EMPLOYMENT TRIBUNALS

Claimant: **Mr Gary Forrester**

Respondent: **Kingdom Services Group Ltd**

Heard at: **East London Hearing Centre**

On: **5, 7 January 2022 and 10 February 2022**

Before: **Employment Judge Burgher**
Members: **Ms G McLaughlin**
Mr L O'Callaghan

Appearances

For the Claimant: **Ms K Green (Partner)**
For the Respondent: **Mr R Cater (Consultant)**

This has been a hybrid hearing which has not been objected to by the parties and a remote hearing by CVP for the final day.

JUDGMENT

1 The Claimant's claim for race discrimination fails and is dismissed.

2 The Claimant's claim for harassment related to race fails and is dismissed.

3 The Claimant's claim that he was subjected to detriment for making a protected disclosure fails and is dismissed.

4 The Claimant's claim that he was dismissed by reason of making a protected disclosure fails and is dismissed.

5 The provisional remedy hearing listed for 18 March 2022 is vacated.

REASONS

1. At the outset of the hearing the issues the Tribunal had to determine were clarified as follows:

1. Direct race discrimination (Equality Act 2010 section 13)

1.1 The Claimant is white British for the purposes of this claim. The Respondent dismissed the Claimant on 26 November 2020

1.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. The Claimant says he was treated worse than 1 or 2 members of his team who were not white and had been involved in the Whatsapp message issue. The names of the comparators are Mr Mohammed Ali Kaser and Ms Saida Atif both of Asian heritage.

1.3 If so, was it because of race.

2. Harassment related to race (Equality Act 2010 section 26)

2.1 Did the respondent do the following things:

2.1.1 John Roberts stated in a team briefing session that took place in September 2020 that the team should target ethnic minority groups to issue fixed penalty notices and parking fines to as they likely spoke poor English so would not understand UK law and were less likely to appeal in time.

2.2 If so, was that unwanted conduct?

2.3 Did it relate to race?

2.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

2.5 If not, did it have that effect?

The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. Protected disclosure

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

The Tribunal will decide:

3.1.1 The claimant says s/he made disclosures on these occasions

3.1.1.1 Concerns about dumping fax's and fly tipping raised to John Roberts orally and in writing (by Whatsapp video messages) on 5 October 2020 and 30 October 2020;

3.1.1.2 Concerns about double billing raised to John Roberts on 21 September 2020, 29 September 2020 and 3 October 2020 and

to Ms Kelly in Human Resources at the end of October/early November 2020;

3.1.1.3 'Whistleblowing' concerns raised on 11, 12 and 13 of November 2020.

3.1.2 Did he disclose information?

3.1.3 Did he believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did he believe it tended to show that:

3.1.5.1 a criminal offence had been, was being or was likely to be committed;

3.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

3.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

3.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;

3.1.5.5 the environment had been, was being or was likely to be damaged;

3.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

3.1.6 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer. If so, it was a protected disclosure.

4. Detriment and Dismissal (Employment Rights Act 1996 section 48 and 103A)

4.1 Did the respondent do the following things:

4.1.1 Subject the Claimant to disciplinary proceedings;

4.1.2 Dismiss the Claimant

4.2 By doing so, did it subject the claimant to detriment?

4.3 If so, was it done on the ground that he made a protected disclosure?

Evidence

2. The Claimant gave evidence on his own behalf and called the following witnesses in support.

2.1 Ms Klaudija Green his partner, and former national director of the Respondent.

2.2 Mr Mohammed Ali Kaser, former Environmental support officer.

2.3 The Tribunal was also invited to read the statement of Ms Saida Atif, former supervisor for the Respondent. Ms Atif was not prepared to attend the Tribunal to evidence her statement and therefore her statement was given very limited probative value given that she could not be cross examined on it. The Claimant also submitted a statement of Ms Christine Pratt, HR diversity management but the Claimant did not seek to rely on this statement given her non-attendance at the Tribunal

3. The Respondent called the following witnesses:

3.1 Ms Karen Kelly, People team manager;
3.2 Ms Sabrina Fernandes, Contract manager;
3.3 Mr William Russell, dismissal officer;
3.4 Mr Lloyd Burton, appeal officer; and
3.5 Mr John Roberts, the Claimants' line manager

4. The Tribunal was also referred to relevant pages in an agreed bundle consisting of 202 pages; a supplementary bundle produced by the Claimant consisting of 37 pages; and also viewed 2 video clips sent by Whatsapp message 5 October 2020 and 30 October 2020 respectively.

