mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Zita**

Respondent: **Roundstone Development Management Ltd**

Heard at: **East London Hearing Centre** **On: 7-9 June & 13 June (Tribunal only)**

Before: **Employment Judge Prichard**
Members: **Mr T Burrows**
Mrs S A Taylor

Representation
Claimant: Mr J Neckles (PTSC Union, Brixton, London SW2)
Respondent: Mr R Kohanzad (counsel, instructed by Moorepay, Bury, Lancs)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The claimant's claim of unfair dismissal (under the EU charter) fails and is dismissed.**
2. **The claims for race discrimination (direct and by way of victimisation) are dismissed.**
3. **The public interest disclosure claim fails and is dismissed**
4. **The breach of contract claim fails and is dismissed**

REASONS

1 The claimant, Mr Alessandro Zita, is self-described as a Brazilian national although he has a current Italian passport and an Italian name. He is a part-qualified accountant in the UK. He joined Ballymore Properties on 2 March 2015 as an Assistant Management Accountant. He TUPE'd shortly thereafter to the present respondent, Roundstone Development Management Ltd. (He worked in the construction side of the business as opposed to rentals). He was there for just over

one year before his dismissal on 8 March 2016. He was paid one month's pay in lieu of notice. He was dismissed says the respondent, for a number of incidents under 3 main headings:-

1.1 persistent errors in accounts
1.2 poor timekeeping
1.3 poor attendance.

Preliminary Applications

2 In an attempt to bring an unfair dismissal case Mr Neckles made an unusual application, ambitious to the point of foolhardy, to bring a claim under Article 30 of the Charter of Fundamental Rights of the European Union.

3 The Charter's present iteration apparently originally adopted in 2001 was amended by the Treaty of Lisbon. The commencement date is given as 1 December 2009. There has been such a charter in existence for many decades. It goes back to the start of the European Economic Community thence to the European Union. One of the features of UK unfair dismissal law is that it mirrors the rights bestowed by Article 30 upon which Mr Neckles relies.

4 The application and his submissions are based upon a lack of research on his part. Reading the Article carefully gives one the answer. The Charter is divided into 7 titles as follows:

- Title I Dignity;
- Title II Freedoms;
- Title III Equality;
- Title IV Solidarity;
- Title V Citizens Rights;
- Title VI Justice;
- Title VII General Provisions Governing Interpretation.

5 Article 30 is under Title IV Solidarity, and reads as follows:

> "**Protection in the event of unjustified dismissal**
>
> Every worker has the right to protection against unjustified dismissal, in accordance with union law and national laws and practices." [tribunal's emphasis]

It could be thought that the UK law of unfair dismissal complete with its 2 year service qualification, and 3 month jurisdictional time limit for application reflects the rights bestowed by Article 30 and is precisely the "national laws and practices" concerned. But the flaws do not stop there.

6 The application of the Charter and the titles in it was originally governed by the Treaty of Rome now as varied since 1 December 2009 by the Treaty of Lisbon. At the end of the Treaty, Protocol number 30 details certain opt outs from the Charter for Poland and the United Kingdom.

> "Article 1(1) The charter does not extend the ability of the Court of Justice European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
>
> (2) In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.
>
> Article 2
>
> To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom."

7 Even when this was pointed out to Mr Neckles he continued to rely upon legal authority to show that the charter has horizontal direct affect. The case he cited however was completely beside the point. *Rugby Football Union Consolidation Information Services Ltd in liquidation* [2012] UKSC was the case. This was a judgment of the Supreme Court. Suffice it to say that the context of that case was Data Protection, not "Solidarity".

8 The answer to Mr Neckles' submission lies within the terms of Article 30 itself, and also Protocol 30 to the Treaty of Lisbon. It is a hopeless submission.

9 The claimant brings claims as follows. Apparently in an attempt to salvage some kind of *quasi* unfair dismissal right:-

9.1 Race discrimination and victimisation;

9.2 Public interest disclosure section 103A and 47B of the Employment Rights Act 1996.

The public interest disclosure is premised on the direct race discrimination / victimisation. That is the breach of duty alleged for the purposes of s 43B of the Employment Rights Act 1996.

10 The claimant also alleges a breach of s 12 of the Employment Relations Act 1999 in circumstances where the claimant asserted his right to be accompanied (by Mr Francis Neckles (john's brother)) at a "disciplinary hearing" on 8 March 2016

11 In the respondent's ET3 response to the claims they pointed out that the claimant's claims were logically flawed because in some instances the protected act post dated the detriment complained of.

12 Exchange of witness statements took place within a week before the final

hearing here but subsequently by a further amendment to the claimant's statement made on the eve of the hearing the claimant sought to predate the protected act to October 2015 relative to a termination which took place on 8 March 2016. There was an application by the respondent to "exclude" that portion of the witness statement.

13 The tribunal decided at the outset of the hearing that to "exclude" portions of a witnesses' testimony is an unsatisfactory procedure. If that is what the witness now wishes to say, then the witness should be allowed to say that. Quite apart from severe credibility problems inherent in the way that this has come to light, the tribunal also made a finding as follows.

14 The claimant alleged that in a conversation with his manager on 28 October 2015 he was told that some of the larger accounts would be taken away from him and that he would be asked to work on smaller accounts (in circumstances where the respondent says he was making too many errors on the large client's accounts). The claimant alleges that he stated: "that's victimisation" and that management replied: "you're not being victimised". The tribunal's finding is that the word "victimisation" on its own and out of any racial context is not capable of amounting to a protected act under the Equality Act 2010. This is quite apart from the respondent's position that no such word was said, and that it would have been remembered if it had been said.

15 Further, if "victimised" was actually what the claimant meant, under s 27 of the Equality Act 2010, on 28 October 2015, he would logically need another protected act prior to that.

16 Victimisation, like harassment, is a common colloquial word. It is also a term of art under section 27 of the Equality Act 2010 where it is statutorily defined. Unless the context of the "victimisation" is clearly alleged and located in the discrimination legislation, it is more likely to be a colloquialism meaning no more than "you're singling me out".

