EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Haydor Khan	**v**	**1. London Underground Ltd** **2. Mr Uchenna Duru**

Heard at: Watford **On**: 10, 11 & 23 April 2018

Before: Employment Judge Alliott
Ms Stella Cheettam
Mr Donovan Bean

Appearances

For the Claimant: Mr Blair Toner, Counsel
For the Respondent: Ms Iris Ferber, Counsel

JUDGMENT

1. It is the unanimous judgment of the tribunal:-

    1.1. The claimant was not subjected to victimisation contrary to section 27 of the Equality Act 2010.

    1.2. The claimant's claim is dismissed.

REASONS

Introduction

1. The claimant began working for the first respondent on 30 October 2000. In 2016 the claimant was working as a Customer Services Supervisor. His immediate line manager was the second respondent, Mr Uchenna Duru, Customer Services Manager. The claimant remains employed by the first respondent. By a claim made on 22 May 2017, the claimant made a number of allegations, but following a preliminary hearing held on 2 November 2017, the issues have been confined to an allegation of victimisation alone.

The Issues

2. At a preliminary hearing held on 2 November 2017, Employment Judge Smail recorded the issues as follows:

> "The Issues
> 3. I now record that the issues between the parties which fall to be determined by the tribunal are as follows. The claimant claims victimisation under s. 27 of the Equality Act 2010. The protected act he relies on is an email to his line manager dated 28 November 2016 in which he raises, informally, the possibility of having been subject to disability and/or race discrimination. He says he was subjected to detriments for having done the protected act as follows:
>
> (a) by the Second Respondent, for whom the First Respondent is vicariously liable, who raised a grievance against the claimant on or about 23 December 2016 for having sent the email;
>
> (b) by the First Respondent, for investigating formally the Second Respondent's grievance, thereby subjecting the Claimant to a formal procedure (which may have resulted in disciplinary processes) rather than refusing to entertain the grievance at the outset and to ensure an appropriate management response to the informal email sent by the claimant on 28 November 2016 which raised matters relating to protected characteristics."

3. It is noted that section 27(2)(d) of the Equality Act 2010 states "making an allegation (whether or not express) that A or another person has contravened this act." As can be seen from the wording of the issue, the protected act is described as the claimant raising "informally the possibility of having been subjected to disability and/or race discrimination." The actual wording of the email of 28 November 2016 is "I am very concerned, that I may be subjected to disability discrimination, as I have gone off sick from work due to a disability related sickness, and my pay has been suspended due to this sickness (variation sheet). I am very concerned, that I may be subjected to racial discrimination……"

4. However, it has been conceded on behalf of the respondent that this was a protected act.

5. Further, following investigation of the second respondent's grievance, the first respondent concluded;

> "…I am satisfied with CSS Khan's explanation that when he sent the email, he feared that it may be a possibility."

It has been accepted by the respondent that the claimant's protected act was made in good faith. Consequently, the respondents do not contend that the protected act was not made in bad faith. As such, whether or not the email contained a protected act is not an issue before us. All parties have agreed that it does.

The Law

6. Section 27 of the Equality Act 2010 provides:-

> "**27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because
>
> (a) B does a protected act……"

7. As recited above, it is accepted that the email dated 28 November 2016 contained a protected act.

8. As such the issues for us are:

   (a) Whether the claimant was subjected to a detriment and;

   (b) If so, whether the claimant was subjected to a detriment because he had done a protected act.

Detriment

9. We have taken as our starting point the EHRC Employment Code at chapter 9.

> "9.8 'Detriment' in the context of victimisation is not defined by the act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."
>
> At 9.9 "There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment".
>
> At 9.10 "Detrimental treatment amounts to victimisation if a 'protected act' is one of the reasons for the treatment, but it need not be the only reason."

10. Both parties have directed us to the IDS Employment Law Handbook, Volume 4 – Discrimination at Work, chapter 19 Victimisation.

