the LBHF asbestos team review as well."

47. He also wrote identifying "glaring error [sic] with regards to my own actions" to a variety of external consultants working on asbestos matters.

48. The following day 15 September, Mr Lock wrote to Mr Buckley about the report complaining that it cited emails apparently sent to him before he had started in his role, reiterating that there were factual inaccuracies, pointing out that there were spelling mistakes. He promised a further rebuttal report.

49. By an email dated 17 September 2019, as promised Mr Lock produced a "rebuttal report", in which he made his own comments in blue in which he was critical of various parts of the report. This was sent to the group of colleagues who had received the report.

50. His final comments on the report raise some questions about the competence of the person providing Asbestos Awareness Training for the individuals dealing with asbestos materials. In fact the provider of the training was the Claimant herself, although Mr Lock's evidence to the Tribunal was that he was not aware at the time that this was the case.

51. In short therefore Mr Lock was plainly upset by the Claimant's report.

52. The Claimant in turn was upset by Mr Lock's treatment of her report. On 18 January she sent an email to Mr Lock, copying in members of the wider team including Mr Buckley which represented something of an escalation. In this email she accused him of tampering with a legal document, which she alleged was a criminal offence. She suggested, in more moderate terms, that he should have written what he had to say separately and that it would be useful to have a meeting to discuss the matter.

53. The Claimant remained, some 20 months later at the time of the Tribunal hearing upset by Mr Lock's approach. She cross examined a number of the Respondent's witnesses on the basis that her report had been

"hacked" and "defaced". She also alleged that this was done because she was a black woman, although this represented an expansion in her claim.

54. Mr Oliver Samuel Pullen an external contractor working with the asbestos team says that he also saw the Claimant's investigation report (and some of the Claimant's other reports) and shared the concerns of Mr Locke.

55. We find based on the oral evidence that we heard that the Claimant's report and her approach did become a topic of conversation among members of the team, including Mr Lock, Mr Pullen and Mr Buckley. Although we do not have direct evidence of it, we infer that Mr Buckley must have been involved in some conversations on this topic. He was copied in on 18 January to what by then had become an acrimonious exchange between the Claimant and Mr Locke. As a responsible manager he would inevitably need to understand this conflict.

56. We find that there were strongly held and genuine but differing views held by those dealing with asbestos matters. For our purposes it is not necessary to comment further or resolve any points of dispute, other than in the context of the claim of race discrimination, which we do below.

Redundancy process

57. There was a meeting which the Claimant attended on 4 April 2019. This meeting was held by Mr Buckley and Ms Cometson at which the Claimant was notified that there would be a service provision change from MPS Housing Limited to the Respondent's Housing Maintenance department. She was warned that she was at risk of redundancy and that a consultation would follow.

58. This process was handled by Jennifer Cometson an Interim HR (TUPE) Consultant.

59. Notwithstanding the consultation process, the reality was that by the meeting on 4 April 2019 the Respondent (specifically Mr Buckley) had already decided that the Claimant was not going to transfer across. We note that the "Selection criteria/person specification" document for the Health and Safety Manager (Compliance) role within the Respondent, which sets out CMIOSH as an essential requirement for this role is undated. We accept the Claimant's evidence that she was not given a copy of this at the meeting on 4 April 2019. The Tribunal is not surprised that the Claimant is sceptical about the provenance of the requirement for CMIOSH. We have not seen any evidence that this was a long-standing requirement.

60. There was a discussion about how long it would take the Claimant to qualify for this requirement. Her case is that she told Mr Buckley that it would take 1 year for her to obtain it. Mr Buckley's recollection is that she said 1 – 2 years. The Claimant says that the Ms Cometson in this meeting stated that Respondent would give some time to reach the required level if it could be done within a reasonable period of time.

61. On or around 5 April 2019 the Claimant presented a statement of fitness for work indicating that she was unfit to work due to “stress at work”.

62. By a letter dated 8 April 2019 the Claimant was notified that there would be a second individual consultation meeting on 12 April with Ms Cometson and Richard Buckley. She did not attend and remained on sick leave.

63. The Claimant was provided with a list of internal vacancies 15 April. In reality this was simply a general list of jobs, none of which were particularly suitable for the Claimant.