17 Protected act is defined in section 27(2)(a) as:

> "bringing proceedings under this Act;
>
> …
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

No such allegation was made so the tribunal would say in advance, even if we found that the claimant said that on that date at that meeting, it would not have been considered a protected act by the tribunal.

18 There was a further preliminary argument which the tribunal considered. In a bizarre attempt to bolster his point about the amendment of the claimant's witness

statement, on day 2 of the hearing Mr Neckles adduced medical evidence about his own depressive disorder which he contends, with the support of a doctor's letter, affects his memory. Mr Neckles advances this as an explanation for the lateness of the amendment to the witness statement. The tribunal cannot accept this explanation. In any event it did not affect our decisions or findings in any way.

19 The final preliminary application before the hearing could start was another extraordinary and hopelessly ambitious claim supported by bizarre legal submissions. Mr Neckles wanted to exclude the entire evidence of the respondent's chief witness Ms Julia Martin, the Finance Manager of the respondent, and the claimant's direct line manager.

20 This was on the basis that at this hearing and in the tribunal's bundle there was far more evidence than that which he had been given at the time of the hearing which led to his dismissal. Let us call it a disciplinary hearing although it was based upon performance / conduct. This evidence is now characterised, in our view quite wrongly, as "retrospective".

21 Mr Neckles cited a range of authority. The point he makes about "retrospective" evidence here was, quite wrongly, based upon *Devis v Atkins* [1977] IRLR 314. *Devis v Atkins* is a principle, like *Polkey*, applicable in some cases when a claimant is successful in an unfair dismissal claim, and the respondent seeks to reduce compensation payable. Sometimes, after a dismissal something bad is discovered that the claimant has done in his employment. In those cases tribunal can reduce or extinguish any compensatory award even though the prior misconduct is not related to the known facts or beliefs that led to the claimant's dismissal. He further cited *Khanum v Mid Glamorgan Area Health Authority* [1978] IRLR 15 EAT.

22 Mr Neckles then bizarrely extended the argument to rely on two cases which are commonly relied upon in connection with *Polkey* contentions when a claimant has won a case. They are *King v Eaton* [1995] IRLR 75 and *Software 2000 Ltd –v- Andrews [2007] IRLR, 568, EAT* in support of the tag line "sea of speculation". He said this was contrary to the principles of natural justice.

23 What the evidence of |Julia Martin is, is evidence that goes into more detail in support of headline performance issues which were identified at the disciplinary hearing on 7 March 2016. We told Mr Neckles and now reiterate in this judgment his application and submissions in support of it are misconceived. This was an absurd application.

<u>The facts</u>

24 The claimant is now 30 years of age. In 2010 he completed his BA in business management in economics at the University of Greenwich. He has since been studying for the ACCA qualification (Chartered and Certified Accounts). He worked for some 9 months in the accounts department of Jaguar Freight Services before joining a property company, similar to the present respondent, Edinburgh House Estates in London, for whom he worked for 4½ years before applying for a post with Ballymore.

25 The claimant came into the respondent as more qualified than most of the

colleagues in his team. He was in the late stages of his accountancy qualification, having passed 11 out of 14 of his professional exams. It was one of the concerns the respondent had, as well as erratic performance on the accounts, that he was not making good use of the study leave he was being provided to pursue his studies to full qualification.

26 The extent of his qualification influenced his relatively high starting salary. He was paid more relative to many other colleagues within the team. The respondent's narrative describes they were in fact outperforming him in quantity and quality. It should not have been so. The claimant's employment was subject to a probationary period of 3 months. The contract provided: "In certain unusual circumstances we may wish to extend this for a further period". He was subject to one week's notice during the probation period. Once employment had been confirmed his notice entitlement would increase to 1 month. That ultimately was the payment in lieu of notice which he received when he was dismissed on 8 March 2016.

27 After starting, the claimant impressed the respondent for a short time. A first probation review held with him and Ms Julia Martin on 27 March was typed up and looks positive:

> "I am very pleased with how Alessandro is settling in and the interest that he takes in his work. He raises sensible questions and appears genuinely interested in what is happening with the companies that he is responsible for.
>
> Alessandro told me he is happy with his colleagues … I believe that they feel the same about him."

28 By May a different picture emerged. We have seen emails from the intervening period before the next probation review. One particularly, on the Pridebank account, showed Ms Martin had multiple criticisms. The claimant apologised to an extent in an email response on 5 May.

29 There was a probation review meeting on 15 May 2015, between Julia Martin and the claimant. The typed notes state:

> "I told Alessando that I had some concerns around his performance and timekeeping and, as a result of this, I wanted to extend his probationary period.
>
> …
>
> Other matters raised during our discussion were:
>
> - To ensure that journals were well documented and filed.
> - To ensure that the narrative entered into Premier was meaningful.
> - To avoid using mobile phones and the internet for non-work purposes during working hours.
>
> I would like Alessandro to improve his timekeeping, although I am aware that at times he does stay after 5.30. I explained that it was unfortunate that we could not be more flexible in our working hours and that it was down to others who have abused the system that has created this situation"

30 We remarked generally that timekeeping was strictly enforced by the respondent

for the whole team. The start time was 8:30am. The well documented narrative reveals that the claimant was late, sometimes very late, but more usually slightly late, to an irritating extent. It hampered Ms Martin's ability to manage the team as a whole.

31 By letter of the same date from Karen Gorman HR Manager, the claimant's probation was formally extended. It was due to end on 2 June, it was now extended to 2 July, just one month's extension.

32 We accept the respondent's evidence that in the run up to 2 July, whether because of pressure of work, or whatever reason, the claimant's extended probation period was forgotten. Accordingly the probation lapsed as at 2 July and the claimant was confirmed in employment and his notice entitlement increased. We accept the respondent's evidence that this was not a "decision" but happened by default.

33 The claimant stated that there was a letter confirming this, but we have not been shown this. The respondent has not produced any such letter. Generally their disclosure was of a high standard. We would expect them to have disclosed it if they had it anywhere.