11. At 19.38, "As this summary indicates, detriment can encompass a range of treatment from general hostility to dismissal. It does not necessarily entail financial loss, loss of an opportunity or even a very specific form of disadvantage."

12. At 19.39, "Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the *claimant's point of view*." In the case of Chief Constable of West Yorkshire Police v Khan 2001 ICR1065HL, the House of Lords said that it was not appropriate "to pursue the treatment and its consequences down to an end result in order to try and demonstrate that the complainant is, in the end, better off, or at least no worse off, then he would have been if he had not been treated differently. I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently."

13. Following Khan, Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR337HL established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all in the circumstances to his or her disadvantage.

14. At 19.40 it is stated that in the case of Derbyshire & Others v St Helens Metropolitan Borough Council & Others 2007 ICR841HL, Lord Neuberger went on to stress that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be *objectively reasonable* in all the circumstances. Accordingly, the test of detriment has both subjective and objective elements. In the case of Chief Constable of West Yorkshire Police v Khan, Lord Scott stated:

> "There must…. be a quality in the treatment that enables the complainant reasonably to complain about it."

15. At 19.41 two examples are given, Deer v University of Oxford 2015 ICR1213 CA involved a finding of detriment in the manner in which a grievance was dealt with; In the case of Cordant Security Ltd v Singh & Another 2016 IRLR4EAT, a detriment was found in a failure to investigate an allegation.

16. Further, at 19.42, the case of Bhattacharyya v Aston University ET case no. 1320453/13 is another example where the manner of the investigation of a grievance was held to be a detriment.

17. No case law or legal text has been placed before us on the issue as to whether or not the making of a grievance and its investigation is or is not a detriment for the purposes of the Equality Act 2010.

Detriment "because of" protected act

18. In the IDS Employment Law Handbook at 19.46 it is stated "The essential question in determining the reason for the claimant's treatment is always the same: what, consciously or sub-consciously, motivated the employer to subject the claimant to the detriment? In the majority of cases, this will require an enquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed."

19. In Chief Constable of West Yorkshire Police v Khan, Lord Scott stated that the question that was not one of strict causation. "Rather, it required the tribunal to identify the *real reason*, the core reason, the causa causans, the motive for the treatment complained of." In the case of Chief Constable of Greater Manchester Police v Bailey 2017 EWCA Civ 425CA, it was held that a 'but for' causative link did not necessarily mean that the detriment was 'because of' the earlier claims.

20. At 19.50 it is stated that "a person claiming victimisation need not show that the less favourable treatment was meted out solely by reason of the protected act." In the case of Nagarajan v London Regional Transport 1999 ICR877HL, it was sufficient if the protected acts had a significant influence on the employer's decision making. In the case of Igen Ltd (formally Leeds Careers Guidance) &

Others v One & other cases 2005 ICR931 Court of Appeal, Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather "an influence which is more than trivial."

21. Ms Ferber on behalf of the respondent urged us to consider the manner of carrying out the protected act and cited the case of Martin v Devonshire Solicitors 2011 ICR352EAT. At 19.54 it is stated that "the EAT took the view that there could, in principle, be cases where an employer has dismissed an employee (or subjected him or her to some other detriment) in *response* to the doing of a protected act, but where the employer could say that the *reason* for the dismissal was not the complaint as such but some feature of it which could properly be treated as *separable* – such as the manner in which the complaint was made. The EAT recognised that such a line of argument was capable of abuse, but this did not mean it was wrong in principle."

22. At 19.64 it is stated that Mr Justice Underhill recognised that the distinction made is subtle, but maintained that such fine lines have to be drawn "if the anti-victimisation provisions, important as they are, are to be confined to their proper effect and not to become an instrument of oppression. Furthermore, he trusted tribunals to distinguish between features that should and should not be treated as properly separable from the protected act.

23. Finally, at 19.56, the case of Woodhouse v West North West Homes Leeds Ltd 2013 IRLR773 EAT is cited in support of the contention that "The EAT warned tribunals against taking Martin v Devonshire Solicitors as some sort of template into which the facts of cases of alleged victimisation can be fitted, stressing that its facts involving grievances based on paranoid delusions about events that never happened, were exceptional."