Facts

5. The Tribunal has found the following facts from the evidence.

6. The Respondent provides environmental enforcement services for up to 38 Local Authorities in United Kingdom including London Borough of Barnet (Barnet) and the London Borough of Waltham Forest (Waltham Forest). The Respondent's costs including staff salary, equipment and IT are paid for by the number of Fixed Penalty Notices (FPN's) issued and paid by members of the public, residents, businesses. FPNs are issued for littering, fly tipping and business waste which may have been put onto the streets outside the council's designated times.

7. The Respondent has different business models with different local authorities. As far as the Barnet was concerned the Respondent's primary contractual arrangement was to receive 70% proportion of all paid FPNs issued to members of the public or businesses. The Tribunal were told that on average 70% of FPNs are paid. However, in March 2020 Barnet suspended issuing FPNs due to the pandemic and did not subsequently authorise reissuing them until August 2021. During this period the Barnet agreed to pay the Respondent's staff and hourly rate for the Respondent's employees undertaking their duties with them.

8. The Respondent also contracted with the Waltham Forest who continued to authorise FPNs in litter, dumping and anti-social hotspots in its area throughout the

pandemic. The Respondent's contract with Waltham Forest was in the process of being retendered in October/November 2020.

9. The Claimant commenced employment as an Enforcement Officer on 3 February 20. On 20 February 2020 the Claimant appointed to position of Team Manager. From 1 March 2020, the Claimant was assigned to manage a team of up to 15 multi ethnic officers at Barnet. As Team Manager, the Claimant was responsible for logging Environmental support officers hours and there was the expectation that he would seek to maximise the team FPNs and consequently revenue for the Respondent.

10. The Respondent has numerous policies and procedures on its intranet colleague zone, including disciplinary, grievance and social media policies. The Claimant stated that he was never trained on the policies and could not access them. However, his contract of employment specifically referred to the policies being on the Colleague Zone and the Claimant ought to have made reasonable enquires especially when he became Team Manager. He did not make reasonable enquiries at the time and when he requested copies of the disciplinary procedures during his disciplinary he was referred to the colleague zone but did not say he did not have access it.

11. In order to communicate with his team members in Barnet, the Claimant administered a Whatsapp group chat. On the documentary evidence before us it was only the Claimant who admitted and deleted members of the group which consisted of 10 – 15 members. The Claimant contended that Ms Atif, a supervisor could also do so add and delete members but there is no record that she actually did so. We find that the Claimant, as Barnet Team Manager and administrator was the responsible person for managing and overseeing this group chat.

12. The Claimant's communication with his line manager, Mr Roberts was invariably by telephone. This was Mr Roberts' preferred method of communication. Due to the pandemic Mr Roberts visited Barnet infrequently and only when necessary to issue or update relevant equipment.

Double billing

13. In September 2020, immediately prior to the Waltham Forest contract being retendered Mr Roberts asked the Claimant to assign his Barnet team to work at Waltham Forest to increase the FPNs issued. The Claimant alleges that he told Mr Roberts that this would amount to double billing or triple billing and was told by Mr Roberts not to tell the Barnet contract contact Matt Lang anything about this. Mr Roberts denies that there was such an allegation made by the Claimant. We prefer Mr Robert's evidence in this regard. The Claimant did not know about the billing procedures between the Respondent and local authorities, how work was audited and or how payments were subsequently authorised. What the Claimant could see was that officers being listed on internal spreadsheets as working at Barnet and Waltham Forest (and other Local authorities) on the same day and times which obviously could not be possible. It was the relevant Team Managers responsibility to check and sign off where an individual actually worked. It

transpired, in October 2020, that officer Mr Rose had been mistakenly paid double for hours listed as working at both Barnet and Waltham Forest at the same time. Mr Rose told the Claimant this at the time. This was a matter of double payment to Mr Rose, not double billing by the Respondent to both Barnet and Waltham Forest for the work done by Mr Rose allegedly at both places at the same time and date. The Claimant's statement stated that this was likely to have been a mistake on behalf of the Respondent's back office team because it was physically impossible to work in two or more regions at the same time. We agree. In summary, we do not accept the Claimant's allegation that he raised concerns of double billing to Mr Roberts or that he was told to keep quiet about it.