34 For his part the claimant never explained why he could not produce a copy from his records. If he had received such a welcome letter it seems the sort of letter that one would like to keep.

35 In her evidence Ms Martin told the tribunal that if they had kept their eye on the ball she may well have terminated the claimant's engagement at that stage because he was not living up to his salary and his timekeeping continued to be a problem for her in managing the team.

36 The claimant had complications in his domestic life. He had a step-father living in Camberwell for whom he was the primary responsible carer. His step-father later had care attendants during the days but that care did not arrive in the morning until 8 am. The claimant considered that he could not leave the house until the carer had arrived. That gave him an extraordinarily tight commuting time, estimated as 25 minutes on a good day, to get into the office, Marsh Wall, Docklands. This situation did not arise until around July 2015. His step-father was going downhill. He had a heart condition. He was eventually admitted to hospital for heart surgery in September 2015. His mother, the claimant states, is more highly paid than he was as a nanny for a wealthy family. That was why he became the primary carer for his step-father. The respondent was never told that last detail, which was a piece missing from the jigsaw.

37 There was another background event. Quite early in his employment with the respondent, the claimant's step-brother died young, killed in a car accident in Livorno in Italy time around April/May 2015. We did ask the claimant when, but he wasn't sure.

38 One significant consequence of that was that it put the claimant off using his motorcycle to go to work. He had a motor scooter which was the most efficient way of to commute. Thereafter he used public transport which took longer anyway, and was subject to all the usual vagaries of London Transport. He was back on his motorcycle before the end of his employment, but for several months he was using public transport.

39 Another background factor was that the claimant was the victim of a robbery in early April 2015. One of his motorcycles was stolen by three youths who threatened him in New Cross Gate. We accept that the claimant had a lot to contend with personally.

40 Ms Martin was aware of the robbery and also the step-brother's death. While she was aware that the claimant's step-father had a heart condition she was not aware of the claimant's role in caring for him and the fact that his mother was not in the frontline of care because she had a residential nanny job for a wealthy local family. The claimant at one stage said that his mother was coming back from New Zealand and the assumption that Ms Martin made, (the same as the tribuna), was that this would take the weight off the claimant for caring for his step-father. In fact she never realised that the claimant had this apparently frontline responsibility for caring for his father-in-law and the return of his mother from New Zealand did not really affect anything because she was only in New Zealand working with the family for whom she is the nanny.

41 The respondent was not aware of the detail of this but it played quite a large part in the claimant's timekeeping. This whole domestic situation was mentioned when the claimant arrived late. For instance on 28 September he had to take the whole day off as an emergency because his step-father was going to hospital for surgery and his mother was flying back from New Zealand.

42 The following day he was late because he had to go to Kings College Hospital to take an extra set of pyjamas to his step-father.

43 We are not sure, nor is the respondent, why the claimant did not go into more detail to explain the situation here. The respondent might have been more sympathetic had the claimant explained the situation as it was.

44 On 28 September 2015, during the difficulty with his step-father the claimant emailed Julia Martin asking for the emergency day off stating:

> "Hi Julia, good morning,
>
> As I have mentioned a few times my stepdad has been subject to a complicated heart surgery and he has had some difficulties, last night he started feeling really uncomfortable again and will be submitted to another surgery today at King's College Hospital, because my mother is away I am the closest person who can keep him company and try to make him feel positive about this. He is 71 … My mother will be … flying from New Zealand ….. so today is all I need."

He was asking for an emergency day off. It is not at all the story the claimant told the tribunal about his mother being a private nanny and paid more than he was as an accountant with Roundstone, (the claimant's salary was £35,000 per annum).

45 Quite apart from the step-father surgery the claimant was having problems in October 2015 waiting for a bus on 9 October for more than 25 minutes; delayed trains at Denmark Hill, the Jubilee Line at Canada Water was packed. He never told the respondent that he could not leave the house until 8 am. His response to tribunal questioning about why he could not arrange for this was that this trusted friend who did

the daily care could not come even 15 minutes earlier than she did. It would have made his commute to work less of a daily gamble than it was. Ultimately we were never given an answer.

46 It appears the claimant was back on his motorbike by February 2016 because he emailed the respondent to say he was late because he could not get his scooter to start because of the cold.

47 Ms Martin's concerns grew between the probation review of May 15 through the summer the autumn where the claimant's step-father's health crisis and admission to hospital in September. (Apparently now his step-father has made a very good recovery from that episode and no longer needs care to the extent that he did then).

48 Just a cursory look at many of the emails from this period show mounting dissatisfaction. For instance there is one on 21 August 2015 where Ms Martin had to write a long email about the Roundstone Construction account (a major focus of complaints). It is unnecessary to go into the detail to see that there was dissatisfaction, over technical matters. In the email Ms Martin, who is a sensitive manager in our view, stated: "… sorry if it sounds like I am nagging".

49 The respondent had relieved the claimant of several of the larger accounts as stated earlier. They felt he was struggling with these accounts and mistakes on these accounts could have more serious consequences. They passed some of these accounts to more junior members of the team whom they considered were more able to carry out the accounting duties to a higher standard in terms of speed and accuracy.

50 One account in particular, Pridebank, was given to a junior member of staff. However, in the event the claimant ended up taking a lot of those responsibilities back because the pressure of work on the team generally meant that the junior members did not have enough time to deal with Pridebank at all.

51 On the important Roundstone Construction Ltd project the respondent acknowledged during the hearing that the claimant could and should have been better supervised on those accounts before errors went through unchecked. What had happened was that Julia Martin and her manager, Dominic Dunford, each considered that the other had taken responsibility for supervising that important account. In fact it was a miscommunication and neither of them was supervising it, so many of the claimant's errors went through unchecked.

52 Mr David Pearson, the UK Financial Controller, was Mr Dunford's manager. He later heard the appeal in this case. He would never check the actual figures in accounts, but simply the presentation and format of the accounts, before they were presented to the clients. It was not his role to micro-check them at that level, cross referencing them to the balance sheets.