64. The Claimant submitted a grievance against Mr Buckley by 16 April.

Dismissal

65. By a letter dated 24 April 2019, signed by Jennifer Cometson, but apparently on the construction of Richard Buckley, the Claimant was dismissed with a purported date of 17 April 2019 (i.e. pre-dating the notification). The basis for dismissal was as follows:

> “The corresponding job description for your role of QSHE Manager at MPS House Ltd was compared against the comparable role in the London Borough of Hammersmith & Fulham, the results of which I shared with you, showing the roles are not comparable as either a direct map or a suitable alternative to redundancy. The Council’s need for the work which you were undertaking has therefore ceased”

66. Although the Claimant acknowledges in her witness statement that the roles are different, it is perhaps surprising that two roles which had been identified as mapping one onto another apparently had so little in common in the comparison matrices.

67. The Claimant was signed off as sick throughout the period from 5 April 2019 to 24 April 2019, the date that the termination letter was sent to her by email.

Pay

68. On 29 April 2019 Ms Cometson confirmed that a payment of £3,430.80 had been paid into the Claimant’s bank account. She explained that this was an advance in respect of Pay in Lieu of Notice and included an overpayment of salary for the period 17 – 22 April 2019 which was due to the timing of advance. She stated the overpayment would be invoiced and will require repayment.

69. Given the Tribunal’s finding that the date of termination was in fact 24 April 2019, this was not an overpayment.

Appeal

70. On 14 May 2019 the Claimant objected to the appointment of Mark Meehan as appeal chair on the basis that he was good friends with the dismissing manager Mr Buckley. Somewhat surprisingly in the circumstances Pat Draper, a Human Resources Consultant said in response "Mark is the appropriate Chair in these circumstances".

71. Notwithstanding the Claimant's concern on this point, we accept Mr Meehan's evidence that he was not a friend of Mr Buckley, nor did the two men socialise outside of work.

72. By an undated letter of appeal the Claimant referred to "unfair dismissal and discrimination and an unfair consultation process". She alleged that when she first met Mr Buckley eight months earlier he said he had "heard great things" about her, but the outcome of the redundancy process had demonstrated a significant change of position. She said that on 4 April she was invited to pick a job description from the Respondent's organisation, but was prevented from seeing a third job description by Ms Cometson. She says that she was eventually sent this document but that it had on it that the one in the meeting. A significant part of the letter emphasises the good work she has done for the Respondent as client, identifying unsafe practices, working hard during the period of short staffing. She does not define discrimination in this document.

73. The Claimant prepared a document entitled "Appeal Questions", which contained four pages of close type. In that document she refers to being "persecuted and punished" for asbestos incidents. She defines discrimination in the following way:

> "it is discrimination because I am being bullied and poorly treated because I have raised issues of health & safety and refused to change my reports."

74. At the appeal hearing on 28 May 2019, at which the Claimant was represented by a union representative Mr Alex Reid, she raised a number of points:

74.1. she felt that she had been unfairly dismissed;

74.2. she felt that there was discrimination;

74.3. she felt that there was an unfair consultation process;

74.4. she highlighted the fact that she was working towards CIMOSH and that it was not normal practice to have two chartered members of staff on the same contract.

75. She was particularly asked about discrimination:

M And what do you mean by discrimination? What grounds?

J Because I was just doing my job, more unfair dismissal, Richard did not come to me, I am female they are male.

M Because of sex?

J That is one way of looking at it but I feel I was unfairly dismissed because I was doing my job.

76. While the appeal was not upheld against the decision to dismiss, Mr Meehan acknowledged complaints about the process being rushed and made reference to the fact that the termination date cited was a week before the letter of dismissal. In light of this he granted a further two weeks' pay, which was paid to the Claimant, less a deduction for an alleged previous overpayment. We note that these two weeks were to reflect both the question about the notice period and the "rushed" consultation period, but Mr Meehan does not delineate between these two sums.

Comparators

77. Six comparators relied upon by the Claimant, although it appears that by the conclusion of the hearing, the focus of the Claimant was on two particular individuals.

78. In order to be a comparator the circumstances of that individual must be the same or not materially different. The crucial aspects in our judgment must be that the comparator was previously employed by Mitie and they transferred through to employment with the Respondent.

79. We can deal briefly with the first four individuals identified:

79.1. Warren Colvin – (white/English) his role was Managing Director of Operations for the Mitie Contract. Crucially he was not engaged by the Respondent.