Section 136 of the Equality Act 2010

24. A tribunal must first decide whether a claimant has established a prima facie case of unlawful victimisation; if he has, the burden shifts to the respondent to prove a non-discriminatory explanation.

The evidence

25. We had oral evidence from the claimant, Mr Khan, the second respondent, Mr Duru and Mr Marlon Osborne, Head of Customer Services on the Jubilee Line. In addition, we had a 454-page bundle of documents along with written witness statements.

The facts

26. At a time of which we are unware, but prior to the events we are dealing with, the claimant made an application to the Employment Tribunal alleging disability discrimination. We are unaware of the details of that claim other

than it was settled with a compromise agreement being entered into. We are unaware of the contents of the compromise agreement, save that it contained a confidentiality clause. From what we have heard during the course of this hearing, it would appear that parts of the compromise agreement related to aspects of the claimant's employment, namely what hours or shifts he would work and how any sickness absence would be managed. Mr Duru, the claimant's immediate Line Manager, was aware of the compromise agreement, but unaware of its contents.

27. We have considered the relationship between the claimant and Mr Duru before 28 November 2016. We find that the relationship between these two individuals was on occasion strained. Mr Duru told us in evidence that "every time I take any sort of managerial action his [the claimant's] default position is making an allegation of disability discrimination or breach of the compromise agreement." We accept that evidence.

28. We have been provided with an example of this attitude of the claimant. In an email dated 30 September 2016, sent by the claimant to Mr Duru, he states:-

> "…I will consider a discrimination under the DDA 1995. It is also a breach of the CA [compromise agreement], please refer to LU Legal Team."

It is noteworthy that this email was copied to Mr Ali Mashud who was the claimant's Trade Union Representative. Again, the evidence of Mr Duru, which we accept, was that every time Mr Khan took action, Mr Ali "jumped in".

29. Mr Duru responded to the claimant's email, which in due course evoked a riposte from the claimant on 1 October 2016. The claimant accepted that the tone of his riposte was sarcastic. We find that it was also challenging the authority of Mr Duru.

30. Also on 1 October 2016, Mr Ali on behalf of the claimant sent an email to Mr Duru and copied in Mr Duru's immediate Line Manager, Mr Carl Painter, referring to the compromise agreement. We find this exchange demonstrates the strained relationship between Mr Duru and the claimant and supports his evidence on that issue.

31. On 25 September 2016 Mr Duru sent an email to a number of individuals, which included the claimant, offering an opportunity to be seconded as a Customer Services Manager as part of a development programme. Along with a number of others, the claimant clearly expressed interest in this secondment opportunity, no doubt as the participants would hope that it would contribute towards them being promoted. On 20 October 2016, the offer of secondment was withdrawn due to cost concerns. We set out this matteras it became relevant later.

32. Mr Duru gave evidence as to how employees were informed what shift patterns they were working. Each employee was equipped with a tablet by the first respondent. The shift patterns to be worked by each employee

were distributed by email and posted on Share Point roughly ten days in advance. We have the signing on sheet for shifts to be worked on 25 November 2016. That is dated 16 November 2016 and it would appear that that was when the shift patterns were sent out. It is clear from that sheet that the claimant was rostered to work 13:00 – 21:00 on 25 November 2016.

33. The claimant stated that he was on annual leave prior to 25 November 2016. We have no evidence to suggest that that is wrong. The claimant's evidence was that he assumed he was on a shift that began at 15:00 hours. That suggests to us that he had not checked the signing on sheet before returning to work from annual leave on 25 November.

34. On 25 November the claimant arrived at Willesden Green at some time after 15:00 hours. Mr Duru's evidence was that the Supervisor on duty, Mr Wahid, told him (Mr Duru) that the claimant came in about 15.40. This is supported by an email written by Mr Duru on 27 November 2016. In cross-examination, the claimant accepted that he was about two and half hours late, but says he did not realise and thought he was only about 15 minutes late.