53 October was not a good month. On 20 October Ms Martin had cause to complain that the claimant had left the office during working hours without telling anyone.

54 On 26 October the claimant sent a heartfelt email to Dominic Dunford and Julia

Martin to thank them:

> "Just really wanted to thank you for being so understanding regarding the difficult personal time I had in the last few months.
>
> I now feel ready to retake more responsibility and pressure and I really feel it was great that both of you relieved me from the higher pressures of Eco World and bigger companies for this quarter.
>
> I am now ready to get involved with some more complex companies (if you so wish) and having a higher number of bigger companies rather than just having RCS (which I really like by the way) and some tiny ones because I know you have released the pressure to help me and the pressure mounted on other members of the team. I know my help will now be appreciated too so that the pressure is re-distributed.
>
> …
>
> I feel it's my responsibility to let you know I am now ready to help out as you had originally intended when I joined as I feel I have been under par regarding my capabilities and work performed for all that went on. You trusted me and kept me here in difficult times so I also feel I need to help with what I am capable of.
>
> Pease don't see this as a complaint as again, like I said to Julia before, I am grateful you have made this decision, I wouldn't have been able to handle all the stress I was going through ..."

Upon receipt of this Ms Martin stated to Mr Dunford:

> "Perhaps we could sit down with him tomorrow?
>
> He told me he has finished RCS and I asked him to let you have it to review if that is ok.
>
> He said yesterday morning that he was almost finished but it still took him all day!"

55 That was on 27 October, so she was referring to tomorrow which was Wednesday 28 October 2015. Unlike the previous typed probation review notes of 15 May, the notes of a meeting on 28 October are quite sketchy. It was clear the 3 of them met. Ms Martin regarded it as a performance discussion. Her rough note states:

> "RCS – David's changes" [David Pearson] …
> "Bank Recs – importance of doing first
> Debtors ledger – need to learn how to receipt
> Speed – work faster – is he at full speed. Can do analysis faster
> Offering to take on more work = good intentions"

56 The point about the good intentions remark, as we know from the claimant's description of the meeting as well as Ms Martin's, was that, far from entrusting the claimant with the big accounts again, they relieved him of many more large accounts. The respondent's interest was in having it properly dealt with, with important deadlines met.

57 Ms Martin raised the problem of timekeeping and absence. Astonishingly the claimant is recorded as saying: "finds it hard to get up". The tribunal cannot imagine why this entry has been made in the note if it was not in fact said. It is not consistent with the many emails we have seen in which he generally manages to come up with an

excuse for his lateness e.g. running late, stopped by traffic police, bus broke down, shortages of buses, had to walk from New Cross to Deptford Bridge, no buses, buses delayed by the rain, main street closed, 15 minutes late waiting for delivery, starting at 9:30 to sort a personal problem, and eventually no excuse at all, as in "… running 10 minutes late see you soon".

58 On the same day as the conversation with the claimant took place on 28 October raising concerns about his work Mr Dunford this time raised his concern with Julia Martin: "RCS bank rec missed out the very last payment". Then sarcastically ,,, "It was only £384k. Dominic". To which she responds:

> "Hmm, worrying isn't it – perhaps the first new challenge for him is to cut down on review points for errors.
>
> Do you want to set up a time to sit down with him?"

59 It is documented and explained to this tribunal that the respondent was strict on timekeeping. Because of past abuse of the system, Ms Martin could not afford to be flexible. It would make management of the team generally too hard.

60 There is no dispute that the claimant often stayed at work late. From the odd email we can see he would sometimes be there at 11pm. We do not know how he managed that given his stated caring commitments. His account did not add up.

61 The respondent continued to keep an eye on the Roundstone Construction account and supervised it. However, problems still mounted throughout December. Given the background it was perhaps surprising that the claimant was one of two lucky employees to be selected for an Eco World trip to Kuala Lumpur Malaysia with free flights and hospitality out there. There was a dancing event. He flew out eventually on 15 December. Some criticism is made of him for not having completed all the work he needed to have completed given that he was going to away for that time. The trip was to be from Thursday 10 December until Wednesday 16th was when he arrived back in the UK. He seems to have enjoyed it.

62 In the run up to that trip, there were concerned emails from Julia Martin to the claimant between the 2 of them. For instance on 2 December she said to him:

> "Morning Alessandro
>
> Thank you for getting all of the companies done, however, I am concerned at how long this is taking – were you working solidly on this since yesterday lunchtime?
>
> I think it will be useful to have Chris and perhaps Shaun do some of these each month so that the turnaround is a lot faster [Chris Starling and Shaun Thorpe].
>
> …
>
> It is now December and I have not been able to start on the management accounts pack for September – I was planning to be able to complete this tomorrow as I will be working from home. I particularly wanted to see Pridebank sooner in case there were any further changes required.
>
> Please let me know what you have on today and confirm that these two companies will be ready

before the end of the day – the sooner the better."

The claimant wrote back agreeing that it was best to split it with Chris or Shaun. He stated:

"… there is quite a lot of pressure on me if I have to do anything else that is also time sensitive that day."

She responded:

"Can you let me have list of all the things that you need to do on the 1st of every month so that I can see where the pressure points are."

He conceded in that same thread: "I'm sure there are things I can do quicker".

63 Julia Martin raised her concern with Dominic Dunford. For instance she said:

"FYI – he was here until 10.30 last night.

The subcontractor reconciliations for the majority of companies should be relatively fast – I did BPL in the morning because he always has problems with this [Ballymore Properties Ltd], it took me an hour because of the volume of transactions in that company…"

And then in a following mail Mr Dunford asked: "If the BPL rec takes you one hour how long does it take him?"

Reply:

"It usually takes him all day, last month it was 2 days! It seems as though he did the rest in about 2 hours, he was probably doing RCS [Roundstone Construction Ltd] in between.

I do think he struggles. I gave him review points for Pridebank on 19th November and he still hasn't finished (2nd December). He talks about the same point over and over and explains what he is doing, but he doesn't seem to actually do it!"