79.2. Sam Pullen – Asbestos Manager (white/English). Mr Pullen is white. He was a consultant engaged by Respondent until recently via the company, Gradient, on a temporary contract. He worked for Mitie through his own company and so he was never a direct employee of Mitie so as to be a transferee under TUPE. He did not transfer.

79.3. Tessa Daniels (white) was an agency worker who did not transfer to the Respondent.

79.4. James Locke (white) is a permanent member of staff recruited directly by Council in November 2018 prior to Mitie exit and so not a TUPE transferee.

80. ***Julie Charles*** (white/English) was an Estate Manager employed by Mitie. She transferred to the repairs section undertaking a post in resident resolution. Her new role is "resident liaison officer". She deals with residents following complaints have been made to contractor on site.

81. The Respondent says that whilst Ms Charles has a basic technical understanding of building structures to liaise with residents/contractors on site and provides information packs, she is primarily employed for her personal skills.

82. The Claimant says that a role was created for Ms Charles, which was a benefit that was not extended in the Claimant's case. This is something of an evolution of her claim. Her witness statement does not refer to "creation" of a role.

83. We cannot conclude based on the evidence that we have seen that the role that Ms Charles mapped across to was significantly different to the role that she had previously been performing. We accept that this was a less "technical" role than the Claimant was carried out, given that it was primarily an interpersonal skills role. We do not consider that the Claimant herself would have been a suitable candidate for this role, and in fairness we do not understand that that is what has been said by her.

84. We are not satisfied based on the evidence we have seen that a role was "created" for Ms Charles.

85. ***Mil Deegan*** the other comparator particularly relied upon by the Claimant, was previously Senior Compliance Manager at Mitie and took a contract manager role. Mrs Deegan is white, Irish.

86. The Claimant similarly alleges that Mrs Deegan had a role created for her. Again this is something of an evolution of her claim. Her claim form and witness statement do not refer to "creation" of a role.

87. The Respondent says that Mrs Deegan was not in a compliance role where formal qualifications are required. The role entails contract management. It seems to be common ground that this role did not require a particular professional qualification. Again we are not satisfied that there is evidence that a role was created for Mrs Deegan.

<u>Other non-white employees the Claimant alleged to have suffered detriments</u>

88. In paragraph 54 of her witness statement the Claimant identified for the first time three non-white colleagues whose circumstances she alleges support her claim of race discrimination:

88.1. Ms Sharnaz Keane whom she says was dismissed.

88.2. Mr Brian O'Mara, whom she says was humiliated, demoted and then removed.

88.3. Mr Anil Goriah, whom she says was demoted from Head of Health & Safety.

89. All of these individuals are non-white. The Claimant says that all of them had some involvement with asbestos. She alleges that each has suffered detrimental treatment. She claims this support her contention that

the non-white people were treated less favourably in this area. None of these individuals has given witness evidence.

90. The first time that the Respondent was aware that the Claimant was drawing a linkage between her situation and that of her non-white colleagues was when they received the Claimant's witness statement. It seems that the exchange of witness statements only took place the day before trial. Whilst we need not for these purposes examine why it was that exchange took place so late, the reality is that the Respondent's witness evidence was not prepared with this particular allegation in mind.

91. We were invited by Mr O'Dair to strike out the part of paragraph 54 of the Claimant's witness statement dealing with these matters. We did not take this approach, but considered that was appropriate to allow the Respondent to rely upon additional documentation and to supplement the witness statements with oral evidence.

92. ***Ms Sharnaz Keane*** was not a full time employee, but had worked on temporary contract as a health & safety adviser for the Bi borough (a combination of Fulham & Hammersmith and Kensington & Chelsea). On 19 December 2018 she had a cordial email exchange with Mr Buckley in which she stated that she had thoroughly enjoyed working for the Bi borough and asked if there was an opportunity to discuss the possibility of working as a permanent employee. Mr Buckley replied in polite terms suggesting that it was outside of the scope of his responsibility, acknowledging her work and telling her that she could apply for permanent positions with either Council.

93. Mr Buckley's evidence was that he was not Ms Keane's line manager and further that himself had not taken the decision that she should not be offered a permanent position. We have not received evidence which would lead us to conclude that this is not correct.