35. Mr Duru's evidence was that he had told Mr Wahid to send the claimant to see Mr Duru when he came in. Mr Duru was told by Mr Wahid that when the claimant was told to go and see Mr Duru, the claimant said he was ill and left work. The claimant stated that he rang Mr Duru three times, but did not get an answer. He could have left a message on the answer phone, but apparently did not. Mr Duru told us that accepted practice was to leave a message if an employee was booking off sick. We accept that as standard practice. The claimant asserted that he did not leave a message due to confidentiality reasons relating to his sickness. We found his explanation unconvincing in that he did not need to leave specific details of the sickness merely the fact of taking sickness leave.

36. In an email later sent, the claimant timed his calls to Mr Duru at 15:35, 17:15 and 22:45. The first two of those times would have been when Mr Duru was working. Mr Duru stated that he did not receive any call or answer phone message from the claimant, but he accepted he could have missed a call as he was in and out of the office on that day. The claimant could have sent an email to Mr Duru during his office hours, but only did so at 22:54 on 25 November 2016. That was after Mr Duru's shift had finished.

37. The first respondent maintains a daily variation sheet which records variations to the final shift plan. The purpose of this sheet is to record why a shift pattern has not been fulfilled. It records the reason for any overtime being paid and records any absence that may have prompted such extra overtime.

38. Mr Duru told Mr Wahid to enter on the variation sheet for 25 November 2016 that the claimant was "unauthorised absence – unavailable". This was in relation to the location of Dollis Hill. The explanation for this given to us, which we accept, is that once he had arrived at Willesden Green the claimant was going to be directed to work at Dollis Hill. As a result of him

going off sick, so someone else had to work overtime at Dollis Hill, hence the Dollis Hill variation sheet being utilised. The evidence from Mr Duru and Mr Osborne was that a recording of unauthorised absence on the variation sheet did not automatically trigger a deduction in pay or any conduct process. Mr Duru told us, which we accept, that every form of non-attendance is unauthorised unless it is agreed in advance. In circumstances where an employee had not booked off sick properly by informing his Line Manager, Mr Duru told us that he would have an interview with the individual when they returned to work next and a decision would be made at that point as to what, if anything, would occur.

39. At 22:54 hours on 25 November, after the conclusion of Mr Duru's working shift, the claimant sent an email to him reporting in sick. Mr Duru told us that he only saw that on the morning of 26 November.

40. On 27 November 2016, Mr Duru sent an email to his immediate Line Manager, Mr Painter. In this he states:-

> "I think we need some clarification from the PMA [People Management Advisor] and the powers that be as to whether or not the AAW [Attendance at Work procedure] applies to Mr Khan at all. This is in light of Friday's incident."

That email goes on to state:-

> "Can we please have firm clarification as to the interpretation that has been agreed with regards to his compromise agreement vis-a-vis do's and don'ts especially as we enter this period of strained industrial relations which will amplify the effect of Haydor's [the claimant's] non-attendance. Can we please get a briefing from a PMA together with clear guidelines as to what elements of the AAW apply if at all."

41. We find that this demonstrates Mr Duru was frustrated in how he could manage the claimant and felt that, to an extent, his hands were tied due to the compromise agreement, the details of which he was unaware of.

42. It is against that background that the claimant came to send his email dated 28 November 2016 and timed at 16:21 to Mr Duru. The entirety of this email reads as follows:-

> "Hi Uche,
> It has come to my attention that I have been marked absent (unauthorised) on the variation sheet on Dollis Hill for 25 November 2016. The variation sheet has also been filled with my name, yet the executor or the authorising person has not named themselves on the sheet. The allocated staff, CSS A Akinyeye, is also not listed on the same variation sheet as either sick or whatever else he should be listed as.
>
> I came into work (Willesden Green) on 25th and I reported sick to the Willesden Green CSS A Wahid. I called your office three times on 25th and was unable to reach you. I also emailed you. You ignored my email and did not respond. You sent me an email after, regarding a work related issue for Dollis Hill waiting room.
>
> Please note:
> - I have had some issues with you before in the past.
> - You have been a party to cancel these CSM L&D opportunity for me.