And Mr Dunford then said:

"OK, give him one day back here to get over his flight and then we will have a chat."

This was about 2 weeks before the claimant was due back in the UK.

64 Accordingly on 17 December, the day after he came back to the UK, in the middle of the day Julia Martin contacted Mr Dunford again:

"Dominic – if we can squeeze in a discussion today to talk about Alessandro, I can at least go back to him and say the 3 of us will sit down to talk about performance, and in the meantime, No to Pridebank?"

(by which she meant the claimant was not going to get the Pridebank account back).

65 The claimant's poor performance continued as did poor timekeeping. The claimant had a cold in January which prevented him from coming in.

66 On 1 February there was claimant's peer review by Julia Martin, and there were 7 review points in number which were major points.

67 As general evidence at this hearing Mr Dunford confessed that he was rather slow to act on Julia Martin's concerns. He thought that the claimant should be given plenty of opportunity to improve under her management. If she had had her way the whole problem might have escalated much sooner than it did. Mr Dunford conceded in retrospect that he was probably wrong to be so patient. It is quite clear from the tone of some emails that we have already cited that Ms Martin was becoming impatient and she was moving towards doing something more formal.

68 It started on 22 February when she addressed Karen Gorman of HR with Mr Dunford copied in, stating:

> "Karen
>
> In addition to performance issues, we also have a timekeeping issue with Alessandro. Dominic and I have spoken to him a couple of times about this previously.
>
> He generally has weak excuses – one day he was unable to get his bike out because a car was parked across the drive. I know the road he lives on and think it highly unlikely that a car would have been parked on the pavement.
>
> I suspect that some of his absence has been down to him avoiding work deadlines, if something is due and he has not completed it, he feigns illness. This is only a suspicion of mine however.
>
> This morning he called at 9.45 to tell me he was going to the doctors – this call should have been at 8.30.
>
> Would you mind having a quick discussion with me on the best approach to speaking to him about this."

69 It was another theme of Ms Martin that, as well as erratic absence reporting, the claimant was regularly ringing in after his scheduled start time to report that he was late or going to be late. It made it hard for her to plan the work of the team under her management. She also said it was discourteous, which it was.

70 2 days later on 24 February 2016 Ms Martin wrote directly to Dominic Dunford this time copying in Karen Gorman. The claimant had just asked her for 5 to 10 minutes of her time which was not the usual situation. Usually she would have to ask the claimant for 5 to 10 minutes of his time.

71 Subsequently she forwarded that to Mr Dominic Dunford, cc Karen Gorman saying:

> "Dominic
>
> It is as if he knows something is up.
>
> I think both Chris and Sharon would have spotted me typing up a document yesterday so possibly one of them gave him a heads up.
>
> Anyway, same old conversation really:

> He wants to do well and thinks that he should have larger companies. He thinks that having already done the small companies he should be ready to do more. I asked him whether he thought that Shaun having done some larger accounts should now be sitting in David's office or in a presentation in Malaysia! I do like to exaggerate.
>
> I told him some embarrassing mistakes that he had made on a simple company and he looked rightfully shamefaced about it. He tried to give me various excuses about why this would have happened.…
>
> I was quite frank with him about how I felt about his current performance and what he needed to do to improve on this."

72 Subsequently and shortly afterwards Ms Martin sent the same people a long email attaching the document that she referred to that she had been working on. It was a long document. It was a full 1-page email with a 5-page attachment all closely typed, including a comprehensive list of absences and latenesses throughout the period of the claimant's employment from March 2015 up to date then 23 February 2016. The summary is in the email:

> "Timekeeping – anything after 8.30 is late. Being late on a regular basis is unacceptable. His record shows that, until recently noted, he has sent emails every month (except August when he took holiday) to advise me that he was running late. The more recent lateness he has not been emailing about.
>
> Notification of absence – as noted in the staff handbook … If you are calling at 8.40 to request a day off, you are already late for work and should have been able to make this communication when you were due to leave home for work.
>
> Performance
>
> - Length of time to undertake routine or repeat tasks
> - Not preparing proper files
> - Only meeting deadlines when constantly reminded/chased
> - General lack of understanding
> - Difficulties encountered with Caseware"

Clearly things were not going to be the same after that. Ms Martin had had enough.

73 By letter of 3 March from Karen Gorman of HR the claimant was invited to attend a capability hearing to be held the next day Friday 4 March at 4pm. It would be chaired by Dominic Dunford. In the body of the letter were the main performance issues:

- Preparation of the accounts for Roundstone Construction Services another aspect of RCSL accounts.
- Contractor reconciliations for RCSL.
- Monomind Management accounts
- Timekeeping and absences.

74 The letter stated:

> "As you have a relatively short period of employment with the organisation we will consider whether your employment may be terminated following the meeting, alternatively a warning may

be given".

75 The appendix to that letter contained a list of timekeeping and absences. The list had been pared down from the list originally attached to Julia Martin's email. Mr Dunford told the tribunal he had taken out all absences related to the claimant's step-brother's death. He also any references to the claimant using his mobile phone during working hours (as the claimant may not have been aware of a recent instruction), but the rest were left in. At the foot of the list he added: "The above does not include a small number of absences between 20th and 31st July 2015 in respect of a family bereavement."

So in Mr Dunford's list there was nothing between 17/07/15 "The bus broke down" and 09/09/1515 "Shortage of buses".

76 4 March was too soon for the claimant, especially given what was at stake in the meeting. It was unobjectionable that the claimant asked for a postponement of the hearing. It was postponed to Monday 7 March. The claimant's union representative was able to attend - Mr Francis Neckles, (the brother of Mr John Neckles who is his representative here at the tribunal). Unbeknown to the respondent, but possibly not unknown to Mr Francis Neckles, the claimant made his own recording of the hearing. He has produced a transcript which has not been challenged by the respondent.