94. ***Mr Anil Goriah*** now has permanent employment with the Respondent in the role that the Claimant contends that she should have mapped into. In respect of the allegation in paragraph 54 we do not accept the Claimant's central premise, which is that Mr Goriah was demoted. We have received limited evidence on this point. We found however on the balance of probabilities that Mr Goriah has used the terms 'Health and Safety Manager' and 'Head of Health and Safety' interchangeably to describe his role. We do not find that there is evidence that he was demoted. It is significant that Mr Goriah himself was non-white and was offered a permanent position as Health & Safety Manager.

95. ***Mr O'Mara*** was not dismissed until August 2019. We have received limited information about the case of Mr O'Mara, in part because this only became a feature of the Claimant's case so late. The chronology we have established does not suggest a strong connection between the Claimant's circumstances and the circumstances of Mr O'Mara.

96. Mr Buckley's evidence, which we accept, was that Des Vincent had taken this decision. Mr Vincent is a colleague and peer of Mr Buckley. Mr

Vincent is black. It of course does not follow that because Mr Vincent is black he cannot discriminate against black people. He might.

97. The evidence we have, however, does not fit with the Claimant's characterisation (asserted during cross examination of the Respondent's witnesses) of there being a group of white men associated with asbestos work who were responsible for detrimental treatment of her and her non-white colleagues. We have not received evidence from which we could properly find that Mr Buckley and Mr Vincent were in some way colluding.

Conspiracy involving Mark Brayford and David McNulty

98. In the Claimant's further particulars of claim (page 61), it is alleged that Mark Brayford and David McNulty were partly responsible for the decision to dismiss.

99. The Tribunal has heard evidence from both. We accept the evidence of both men that they were not personally involved in the decision to dismiss the Claimant.

100. Mr Brayford gave evidence, which we accept, that he was involved in the "commercial" aspects of the ending of the contract with Mitie which had given rise to the TUPE transfer of the Claimant's employment. The final account between Mitie and the Respondent was concluded in June 2020.

101. Mr McNulty, was similarly involved in a more commercial way. His role was at a strategic level, rather than getting involved in the specific detail of individual cases.

102. We noted that the Claimant did not produce any documentary or direct evidence to suggest that the two men had been directly involved in the decision to dismiss her. Her case was that their own statements were the evidence. Both statements had been prepared to rebut the Claimant's case that they were involved.

103. We do not conclude that either of these individuals was involved in the decision to dismiss the Claimant. That decision was taken by Mr Buckley alone.

LAW

Discrimination

104. An Employment Tribunal does not need to focus on the operation of the burden of proof in race discrimination claims in the event that it is in a position to make positive findings one way or the other as to whether discrimination occurred. (*Hewage v Grampian Health Board* [2012] UKSC 37)

Date of termination

105. In *Geys v Societe Generale* [2012] UKSC 63, [2013] 1 AC 523 the Supreme Court held that termination of an employment contract is only effective when communicated to the employee.

TUPE regulation 10 & Pension

106. Regulation 10 of TUPE provides:

> "Pensions
>
> 10.—(1) Regulations 4 and 5 shall not apply—
>
> (a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Pension Schemes Act 1993; or
>
> (b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme."

107. Section 1 of the Pension Schemes Act 1993 provides:

> 1. (1) In this Act, unless the context otherwise requires– ["occupational pension scheme" means a pension scheme–(a) that–
>
> (i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or
>
> (ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people, is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme wasestablished had that subsection then been in force,
>
> or a pension scheme that is prescribed or is of a prescribed description;
>
> "personal pension scheme" means a pension scheme that–(a) is not an occupational pension scheme, and(b) is established by a person within [...3] section 154(1) of the Finance Act 2004;
>
> "public service pension scheme" means an occupational pension scheme established by or under an enactment or the Royal prerogative or a Royal charter, being a scheme–

(a) all the particulars of which are set out in or in a legislative instrument made under, an enactment, Royal warrant or charter, or

(b) which cannot come into force, or be amended, without the scheme or amendment being approved by a Minister of the Crown or government department, and includes any occupational pension scheme established, with the concurrence of the Treasury, by or with the approval of any Minister of the Crown and any occupational pension scheme prescribed by regulations made by the Secretary of State and the Treasury jointly as being a scheme which ought in their opinion to be treated as a public service pension scheme for the purposes of this Act

CONCLUSIONS

108. We are grateful to both parties for written submissions. In the case of Mr O'Dair he supplemented these orally, emphasising the key points. In the case of Ms Rodriguez, she substantially read her submissions and made a few points in response to Mr O'Dair.