Racist instruction

14. The Claimant alleged that in September or October 2020 Mr Roberts provided a direct instruction during a verbal briefing session to his multicultural team to target ethnic minority groups when issuing FPNS and parking fines. It was alleged that Mr Roberts said that this group should be targeted as well as they were likely appeal in time and they would not understand UK law. Although not in his witness statement, the Claimant's ET1 states that Mr Roberts told him that ethnic minorities were likely to speak poor English as an additional reason to target them. The Claimant stated that he raised concerns about this instruction to Mr Roberts but was ignored.

15. Mr Kaser gave evidence relating to this. We found his evidence to be confused and unclear. He stated that Mr Roberts told them to target disabled groups, ethnic minority groups and people attending funerals who were grieving for their loved ones and that 'more blacks' and 'more Asians' should be issued with tickets. The wording of Ms Atif's statement is drafted in identical terms to that of Mr Kaser in this respect.

16. Mr Roberts denies that that there was a group meeting with the Barnet team or that such an instruction was given. He stated he attended Barnet only once in September 2020 to provide equipment to the Claimant, speaking only to the Claimant and he did not have a team meeting as alleged. He states he did not say such things and is not something that would make sense to do to a multi ethnic team and a KPI is the number of complaints received, such an instruction would inevitably increase complaints.

17. No date was provided by the Claimant or Mr Kaser anyone as to when the alleged racist instruction was given by Mr Roberts. The nature of this instruction, to a multicultural team, would have been likely to have been noted, complained about or commented on contemporaneously but was not.

18. The Tribunal considered the Team Whatsapp messages, which Mr Roberts did not have access to, and there is no mention in passing trenchant terms, commenting on the instruction that was allegedly given by anyone, whether or not ethnic minority 'black' or 'Asian'. The Tribunal also observes that Barnet team members expressed themselves in offensive, assertive and forthright terms during the Whatsapp group chat but there was no mention at all about the, on any view, outrageous instruction that Mr Roberts had allegedly given to them.

19. When questioned on what he did about the instruction, the Claimant stated that he followed it as he was fearful of losing his job. The group Whatsapp messages do not support this. On 3 October 2020 the Claimant proceeded to joke about the heavily accented response of an East Asian elderly man who was video recorded remonstrating against an unfair and improperly imposed FPN against him. The Claimant uploaded the whole video recording of the interaction and engaged in reprehensible mimicry of the East Asian man. This was not the conduct of a fearful manager reluctantly carrying out an allegedly racially discriminatory instruction.

20. Finally, the Claimant does not mention this racist instruction by Mr Roberts as part of his subsequent defence or mitigation for the disciplinary allegations he faced regarding the racist, homophobic and transphobic postings on the Whatsapp group.

21. Having considered the competing evidence we prefer the evidence of Mr Roberts and do not find that a racist instruction to issue FPNs to ethnic minorities, 'blacks' or 'Asians' was given. Given the evidence we have considered we do not consider this to be a credible allegation.

Waste disposal

22. Street Scene are directly employed Barnet and are responsible for issuing council labelled waste bags to businesses and residents and for collecting and disposing of their waste. The Claimant was suspicious about the way Street Scene were working and expressed his concerns about their operations to Mr Roberts and Mr Lang from Barnet.

23. The Claimant sent Mr Roberts a Whatsapp message on 5 October 2020 with a video clip of waste collection. The Claimant mentioned this on a telephone conversation with Mr Roberts alleging Street Scene alleged illegality in collections as it was affecting the effectiveness of his team is monitoring and investigating environmental breaches by individuals and businesses. Mr Roberts forwarded the concern to Barnet to investigate in accordance with protocols.

24. On 24 October 2020 a Street Scene Waste operative who was allegedly engaged in illegal dumping activities approached a member of the Claimant's patrolling team who and stated "Your manager tried to fuck me over" but that his boss did not believe me anyway and they laughed it off. The Claimant reported this incident in writing to Barnet management who replied to him on the 26 October 2020 stating that the operative concerned will be facing disciplinary action.