77 Mr Francis Neckles lives in Huddersfield. He used to live in London. When he comes to London, he stays with his brother in Brixton. The PTSC union is the creation of the 2 Neckles brothers. It started originally as a transport union but now it accepts workers from all sectors. They have a current membership of over 200. Their aim is apparently to appeal workers who are disaffected with some of the mainstream unions. There is no doubt that both of them have invested a considerable amount of time and effort in the claimant's case.

78 Early on in the meeting in response to Mr Dunford's statement of the company's case against him the claimant responded:

> "Ok, I am puzzled such an issue has been raised and to my knowledge the quality of my work is quite good. I have never been told verbally nor in writing that this was going on and I feel victimised because I am a non-British white. I feel if I was a white British I would have different treatment based on the treatment the white British get here because I believe the quality of my work is quite up to standard. So I am puzzled such an issue has been raised in a capability meeting which could jeopardise my career…… This has never been communicated to me neither in writing nor verbally …."

79 The claimant's evidence was he had no particular reason to leave his previous employer come to Ballymore Properties other than that he wanted new challenges and that was consistent with his desire to retain the larger accounts. These were the accounts he wanted for the sake of his career. These were the same accounts that the respondent says he struggled with.

80 After this initial statement (which is relied upon as a protected act for the purposes of the s 27 victimisation claim), the claimant repeatedly said he felt victimised in the context in which he now raised it. Logically a person has to make a complaint of direct discrimination before they have a protected act in order to be victimised under s 27. Victimisation is a secondary form of discrimination. It struck the tribunal. This

echoed the earlier dispute over "amending" the claimant's witness statement. The claimant has struggled with the logic of his claim and how it meshes in with the events which happened here.

81 We should mention the constitution of the claimant's team and management. Shaun Thorpe is white British. The claimant white Brazilian. Anna Sziegadi Hungarian. Chris Starling white British. Sharon Nartey black Ghanaian. Priya Singh Indian. Elsewhere in the company one of the more senior accountants Mr Noor Chowdhury was from Pakistan. James Sutton in commercial finance is white Australian. Tessa Senior, whose name was mentioned several times, is Jamaican. Julia Martin and Dominic Dunford are white British, as is David Pearson.

82 The transcript of the meeting is 37 pages of close typing. There were also several off the record discussions which were apparently not recorded, between Mr Francis Neckles and management. One of them leads the tribunal to think that Mr Neckles himself may possibly have been recording it. Mr Neckles was always vigilant for the possibility of a settlement. We heard that the respondent was prepared to offer some form of settlement.

83 There is controversy surrounding Mr Francis Neckles' submissions to the hearing. Mr Francis Neckles was planning to return the following day after decisions had been made. Mr Dunford was not going to decide it there and then. The meeting started at 2pm and went on till late.

84 Mr Francis Neckles' evidence to the tribunal was that he was due to make his submissions the following day, 8 March, and it was not just a day for a decision to be announced. Mr Dunford is quite certain that he cleared it with Mr Neckles that he had said everything he needed to say on his union member's behalf. He would not be returning. Mr Francis Neckles said sometime before the end: "These are my submissions unless you want to do it yourself" and the claimant responded: "No you go on. I do want to add a point if I can add a point". At the end Mr Dunford said on the transcript:

> "In terms of how we are going to move forward with this, really, I need to, obtain a little bit more advice from Karen Gorman, the HR manager, so what I'd like to do is either sort of, defer the outcome for this meeting, either until tomorrow morning, until I've spoken to Karen and I don't know whether you would want to join us and reconvene with you present or whether we would just relay the outcome to Alessandro and then he would relay that back to you or how we go from there but that's what I propose to do at the current time."

Mr Dunford had also said:

> "Unless there are any more points here I'd like to just maybe I'll … I'll just ask Kevin to join me for a couple of minutes and make some decisions here so unless there is any more points you'd like to bring up."

85 Mr Neckles says: "Are you gonna let me finish now?". It seems to the tribunal on reading the above that all that was left was the announcement of a face to face decision which, even in terms of the ACAS Code, is not a necessary step in any such procedure. The announcement of a decision which has been made could be made by letter alone. It is like this tribunal's reserved judgment, at the end of evidence and submissions.

86 At the time Mr Francis Neckles planned to come back the following day but after he returned to his brother's house in Brixton he had a call from either his lawyers or his ex-wife. He had an important meeting in connection with divorce proceedings up in Huddersfield at home. He could not afford to miss it, and so he had to drive back to Huddersfield that night. That is where he was when the dismissal decision was announced.

87 Ultimately, on Tuesday 8 March, the decision was announced that the claimant had been dismissed. It was attended by the claimant, Mr Dunford, and Kevin Fidler who took the minutes again. Funnily Mr Dunford started: "Thanks for sort of agreeing to meet now", perhaps that was because the claimant had expected to be accompanied.

88 Contrary to what the claimant had said on 7 March, Mr Dunford reminded the claimant of the times that he had been spoken to, for instance at the second probation review back in May 2015, and the discussion on 28 October 2015 at which timekeeping and shortfalls in performance were mentioned. He says: "You know I think basically the best outcome is that we terminate your employment with immediate effect" which the claimant says: "I will not be making any comments here without my trade union representative present".

89 Mr Dunford then said:

> "There's an option here. What we can do and you may want to discuss it with him I will be willing to go down the settlement route and I'm not sure whether you're familiar with what that means but basically we can come to some kind of agreement. Under the sort of termination of your employment would be entitled to your one month's full notice which technically you may have to work but we would say you won't have to work and also obviously any holiday entitlement on that front that would be taxed at your rate of tax. Now if we go down the settlement route it would mean that you'll have to sign a legal agreement to say you agree with the termination but as a result you wouldn't actually have to pay tax on what we are proposing to pay you i.e. your final payments."

This option would have been to the claimant's benefit in the amount of approximately £1,300. In addition to make the agreement binding they would enter a compromise agreement for which the claimant would have to receive formal advice. The respondent offered to pay £300 towards the fee of any qualified adviser for the purposes of s 203 of the Employment Rights Act 1996. That was their offer.