With the points mentioned, as it displays a continuous and consistent pattern, I need to raise some things to your attention. I am very concerned, that I may be subjected to disability discrimination, as I have gone off sick from work due to a disability related sickness, and my pay has been suspended due to this sickness (variation sheet). I am very concerned, that I may be subjected to racial discrimination, as CSS A Akinyeye, who was assigned to DHL 15:00 for 25 November and I was assigned late spare for WGN area, yet I was marked absent for the DHL variation sheet (a favourable treatment to CSS A Akinyeye, yet a double penalty for me). Furthermore, this will only be compounded if it comes to light, that CSS A Akinyeye was given special privileges or accommodation for 25 November.

Now if you can, without a shadow of a doubt, explain to me that I am mistaken, and in fact the variation sheet has not been modified to the way I have described it, or if you state that you did not modify the variation sheet or give the instruction to mark me absent, then I would withdraw my concern. Currently as it stands, this is unlawful deduction of pay, and whether it get reinstated before the next pay date, it does not change the breach of the law. Also, if you can explain to me, that I am mistaken about the duty which was initially given to CSS A Akinyeye, and favourable treatment was not given to him, then I will stand corrected.

*These are reasonable and very concerning issues, and I would advise you not to ignore this email.

If you cannot convince me that an error has been made and this is all a misunderstanding, then I will take this further. I will also data request and find out if staff have been given more weekends off than myself, days off when requested and overtime share on the group.

On a separate note, I am still off sick at home and my fever has subsided substantially however I have developed a chest infection. I see my GP Tuesday and Friday this week. I have not started a course of antibiotics however tomorrow it's possible I may be prescribed some.

*Your actions may amount to the breach of a special workplace agreement between London Underground Legal and I. I reserve the right to add to this.

Regards
Haydor Khan
(cc. Mashud Ali)"

43. As might be expected the claimant was cross-examined on this document. He conceded that he did not think it was polite. The claimant expressly confirmed in his evidence that he regarded the context as suggesting to Mr Duru that he (Mr Duru) had done something fraudulent or incorrect in regard to absence procedures. He agreed that the context was him asserting that Mr Duru had not done his job as Manager correctly. When he was questioned about the racial discrimination allegation he asserted that Mr Akinyeye was African British and that he, the claimant, was Asian British. He stated that he thought that due to both Mr Akinyeye and Mr Duru having a Nigerian background, he concluded that Mr Duru was giving special privileges to Mr Akinyeye. He stated that he considered that Mr Akinyeye should have been on the variation sheet as well. The evidence regarding

Mr Akinyeye is that he had been booked off sick for some time prior to this date and so would not have been entered on to the variation sheet because his sickness was known about. The claimant characterised his comments about not ignoring the email as being assertive, but not aggressive. Further, he also characterised the comment that he would take it further as being assertive and not threatening.

44. We did not hear any evidence as to how it was that the claimant became aware that he had been marked absent (unauthorised) on the variation sheet on Dollis Hill.

45. As we have already recorded, being marked absent (unauthorised) on a variation sheet did not automatically lead to a reduction in pay. We find that the claimant would have been aware of this. He regularly worked overtime and so would have been aware of the procedures in relation to variation sheets.

46. Notwithstanding that this email contains a protected act of alleging disability and/or race discrimination, we find that this email is something of an overreaction. Firstly, the claimant had not at that time had pay deducted. Secondly, the CSM L&D opportunity had been cancelled due tto cost – hardly Mr. Duru's fault. Thirdly, it goes significantly further than making those protected acts and also accuses Mr Duru of falsely doctoring the variation sheet and threatens to escalate the matter, the implication being to Mr Duru's line Manager and the Legal Department of London Underground Ltd.