Race discrimination

109. The Claimant makes the point in her written submissions that the Respondent has provided no witness who was involved in the mapping nor who could explain how it was undertaken. Therefore, she argues, they were unable to prove that the mapping was not detrimental to the Claimant. She argues that the mapping could be manipulated to provide any result that they wanted to provide. We have acknowledged her scepticism above.

110. In this case, as with many discrimination cases, there was no direct evidence of race discrimination, e.g. overtly racist language. Of course this is not uncommon. Can we draw an inference of race discrimination from the circumstances?

111. The Tribunal has addressed itself carefully to the question of why, when it appears that it was assumed that the Claimant's role would map onto a role in Mr Buckley's department, this did not happen.

112. We find that there were a number of factors. The unhappy relationship between the Claimant and the asbestos specialists was plainly a significant factor. The absence of a CIOMOSH Qualification was another concern, which we find was genuinely held. The Tribunal was struck by Mr Buckley's oral evidence that in the wake of the Grenfell tower disaster, there was an even greater emphasis on health and safety and ensuring that senior staff in this area had appropriate qualifications. We note that Mr Buckley had

previously been Head of Environmental Health for the Bi-borough of the Royal Borough of Kensington and Chelsea Council and the Respondent Council from 1 April 2012.

113. The Claimant's position was that there were such H&S officer roles available, and further that such a role should have been offered to her and the failure to do this amounted to discrimination.

114. Mr Buckley's evidence was that the job descriptions document contained a "mistake" when it referred to three health & safety officers, whereas in fact there was only one such role, and additionally a business support role (and at a later stage an apprentice role). We accept Mr Buckley's evidence that the reference to 3 health & safety officers was inaccurate. This inaccuracy is unfortunate, given that it has given the Claimant the impression that there were roles that might have been suitable for her which she was not offered.

115. We note that subsequent to the Claimant's redundancy there is still only one role described as "health & safety officer", which lends support that the job description was inaccurate on this point. The Respondent put a certain amount of emphasis on the fact that the one occupant of this role was Ms Brown, who is black. We do not consider that the fact of Ms Brown being in this role in itself means that the Claimant herself was not discriminated against. We do not have sufficient evidence of the circumstances of Ms Brown's appointment to draw conclusions from this.

116. Of greater significance is the fact that Mr Goriah, the person who was carrying out the role the Claimant contends she should have transferred into, is himself Asian (non-white in the terms of the Claimant's race claim). He has the CMOISH qualification and was permanently given the role after a recruitment exercise in summer 2020.

117. Additionally, we accept the evidence of Mr Buckley that he was part of the three person panel which approved the recruitment of Anthony Gushman a black male manager who was an agency worker but has now been recruited on a permanent basis into a role reporting directly to Mr Buckley.

118. The Tribunal has made positive findings as to the reasons why the Claimant was made redundant. We find that the Claimant's race was not a material influence on that decision and do not therefore need to consider the operation of the burden of proof.

<u>Unlawful deduction from wages</u>

119. We find that the effective date of termination in this matter was 24 April 2019, the date on which the Claimant admitted in her grounds of appeal (page 627) that she received the email with the letter of termination attached.

120. It follows that the Claimant was engaged for a further week longer than envisaged by the Respondent with the purported termination date of 17

April 2017 as confirmed in the letter of dismissal and the P45. During this period of time her absence was covered by sick certificates. It follows that she was entitled to be paid sick pay and pension contributions for this period.

121. Under clause 13 of the Claimant's contract of employment she is entitled to 20 days sick pay per annum for a rolling year, thereafter she is only entitled to statutory sick pay.

122. Unfortunately the documents provided in the agreed bundle relating to pay and pensions have been inadequate, despite a number of additional documents added by both parties during the course of the hearing.

123. It has been very difficult to satisfactorily reconcile a number of documents:

123.1. A spreadsheet document analysis of pay showing an alleged overpayment [pages A:51-A:52];

123.2. A document containing information about pay and deductions, which no one present at the hearing was able to explain the provenance of [A:53-A:63];

123.3. Pay slips, which were never supplied to the Claimant at the time of the payments to which they relate and were introduced by the Respondent at a late stage in the hearing [718-719]. These documents were printed incompletely with the result that not all of the document can be read, in particular net payments;

123.4. Email dated 17.9.20 [A:69];

123.5. Mitie pay slips [130-131].

<u>Sick pay</u>

124. The Claimant asserted in her closing submissions that she had not been off sick before April 2019, and accordingly has not exhausted any of her 20 day full contractual sick pay entitlement for the preceding rolling year. We have received no evidence on this point from either party.