90 Subsequently after the claimant had spoken to Francis Neckles in Huddersfield, on the phone, Mr Neckles then joined the meeting by telephone, on speaker, making it a 4-way meeting, including Kevin Fidler. Also it was again recorded and transcribed by the claimant.

91 Mr Francis Neckles' evidence to this tribunal was that he had struck an agreement with Mr Dunford (curiously during an unrecorded off the record discussion on 7 March) that he would complete his submissions the following day. At this stage the tribunal has no hesitation in rejecting that evidence. It cannot be true. It is wholly inconsistent with the detailed transcript we have for both days.

92 When he joined the second part of the meeting on Tuesday 8 March, never once did Francis Neckles protest that a decision had been made without him having the chance to make his final submission. That seems extraordinary for an assertive union representative. His evidence to this tribunal, that the decision had been made

and so it was too late, was not credible to the tribunal. Not only was he not concerned about his submission not being heard, but the meeting ended very cordially:

Francis Neckles "What I will say to you is, it was nice meeting you Dominic and regardless of whatever issues and whatever decisions you make, I hope we left on good terms and I don't know, maybe I'll see you again in the future, maybe not."

Dominic Dunford "I hope not in a lot of respects Francis but, in some respects I do, and thank you for your help and thank you for your support for Alessandro. I think he served you well if I can say that or maybe not, I don't know (laughs)."

That kind of exchange was completely inconsistent with Mr Francis Neckles' evidence to this tribunal.

93 On 9 March 2016 Mr Dunford sent a 5-page closely typed dismissal letter confirming what had been said on 8 March and giving a fully detailed explanation. It was a reiteration of the charges and the findings upholding these charges of poor performance, attendance, and timekeeping. Mr Dunford's decision was balanced. For instance, he made a finding that some of the late starts were due to his caring role at the time of his stepfather's operation. However that could not explain adequately the number of late starts before and after then and the lateness of the notifications.

94 The claimant's explanation to the tribunal, on why some of the notifications were so late, was incomprehensible and could not be accepted either by him, or the tribunal. The performance points were reiterated yet again.

95 It is not just the headline allegations that the tribunal has considered at this hearing. The tribunal has looked at much of the email evidence and listened to the witness evidence of Julia Martin who was a careful and punctilious individual both in her work and in her evidence to the tribunal. There was no meaningful challenge to the detail of any of her evidence. Maybe this is why Mr John Neckles thought the best idea to deal with her evidence was to get it excluded.

96 The claimant appealed to David Pearson. The dismissal letter had told him of his right to do so. He did so by letter of 13 March. Mr John Neckles accepted the main responsibility for composing the appeal letter. There were 6 points: (1) Disputed evidence, (2) Sanction too high, (3) Dual role of the disciplinary officer - Dominic Dunford was a judge in his own "case" [sic], (4) Protected act and race discrimination under section 13 of the Equality Act 2010 (direct discrimination), (5) Breach of contract - recklessly failing to comply with the respondent's own disciplinary code / procedure, (6) "Protected Interest Disclosure" [sic].

97 A hearing was convened and took place on 1 April. It was attended by David Pearson, Karen Gorman, HR manager, who took notes and advised Mr Pearson as necessary, the claimant, and Mr John Neckles. Again the claimant took a secret recording the transcript of which runs to 41 pages of typing. Mr Pearson ultimately rejected all 6 points. In particular, Mr Pearson was insistent about explaining to the claimant that he had been spoken to about performance and timekeeping issues in the past. There were written records for 15 May and 28 October 2015. He considered that the sanction was not too high, given the claimant's stated level of qualification, which was the reason he was hired for that particular role of Assistant Management

Accountant.

98 He considered Mr Dunford was the most appropriate person to conduct the disciplinary hearing. It was not a dual role. He was sufficiently removed from the claimant's situation because the primary evidence all came from Julia Martin, despite Mr Dunford being aware overall with growing concerns over the claimant.

99 Over the protected act the minutes were not accurate. At this stage Mr Pearson was aware that a covert recording had been made. However, he was never given either the recording or a transcript. He made the point that it was clear even from the respondent's minutes of 7 March hearing (Mr Fidler's) that the claimant mentioned being Brazilian and not white English (it says British on the transcript). He states he could only conclude that no race discrimination / victimisation had taken place.

100 As far as breach of contract is concerned Mr Pearson only addressed the notice period rather than any alleged breach of any contractual capability / disciplinary procedure. The contract provides apparently contractual right to receive a warning in a capability case. That, as we understand at this hearing, is what is being alleged on behalf of the claimant.

101 In any event, the tribunal considers that the claimant's lateness alone was probably a summarily dismissable conduct issue. That might have been a capability issue for which formal warning can often be the best appropriate. The claimant was told by the letter that dismissal was a possible outcome. If this were an unfair dismissal case the tribunal's conclusions might have been different. (See further below)

102 This claim stands or falls on the proof of the reason for the dismissal. The evidence against the claimant seems, even to us non-accountants, appears overwhelming on the performance issues, let alone timekeeping and attendance.

103 Mr Pearson dealt at length with the claimants ill-particularised complaint of race discrimination. He said the claimant had never before said anything about his race. Others in the company had been given performance reviews and had probation extended. He pointed out that the claimant was the only member of the whole finance department who was given the opportunity to go on the trip to Kuala Lumpur. He stated:

> "As you had not made any claim of discrimination at any point prior to the capability hearing we don't believe that you could have been treated any differently in the hearing based upon a claim that you didn't make."

104 This was an allusion to the same circularity the tribunal has struggled with. The tribunal have not accepted that victimisation on racial grounds was mentioned on 28 October 2015 as the claimant said "by amendment" in an attempt to establish an early protected act.

105 The claimant's other victimisation contention that the capability meeting would have ended more favourably, had the claimant not started it by mentioning direct race discrimination, is far fetched. A full and detailed case against the claimant had been

gathering momentum over a long period before this. Given the case against the claimant, the outcome of the hearing was always likely to be dismissal. It is not as if the mention of race discrimination turned the hearing around. In fact, over his one year with the respondent, the claimant appears to have been favourably treated, particularly by Mr Dunford who was forbearing to the end, even after Ms Martin had become understandably impatient with the claimant (and Mr Dunford too). The claimant himself acknowledged his own under performance, to some extent.