47. The claimant's email was copied to his Trade Union Representative, Mr Mashud Ali. At 16:43 hours, some 22 minutes after the email had been sent to Mr Duru, Mr Ali forwarded it to Mr Duru's Line Manager, Mr Painter. The email is headed "Alleged fraud". Mr. Ali ends the email "Please advise on what course of action you will take. I reserve the right to raise this with the managing director".The claimant told us that he had discussed the issue with Mr Ali at some time during the day, but he could not recollect discussing forwarding the email to Mr Painter. Be that as it may, it is clear to us that Mr Ali was escalating the complaint to Mr Duru's Line Manager before Mr Duru had had an opportunity to reply.

48. Mr Duru told us that before he replied to the claimant's email Mr Painter rang him and talked to him about it.

49. At 18:59 hours on 28 November 2016, Mr Duru replied to the claimant, copying in Mr Painter. This email reads as follows:-

> "Hi Haydor,
> In the interest of transparency, I have taken the liberty of copying in the Area Manager.
>
> You have listed below very serious allegations below against me and you have threatened me, based on nothing but supposition and innuendo. That being said allow me to respond to what I can;

1. 25/11/2016: your duty on that day was 13:00 – 21:00 as detailed on the duty sheet. At 14:40 when no one had heard from you nor seen you I spoke to CSS Wahid who offered to contact you, which he did and he informed me that you had informed him that you were running late and would hopefully arrive between 15:00-15:45, which would have made you well over 2.5 hours late, which would have necessitated a lateness interview. As far as I am aware you never officially signed in or booked on anywhere on the 25th, how then did you manage to book off if you never booked on?

2. You stated you reported sick to CSS Wahid, let me take the liberty of quoting CSS Wahid "Haydor came in at about 15:40 I told him that you wanted to see him, he picked up his bag and left saying he was not feeling well and he will call you later". Does that class as booking off sick as the AAW? Additionally, you claim that you called the CSM office three times however as you have done on multiple times in the past, how come during neither call did you leave a message?

3. Your email was received by myself on 26th a day after the fact, I was not aware that you required an acknowledgment, had you requested for one I would have obliged. The email which I sent about the waiting room at Dollis Hill was addressed to +CSS Willesden Area (all the Customer Service Supervisors) and not to you specifically.

4. With regards to what is or isn't on the variation sheet, I am afraid that I cannot comment until you have a return to work interview at which point all will be revealed as per procedure.

On a separate note you have made a serious allegation of racial discrimination, nepotism, corruption, bullying and discrimination on the basis of a protected characteristic; all of which are very serious allegations and may even cross the threshold of illegality.

I totally refute all your allegations as baseless and without merit and I will be asking for a formal investigation to be carried out on what is a vexatious grievance designed to undermine me and cause me to feel insecure in my role.

I shall of course be seeking advice as to what avenues are open to me, personally and officially within the law to receive satisfaction from your malicious besmirching and libellous allegations.

I of course cannot comment on your agreement with the company as that is a matter between you and Transport for London.

I wish you a speedy recovery.

p.s. I will not be corresponding any further of this issue with you. Please direct all further communication to the Area Manager, Mr C Painter."

50. In his evidence Mr Duru stated that the claimant's email really did make him angry and upset, which we accept.

51. Despite the invitation to correspond with Mr Painter, at 05:11 on 29 November 2016 the claimant sent an email in reply to Mr Duru. Within this email the claimant states that he is not making a grievance complaint

against Mr Duru. The claimant endeavours to draw a clear distinction between having a concern about being the subject of racial and disability discrimination and actually alleging racial and disability discrimination. The claimant accepted in cross-examination that the email was sarcastic in parts and a little bit rude. That email was copied to Mr Ali.