25. The Claimant sent Mr Roberts a Whatsapp message on 30 October 2020 with a video clip and message stating Street Scene Dumping waste on Watling. The Claimant's concerns in this regard were what Street Scene were allegedly doing, not the Respondent or Barnet. It was in the Respondent's interests for Street Scene to be held to account for what they were doing.

Disclosure to Ms Kelly

26. The Claimant alleged that he mentioned to Ms Kelly at the end of October or early November 2020 his concerns about double billing. Ms Kelly denies this. We accept Ms Kelly's evidence. If the Claimant had made such a disclosure would have been able to state or write that he had actually blown the whistle about this matter in his subsequent correspondence to Ms Kelly or Mr Roberts. However, his subsequent communication and correspondence on 11, 12 and 13 November 2020 is conspicuously consistent in asserting that the Claimant 'will' whistleblow and he is putting a case together to blow the whistle. However, nothing is mentioned in this correspondence about what he will blow the whistle about nor that he had already blown the whistle.

27. The Claimant's email to Ms Kelly responding to the disciplinary hearing to discuss ban on 12 November 2020 is an illustrative example. It states:

> "Dear Ms Kelly,
>
> I am concerned that I haven't received an acknowledgment or a response to my urgent email dated 11/11/2020.
>
> I will need to see documents in question and receive your detailed response before my Disciplinary Hearing tomorrow. Otherwise, you will be forcing me to attend Disciplinary Hearing without documentation I require and as a direct result of me informing you and John Roberts that **I will whistleblow**.
>
> I also would like to inform you that you haven't formally written to me to confirm that you found me innocent of all the made up charges that LAS employee has brought up against me and my team. John Roberts did call me to confirm but I would like to see this in writing.
>
> As soon as that issue was wrapped up and **after I informed you and John of my intentions to disclose something** that was in public's interest, you contacted me to inform me that I am facing Disciplinary Hearing.
>
> Needless to say I am feeling victimised as the result and treat unfairly when all I ever wanted to do is just do my job.
>
> I hope to receive a response from you today and at the very least cancellation of the Disciplinary Hearing tomorrow which should not be taking place due to current circumstances.
>
> I look forward to hearing from you at your earliest convenience."

28. Having considered the competing evidence we do not find that the Claimant mentioned any double billing concerns to Ms Kelly at all.

Disciplinary, dismissal and appeal

29. The Claimant managed and administered the Whataspp group for Barnet. He admitted agency team member Ms Bryans to the Groupchat in September 2020.

30. On 14 October 2020 the Respondent received a complaint from Ms Bryans alleging bulling and sexual harassment on the Barnet site. An investigation commenced. Whilst this investigation was ongoing on 28 October 2020 a vegetable substance was found in Ms Bryans bag that was in a communal area. An internal investigation commenced the matter reported to the police who took no action.

31. The Claimant was tasked with provided the initial report of the incident on everything that had gone on.

32. On 3 November 2020 and 4 November 2020 Mr Roberts and Ms Fernandes attended the Barnet to start to conduct interviews with all the staff including Ms Bryans.

33. During Ms Bryans interview the Barnet group Whatsapp chat was brought to the attention of Mr Roberts and was sent to him by her on 4 November 2020. The Whatsapp Group chat evidences wholly inappropriate behaviour and comments from a number of the team who had been interviewed and a larger investigation commenced into the Whatsapp group chat. Amongst other matters were the East Asian man remonstrating and being mimicked, a man urinating, a team member being teased as gay and naming a team member as Trans.

34. Within the investigation meeting with the Claimant discussion ensured about the substances that was found, who had access to the cupboard, whether it left unlocked and unattended at time. Discussion involved he bullying claims and what the Claimant had seen. He was also asked if he had shown pornographic images to Ms Bryans and asked could he provide the audit of the Whatsapp group he was in charge of. The Claimant responded that the Barnet Whatsapp group was deleted and that he did not have a back up copy.

35. On 5 November 2020 Mr Roberts reported the Whatsapp group Barnet, as he felt that this posed a potential risk to their reputation along with their relationship with the Respondent.

36. Mr Lang informed Mr Roberts to immediately remove the Claimant and his other colleagues from Barnet site, due to the nature of the content of the Whatsapp group.

37. The Claimant was informed that allegations of gross misconduct were to be investigated and he should contact operations for work at other locations. Mr Kaser and Ms Atif were other members of the team that Barnet requested to be removed due to their alleged culpability in the Whatsapp chat content.