125. The point has been made on behalf of the Respondent that the burden is the Claimant to prove her entitlement to pay. While this is correct, the disclosure on pay matters has been late, incomplete and unsatisfactory. For example the Claimant has received payslips during the course of the hearing 17 months after material events. She makes the point that this is breach of a statutory right. These documents were plainly relevant to her claim and ought to have been in the bundle, in a properly legible form, from the outset.

126. Ordinarily, in the interests of proportionality for a fairly low value pay claim the Tribunal would attempt to do the best we could with the evidence supplied. Given however that we consider that a remedy hearing is desirable to deal with the question of pension entitlements, and given that this part at

least may be to the Respondent's advantage (see below) we consider it is in the interests of justice to consider further the entitlement to sick pay at the remedy hearing.

Unlawful deduction - Pension

127. We find that the pension scheme operated by Scottish Widows on behalf of Mitie, which is described as a personal pension in the Scottish Widows documentation contained within the bundle, is a personal pension scheme within the meaning of section 1 of the Pension Schemes Act 1993. The Act draws a distinction between occupational pension schemes and private pension schemes. The former type are operated by an employer for its employees. The latter are operated by pension companies. We find that this is a scheme operated by Scottish Widows, to which access is facilitated by Mitie, rather than a scheme operated by Mitie.

128. As to the "full-back" argument advanced by the Respondent, that because the policy is between the Claimant and the pension company, her remedy should be against the company, we reject this argument. In our view the liability to make employer contribution payments was that of Mitie. Clause 8.1 of the contract of employment dated 26 March 2018 provides that the employer will pay a minimum of 5% employer's contribution.

129. It follows, given our finding that this is not an occupational pension scheme, that this pension liability does not fall within the exception set out at regulation 10 TUPE 2006.

130. We find, based on the "Premium History" document from Scottish Widows Ltd dated 21 September 2020, supplied as a late addition by the Claimant to the agreed bundle, that on the balance of probabilities Mitie has not paid employer contributions in the period December 2018 – 17 April 2019.

131. Given our finding on regulation 10, liability therefore did pass to Respondent by operation of TUPE.

Remedy Hearing

132. The Tribunal has found it difficult to pick through and make sense of the inadequate selection of documents evidencing the Claimant's pay and pension payments. We have made a separate case management order to facilitate a remedy hearing.

133. It was unsatisfactory that the Claimant was not given a payslip for payments made to her in both May and July 2019. These have only been provided to the Tribunal when we asked for them. We have been told that the Claimant is a member of the Local Government Pension Scheme but have not been provided with documents satisfying us that she has received employer's contributions for the period 17 April 2019 – 24 April 2019.

134. Notwithstanding our finding that liability for pension payments for the period December 2018 – 17 April 2019 passes to the Respondent, in the

event that it can be demonstrated that Mitie has made these employer contributions and these have been received by Scottish Widows, we acknowledge that it would be appropriate to reconsider this decision since it would be unjust if the Claimant essentially received this sum twice. We have made an order directing the Claimant to write to her former employer.

135. By the date of the remedy hearing, the Tribunal would expect to see:

135.1. Fully legible and complete versions of payslips produced by the Respondent (i.e the period April-July 2019 clearly showing net payments).

135.2. Documentation demonstrating what if any payments have been made into the local government pension scheme and what arrangements are being made to reflect a termination date of 24 April 2019.

135.3. The Claimant's sick record for the period April 2018 – April 2019 inclusive. The Claimant may wish to produce a signed witness statement confirming what sick leave she took during this period if contemporaneous records cannot be obtained.

136. In relation to the Mitie documentation the parties are reminded in the event of difficulty in obtaining these documents that the Tribunal can make an order against non-parties for disclosure of documents and information under rule 31 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1. Any such application should be made by 13 November 2020 for the Urgent attention of Employment Judge Adkin.

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Employment Judge - Adkin

Date: 5th Oct 2020

WRITTEN REASONS SENT TO THE PARTIES ON

05/10/2020

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

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