52. On 29 November 2016, Mr Painter sent a holding reply to Mr Ali. On 30 November 2016 Mr Painter provided his response to Mr Ali. He dealt with the reason that the claimant's name was entered into the Dollis Hill variation sheet on 25 November as being in accordance with payroll procedures in order to demonstrate why there was a need for overtime. He accepted that the variation sheet for Dollis Hill should also have contained Mr Akinyeye's name, but asserted that the first respondent was aware that he would not be working that day due to illness. Mr Painter clarifies that there was no unauthorised payment for the duty and no-one had been booked at work who did not come into work that day. That response from Mr Painter appears to us to address the core concern relating to variation sheets that was raised by the claimant in his email of 28 November 2016.

53. Mr Ali responded to Mr Painter on 30 November 2016. The only issue he raises in response is somewhat procedural in that he is querying why the variation sheet for 25 November 2016 records Mr Caner doing overtime for a period after the scheduled end of the claimant's shift at 21:00 hours. We note that Mr Ali also complains that the variation sheet has not been completed by hand in blue ink, which he asserts is contrary to the rule book. We consider that both issues raised by Mr Ali in this email are irrelevant to our considerations.

54. The next events of note that took place relate to an exchange of emails on 22 and 23 December 2016.

55. Between 30 November and 22 December, it would appear that from the claimant's perspective, and that of Mr Ali, the complaints and issues raised in his email of 28 November 2016 were not being pursued. We reject the suggestion that it was for the first respondent to be pro-active in continuing to investigate the matter. The first respondent had provided a reasoned response that, if accepted, went to answer the concerns raised by the claimant in the email of 28 November. In our judgment, if the response from Mr Painter had been inadequate or unsatisfactory in the eyes of the claimant, then it was for him and/or Mr Ali on his behalf to continue to raise concerns or escalate the matter to a formal grievance.

56. On 22 December Mr Ali emailed Mr Ross Marshall raising concerns about the allocation of RDW (Rest Day Worked) being allocated by Mr Duru. We do not need to go in to details of the issues raised. However, one of the matters raised referred to a non-union staff member who, whilst unidentified Mr Duru accurately speculated was the claimant. (He was in the process of changing Unions apparently, notwithstanding his close working relationship with Mr. Ali).

57. It was following this email exchange that Mr Duru lodged his grievance against Mr Ali and the claimant in an email timed at 17:50 on 23 December 2016. The claimant told us in evidence that he had written this grievance email prior to the email exchanges of 22 and 23 December, but that exchange was the catalyst for him submitting his grievance.

58. Whilst the claimant and Mr Ali did not continue to pursue the complaints made in the claimant's email of 28 November 2016 between 30 November and 22 December, the same cannot be said for Mr Duru. His evidence, which we accept, is that he contacted the first respondent's PMA for advice on raising a formal grievance. He said in evidence that it had been explained to him that there were two streams that could be followed, namely an informal or formal route. Mr Duru told us that when he spoke to his Manager he was told that the matter would only be dealt with by another Manager he if, Mr Duru, raised a grievance himself. Mr Duru told us that he wanted the issue formally investigated.

59. When he was asked why he made his grievance complaint he stated; "because I felt I had been accused of being racist and acting in a racist manner and also accused of fraud, I felt I had been libelled or slandered, I felt this was a consistent pattern of one two blows from Mr Khan and Mr Ali". He stated in evidence that his grievance was that he wanted a light shone on the entire allegations. He accepted that race was one of the triggers for him, along with fraud and the allegation of disability discrimination. He explained that in his grievance he had set out options relating to discipline and an apology as he was seeking clarification as to what he could and could not do in the light of the compromise agreement.

60. We entirely accept the reasons given by Mr Duru for raising his grievance. We accept that he was genuinely upset and distressed by the range of accusations being made against him which ranged from fraud, favouritism and bad management and obviously included the protected acts. In the light of the issues identified, the facts thereafter are relatively straight forward.