38. Ms Fernandes was asked to attend Barnet site on 5 November 2020 to inform all officers and team managers of their removal and collect security passes. The Claimant stated that he was outside of the council building and that the newspaper and news were on their way down and they would not be moved.

39. After review all of the whatsapp chat transcript, photographs, videos contained within and meeting notes were reviewed Mr Roberts determined that there was a potential case to answer for the Claimant in respect of potential gross misconduct and he recommended that the Claimant be invited to a disciplinary hearing. Mr Roberts concluded that the Claimant should be invited to a disciplinary meeting to consider the following allegations:

39.1 He failed to act in a manner appropriate to his position;
39.2 He had posted racist comments in the Whatsapp Group and
39.3 He had engaged in Transphobia.

40. By letter dated 10 November 2020 the Claimant was invited to attend a disciplinary meeting to take place on 13 November 2020 with Mr Russell.

41. On 11 November 2020 the Claimant sent an email to Ms Kelly complaining about disciplinary process and advising that he will whistleblow. No detail of what he would whistleblow about was provided.

42. On 12 November 2020 the Claimant sent an email to Ms Kelly requesting documents and repeated the statement that he will whistleblow and had the intention to 'disclose something that was in the public's interest'. Again no detail of what he would whistleblow about was provided.

43. The disciplinary meeting with Mr Russell took place on 13 November 2020. During the meeting the Claimant stated that he is putting a case together about whistleblowing and regarding the Respondent's illegal practices and requested the disciplinary process to be suspended because 'he will be going down the whistleblowing procedure'. No detail was provided.

44. Mr Russell considered the issues before him and the Claimant's explanations. The Claimant stated that he did not consider mimicking the accent of an Asian man as racist, and compared it to someone mimicking his Yorkshire accent. The Claimant stated that changing a colleagues name from Trant to Trans was not transphobic and illustrated that names could easily be misspelt. He stated that he did not have specific training to tackle the homophobic comments and offensive photographs that were posted on the whatsapp group. The Tribunal find that there was some very offensive homophobic content posted and the Claimant's contention in the disciplinary meeting that descriptive references to 'gay' in messages was referring to happy as incredible.

45. Mr Russell concluded that dismissal was appropriate. Mr Kaser, of Asian heritage, also suffered the same fate of dismissal for the content he posted on the whatsapp groupchat. He was equally lacking in remorse for his offensive content of the group. Ms Atif, also of Asian heritage, posted offensive content on the Whatsapp group. Mr Russell decided to issue her with a final written warning. He took the view that her postings to the whatsapp group were, whilst serious, less so than the Claimant; her seniority was less;

and she showed contrition and insight to what she had done during the disciplinary process.

46. On 30 November 2020 the Claimant lodged a dismissal appeal/grievance providing detailed allegations of whistleblowing concerns specifying

46.1 Environmental practises relating to fly tipping and public fines;

46.2 Concerns regarding issuing fixed penalty notices and instructions given by management to target, and issue tickets come out to disabled, Asians and non - English speaking members of the public (ethnic minority groups);

46.3 Double (or triple) billing of resources across several councils.

47. The Claimant was unable to explain why he did not specifically articulate the three above matters in any of his correspondence of the 11, 12 and 13 November 2020 prior to his dismissal.

48. The Claimant subsequently attended appeal meeting his appeal issues were investigated and his appeal against dismissal was subsequently rejected by Mr Burton on 12 March 2021.

Law

49. In respect of race discrimination section 13 of the Equality Act 2010 (EqA) states:

Direct discrimination

(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5)If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6)If the protected characteristic is sex—

(a)less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b)in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7)Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8)This section is subject to sections 17(6) and 18(7).

50. The burden is on the Claimant to prove, on the balance of probabilities, to establish a prima facie case of discrimination. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, Mummery LJ stated at paragraph 56 that the court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination). It is confirmed that a claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

51. Even if the Tribunal believes that the Respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that his treatment was due to the Claimant's colour or race.