Conclusions

106 On that evidence we have to say whether the claimant was discriminated against or victimised. The public interest disclosure is really coterminous with the Equality Act victimisation claim. The alleged protected disclosure itself concerns a breach of race discrimination legislation. It seems to be an add-on that serves no particular or useful purpose. It does not increase the compensation potentially awardable in a case where the claimant is claiming near to the maximum for injury to feelings anyway under the Equality Act anyway.

Section 12 of the Employment Relations Act 1999

107 There is the issue of whether the claimant was subjected to a detriment as a result of asserting his right to be represented at a disciplinary hearing under section 12 of the Employment Relations Act 1999 we shall start with that.

108 A disciplinary hearing is defined as follows in section 13(4) of the 1999 Act:

> "For the purposes of section 10 a disciplinary hearing is a hearing which could result in –
>
> (a) the administration of a formal warning to a worker by his employer,
>
> (b) the taking of some other action in respect of a worker by his employer, or
>
> (c) the confirmation of a warning issued or some other action taken."

Having studied this and the scheme of the Act subsection (c) seems to refer to an appeal hearing. Some other action in subsection (b) clearly includes dismissal.

109 Contrary to our earlier instincts we consider that the announcement hearing so called on 8 March, on the Tuesday was not a disciplinary hearing for the purposes of the 1999 Act. It was a hearing inasmuch as it was minuted by a minute taker, but the hearing leading to the "result" i.e. the decision, was the previous day. An announcement hearing is strictly unnecessary and not the disciplinary hearing. That itself would be enough for this claim to fail.

110 On the facts, the timing is also against this claim. That the detriment should follow almost immediately after the assertion of the right to be accompanied is hopelessly far fetched. The claimant did not initially know that Mr Francis Neckles was not to be available on 8 March. Francis Neckles' meeting in Huddersfield over his divorce was unforeseen. This claim suffers from the timing just like the race victimisation claim. There was such a slender gap between the protected act and the

detriment.

111 The evidence against the claim is overwhelming. To think that this played even an infinitesimal part in the decision is utterly fanciful. It had absolutely nothing to do with it. This, like other claims, has the hallmarks of a lawyer/ representative-devised claim. It is another reason we rather doubt that the alleged protected act on 28 October 2015. The claimant only seems to have made these allegations when PTSC got involved.

112 The momentum towards termination had all been established prior to any alleged protected act, and a long way prior to the claimant's assertion of the right to be represented. (We must not forget the request for a postponement of the meeting on 8 March. Insofar as it was different, Mr John Neckles was at pains to ensure that the tribunal remembered it was part of the claimant's case).

Race Discrimination

113 So far as race discrimination both direct and then by means of victimisation is concerned, the tribunal have to say despite our desire to use moderate language, it is a ludicrous assertion given the make up of the team and members of the company we have been told about, and the strength of the case against the claimant . The claimant is reasonably fluent in English. The fact that he came from Brazil and has an Italian passport can have had absolutely nothing whatsoever to do with the respondent's view of him. The claimant can suggest no particular reason why it could have.

114 Similarly to the victimisation claim under section 27 of the Equality Act 2010 the timing of all this was always a problem for the claimant. Attempts to rescue it were nugatory, for the many reasons given in the above discussion.

Public Interest Disclosure

115 Finally there is public interest disclosure allegation which relies on the same allegation of discrimination. It is parasitic on the Equality Act claim. Under section 43B(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 –
>
> …
>
> (b) that a person has failed or is likely to fail to comply with any legal obligation to which he is subject."

The claimant's qualifying disclosure could only be through that subsection, in our view.

116 Given our views of the extant direct discrimination complaint, the vanishing unlikelihood of it being an infinitesimal influence on the decision-making processes of the respondent, and the extreme lateness of it being raised, the tribunal considers it a hopeless claim.

117 The tribunal does not consider that the claimant could reasonably have believed that his disclosure was made in the public interest. It seems to be made for purely selfish reasons to save the claimant from a difficult predicament. It was an *ex-post facto* attempt to leverage some sort of negotiating power out of his situation.

118 The claimant had less than 2 years service with the respondent so there is no unfair dismissal claim under UK law (or otherwise now). Every conceivable alternative has been put before the tribunal.

119 The only point with which the tribunal had some sympathy was that an apparently contractual disciplinary procedure was not followed to the book, inasmuch the respondent moved straight to dismissal in a matter that could be thought to be predominantly capability related. However, that is open to debate. As stated above, the claimant's timekeeping and late reporting was not a truly a matter of capability. It was a matter of the claimant's apparent attitude. Despite repeated requests by Julia Martin, the claimant failed to comply, making her job as a manager difficult.

120 With respect to the parties, the tribunal will not be citing the voluminous case authorities which were put before the tribunal. Much of it related to unfair dismissal cases which are not in scope in a case which is not an unfair dismissal case. The ACAS code does not apply. It is not an unfair dismissal claim under the Employment Rights Act which could arguably bring into scope the ACAS code (which the tribunal is bound to take into account in an unfair dismissal case).

121 It is clear that despite the claimant being summarily dismissed i.e. dismissed after a first formal hearing for matters that related to capability / conduct, he was not summarily dismissed in the sense that he was not paid notice. He was paid in lieu of notice. There is no claim for that sort of breach of contract. That was the only aspect which Mr David Pearson dealt with, but it was unnecessary for him to do so.

122 Much of the other authority was not relevant. There was certain amount of authority on the Employment Relations Act 1999. For instance the case of *Harding v London Underground Ltd* EAT 0045/02 was all about the ACAS code and disciplinary hearings and the right to be accompanied. Nothing in that case influenced the tribunal's interpretation of section 13 and section 12 of the 199 Act.

123 The claimant's claims are all dismissed.

Employment Judge Prichard

3rd August 2017