52. In respect of unlawful harassment section 26 EqA states:

S.26 EqA defines harassment, the material subsections being the following:

(1) A person (A) harasses another (B) if

(a) A engages in unwanted conduct related to a relevant protected characteristic and,

(b) The conduct has the purpose or effect of –

(i) Violating B's dignity, or
(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(3) In deciding whether conduct has the effect referred to in sub-section

(1)(b), each of the following must be taken into account –

(a) The perception of B;
(b) The other circumstances of the case;
(c) Whether it is reasonable for the conduct to have that effect.

53. Insofar as is relevant Section 43B Employment Rights Act 1996 ('ERA') defines qualifying disclosures.

Section 43B Disclosures qualifying for protection.

> (1)In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a)…
>
> (b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c)…,
>
> (d)that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e)…, or
>
> (f)…..
>
> (2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
>
> (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
>
> (4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
>
> (5)In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

54. The starting point is that the disclosure must be a "disclosure of information" made by the employee bringing the claim. That disclosure must have two features. Both are based on the belief of the employee, and in both cases the belief must be a reasonable belief. The first is that at the time of making the disclosure the worker reasonably believed the disclosure tended to show relevant wrongdoing; or deliberate concealment of that wrongdoing. The second is that at the time of making the disclosure, the employee reasonably believed the disclosure was made in the public interest. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 Sales LJ noted that allegations could amount to disclosures of information depending on their content and on the surrounding context. He set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have "*sufficient factual content and specificity such as is capable of tending to show*" one of the five wrongdoings or deliberate concealment of the same. It is a matter "*for the evaluative judgment of the tribunal in the light of all the facts of the case*" (paras 35-36).

55. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (Soh v Imperial College of Science, Technology and Medicine EAT 0350/14).

56. The Tribunal needs to assess whether, given the factual context, it is appropriate to analyse a particular communication in isolation or in connection with others. In Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 (EAT), Slade J (at para 22) said

that "*an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if taken on their own they would not fall within Section 43B(1)(d)*". Whether or not it is correct to do so is a question of fact.

57. In Kilraine, one of the alleged protected disclosures was made using these words: "*There have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented*". In itself, this lacked sufficient factual content and specificity. The oblique reference to other documented instances did not incorporate other documents by reference.

58. What is reasonable within Section 43B involves an objective standard and its application to the personal circumstances of the discloser. A whistle-blower must exercise some judgment on his own part consistent with the evidence and the resources available to him (Darnton v University of Surrey [2003] IRLR 615, EAT. However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may be a reasonable belief even if it is wrong: Babula v Waltham Forest College [2007] ICR 1026.

59. In relation to the type of wrongdoing, there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase "*is likely to*" has been interpreted as meaning more than a mere possibility. In Kraus v Penna [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was "*probable or more probable than not*".

60. So far as breaches of a legal obligation under Section 43B(1)(b) are concerned, any legal obligation potentially suffices. Unless the legal obligation is obvious, Tribunals must specify the particular obligation that the Claimant believes has been breached, the source of the obligation should be identified and capable of verification by reference to statute or regulation: Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] ICR 747 (EAT) at paragraph 98. An employee's belief that a legal obligation has been breached need not be formed by reference to a detailed or precise legal duty, though it must amount to more than simply a belief that the impugned conduct is wrong Eiger Securities LLP v Korshunova [2017] ICR 561 (EAT), per Slade J at paragraph 46. It is not necessary that the disclosure identify the specific legal obligation that is said to have been breached: Twist DX Limited v Armes (UKEAT/0030/20) at paragraph 84.

61. In Kilraine v London Borough of Wandsworth [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The tribunal held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the particulars of claim or the witness statement

indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

62. Section 43B(1) also requires a claimant to have a reasonable belief that the disclosure was in the public interest. This requirement has two components, first a subjective belief, at the time, that the disclosure was in the public interest; and secondly, that the belief was a reasonable one.

63. What amounts to a reasonable belief that disclosure was in the public interest element was considered by the Court of Appeal in Chesterton Global Limited v Nurmohamed [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in additional to his own personal interest. So long as workers genuinely believed that disclosures were in the public interest when making the disclosure, they could support the reasonableness of the public interest element by reference to factors that they did not have in mind at the time.

Qualifying protected disclosures

64. A qualifying disclosure is a protected disclosure if it is made to the claimant's employer (sections 43A and 43C Employment Rights Act 1996). In this case, all of the alleged disclosures were made to the Respondent. Therefore, if the alleged disclosures were qualifying disclosures, they were also protected disclosures.

Detriment and causation

65. Section 47B ERA states:

> **Section 47B Protected disclosures**
>
> (1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a)by another worker of W's employer in the course of that other worker's employment, or
>
> (b)by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
>
> (1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

> (1D)In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
>
> (a)from doing that thing, or
>
> (b)from doing anything of that description.
>
> (1E)A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
>
> (a)the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
>
> (b)it is reasonable for the worker or agent to rely on the statement.
>
> But this does not prevent the employer from being liable by reason of subsection (1B).
>
> (2) This section does not apply where—
>
> (a)the worker is an employee, and
>
> (b) the detriment in question amounts to dismissal (within the meaning of Part X).
>
> (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

66. The concept of 'detriment' in relation to protected disclosures was summarised by Sir Patrick Elias in Jesudason v Alder Hey Children's Hospital [2020] EWCA 73 at paragraphs 27-28 in the following terms

> "the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment … an unjustified sense of grievance does not amount to a detriment … Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

67. The effect of these sections is that it is for the worker to prove, on the balance of probabilities, that there was a protected disclosure, that there was a detriment and the employer subjected the claimant to the detriment. If so, then the burden shifts to the employer to show the ground on which the detrimental act was done: Section 48(2) ERA.

68. If a Tribunal rejects the reason advanced by the employer, then it is not bound to accept the reason advanced by the worker, namely that it was on the ground of a protected disclosure: it is open to the Tribunal to find that the real reason for the detriment was a third reason.

69. The Tribunal must consider what, consciously or unconsciously, was the employer's motivation for the detrimental treatment. Causation will be established unless the protected disclosure played no part whatsoever in its acts or omissions: Fecitt v NHS Manchester [2012] ICR 372, CA. The result is that there will be a sufficient causal connection if a protected disclosure was one of several reasons for the detriment, even if

it was not the predominant reason. It is enough if it was a material influence, in the sense of being more than a trivial influence.

Automatic unfair dismissal

70. Section 103A ERA 1996 provides:

> **Dismissal - 103A Protected disclosure.**
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

71. In contrast to a claim of protected disclosure detriment, a claim of unfair dismissal for making a protected disclosure requires the Tribunal to determine the principal reason for the dismissal. It is not sufficient if the Tribunal decides that the dismissal was materially influenced by protected disclosures, it is necessary for the principal reason for the dismissal to be the protected disclosures.

Conclusions

Direct race discrimination

72. The Claimant is white British and claims that he was discriminated against on grounds of race by being dismissed on 26 November 2020. His initial comparators were Mr Mohammed Ali Kaser and Ms Saida Atif both of Asian heritage. However, in evidence it was established that Mr Kaser was also dismissed by Mr Russell for his involvement regarding the offensive and discriminatory whatsapp messages. Ms Atif, who was given a lesser sanction of a final written warning for her involvement was therefore the sole comparator for less favourable treatment.

73. When considering whether Ms Atif is an appropriate comparator Mr Russell alleged that her contribution on the whatsapp message, whilst seriously offensive, was less so than the Claimant. He stated that her seniority was less than the Claimant and that she was contrite in respect of her conduct where the Claimant was not.

74. We conclude that her whatsapp conduct of a similar seriousness to the Claimant. However, we accept that she was less responsible for the team and the running of the whatsapp group than the Claimant and that her remorse for her conduct distinguished her from the Claimant. Therefore, we accept and conclude that there were material differences in the circumstances of the Claimant and Ms Atif and do not conclude that she is an appropriate comparator.

75. The Claimant has not established that he was less favourably treated due to his race. The dismissal of Mr Kaser for similar conduct and attitude wholly undermines his case in this regard. His claim for race discrimination therefore fails and is dismissed.

Harassment related to race

76. In view of our findings of fact on the competing evidence, set out at paragraphs 16 – 21 above we do not conclude that Mr Roberts gave a racist instruction to the Barnet team to issue FPNs to ethnic minorities, 'blacks' or 'Asians' was given. We conclude that this allegation was lacking in credibility.

77. The Claimant's claim for harassment related to race therefore fails and is dismissed.

Protected disclosure

78. We accept that the Claimant relayed concerns about Street Scene dumping and fly tipping to John Roberts orally and by whatsapp video messages on 5 October 2020 and 30 October 2020. When considering whether they amounted to disclosures of information, taking a generous interpretation of the facts and the law we conclude that they disclosed information that Street Scene may not be complying with its legal obligations to collect waste properly. This was allegedly a breach by Street Scene of its legal obligations that Mr Roberts forwarded to deal with, in accordance with its investigation processes. However, it is not a matter that concerned Mr Roberts as there was little else he could do apart from await the outcome, if any, of Barnet's investigation process.

79. We accept that, on the basis of the video clips the Claimant had a reasonable belief that Street Scene was not complying with its legal obligation of collecting waste properly. We also accept that disclosing information about Street Scene's allegedly improper collections was in the public interest as the public and business has a legitimate expectation that collections will be made in accordance with published regulations and guidelines. The whatsapp messages and associated telephone calls were made to Mr Roberts. Therefore we conclude that these were qualifying protected disclosures.

80. We do not conclude that the Claimant raised concerns about double billing to Mr Roberts on 21 September 2020, 29 September 2020 and 3 October 2020 or to Ms Kelly at the end of October/early November 2020. The Claimant raised concerns by telephone of erroneous double paying of a member of staff to Mr Roberts but we do not accept he raised concerns of double (or triple) billing to Mr Roberts or Ms Kelly. Therefore he has not established that he disclosed information in this regard.

81. As an aside, if it was being alleged that the Claimant disclosed information of discriminatory instruction issue FPN to ethnic minorities, we have not found that such an instruction was given and do not conclude that there was any contemporaneous complaint about it.

82. The Claimant raised 'whistleblowing' concerns in email correspondence on 11, 12 and 13 November 2020. The Claimant referred the Tribunal to the Employment Tribunal case of Bilsborough v Berry Marketing Services Ltd to the effect that a purposive approach is

necessary for the protected disclosure claims and that a disclosure of information can be determined from an expression that a person may whistleblow. We note from that case that there was found to be an earlier related disclosure.

83. However, we conclude that there must be a disclosure of information. We follow Norbrook Laboratories (GB) Ltd v Shaw in that "*an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if taken on their own they would not fall within Section 43B(1)(d)*". Whether or not it is correct to do so is a question of fact.

84. On the facts of this case the only earlier 'disclosure related to wrong doing by Street Scene which was of no concern to Mr Roberts at all. Ms Kelly and Mr Russell knew nothing about this. Therefore, when the Claimant stated that he '*will whistleblow'* we do not conclude that there is any factual information, whether background or otherwise for the Respondent to conclude that the 11, 12 and 13 November 2020 communications disclosed any information at all. Therefore, whether on their own, or read in the context of when and what the Claimant had raised to Mr Roberts previously, we do not conclude that they amounted to disclosures of information to amount to protected disclosures.

85. Therefore the only protected disclosure established relates to the concerns the Claimant to John Roberts orally and by whatsapp video messages on 5 October 2020 and 30 October 2020raised about Street Scene dumping and fly tipping.

Detriment

86. When considering whether the Claimant has been subject to detriment on ground of his protected disclosures we had regard to the chronology of allegations by Ms Bryans the counter allegations against her and the raising of the whatsapp messages by Ms Bryans. This is the contextual frame for the Claimant's disciplinary action. We do not conclude that Mr Roberts was influenced by the Claimant's allegation against Street Scene at all in this regard. He had handed the concerns to Barnet to deal with. In reality, the whatsapp messages were very serious and needed to be dealt with and this was the basis for disciplinary action, not protected disclosures.

Dismissal

87. The Claimant's claim for detriment on ground of making protected disclosures therefore fails and is dismissed.

88. In respect of dismissal, the reason for the Claimant's dismissal was the whatsapp messages. Mr Russell had no detail of what the Claimant had raised with Mr Roberts and had no inclination of what the Claimant was threatening to raise by 'whistleblowing'. It is apparent that at this stage the Claimant was raising whistleblowing as a strategic step to delay the disciplinary process. However, he omitted to take the essential step of disclosing any information to Mr Russell at all.

89. The Claimant's claim that he was dismissed by reason of making protected disclosures therefore fails and is dismissed.

90. In view of the conclusions outlined above, the provisional remedy hearing for 18 March 2022 is vacated.

Employment Judge Burgher
Dated: 21 February 2022