61. Following the lodging of Mr Duru's grievance, an investigatory meeting was held on 28 February 2017 with Mr Duru.

62. On 9 March 2017, Mr Khan raised a formal grievance against Mr Duru concerning issues unrelated to the matters raised by the claimant in his email of 28 November 2016. At the time the claimant raised this grievance he was unaware that Mr Duru had raised his grievance against the claimant.

63. On 29 March 2017, the claimant was notified about the grievance made by Mr Duru against the claimant. The claimant was informed in that letter that an investigation would take place and, in order to ensure independence and impartiality, a different Manager had been asked to investigate it.

64. On 6 April 2017, a grievance fact finding meeting took place with the claimant concerning Mr Duru's grievance against him.

65. On 22 June 2017, a grievance fact finding meeting was held with the claimant concerning the claimant's grievance against Mr Duru.

66. On 25 September 2017, the claimant was notified that his grievance against Mr Duru had not been upheld.

67. On 10 October 2017, Mr Duru was notified that his grievance complaint against the claimant had not been upheld.

68. The claimant appealed the rejection of his grievance against Mr Duru on 30 September 2017. A grievance appeal meeting was held on 16 November 2017. The claimant was notified of the outcome on 12 December 2017. His appeal was upheld in one respect, but rejected in all the others.

69. Turning to the factual matters identified in the List of Issues, we find that the first respondent did investigate formally the second respondent's grievance.

70. We find that the claimant was involved in the investigation of the second respondent's grievance within the first respondent's grievance procedure.

71. We reject the suggestion that the first respondent's grievance procedure may result in disciplinary processes in anything other than the loosest sense. We have a copy of the individual grievance procedure and there is no provision within it for disciplinary processes to flow from it. Of course, we accept that if during the course of a grievance investigation reasons to subject the individual to the disciplinary process emerge then the disciplinary procedure would be invoked.

72. We have considered whether the first respondent could or should have refused to entertain Mr Duru's grievance at the outset. The claimant pointed to an instance where he says that the first respondent rejected a grievance that he had made about not being allowed to be accompanied at a meeting by his chosen Trade Union representative. Whilst it is true that his grievance was initially rejected, in due course it was acknowledged that that was wrong and his grievance was heard and determined. We find that that was not an instance of the first respondent's discretion as to whether or not it could hear a grievance or reject it. We find that the first respondent was under a duty to investigate a grievance once an employee had raised it. We have been provided with 59 pages of the first respondent's training pack concerning grievances. Within that the following is stated:-

> "Grievances and the Law
> In the case of WA Goold (Pearmak) Ltd v McConnell (1995) the Employment Appeal Tribunal (EAT) held that:
>
> It is an implied term in a contract of employment that employers will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. Moreover, this is a fundamental term, breach of which will be sufficiently serious to justify the employee in terminating the employment and bringing a claim of constructive dismissal."
>
> "For the above reasons, grievance procedures have been given an ever higher profile in recent years and proper exhaustion of them will now usually be very advisable."

Conclusions

73. We have first considered whether having a grievance raised against an individual and that grievance being investigated constitutes a detriment.

74. During the course of this hearing no complaint has been made as to the conduct of the investigation of the grievance, either as to its tone, manner, duration or outcome. The complaint relates simply to the fact of a grievance being raised and it being investigated formally.

75. To an extent we find it surprising that there is not already authority on this point. It is not unusual for employees to make allegations against each other of discriminatory conduct. A and B have a dispute at work. A raises a formal grievance that B has discriminated against him. When B hears about the grievance raised against him, B raises a grievance against A alleging discriminatory conduct. The employer is duty bound to investigate A's grievance against B. What, we say rhetorically, is the employer to do in the face of B's grievance against A? B's grievance against A was only made, at least to a substantial extent, because of A's grievance against B. Is it correct that the employer cannot investigate B's grievance because A made his grievance first and to do so would subject A to a detriment? Alternatively, does the employer run the risk of B making a complaint of victimisation if his protected act of complaining of discriminatory conduct against A is not investigated, the detriment to him being the non-investigation of his grievance? It seems to us that the employer is in effect damned if it does and damned if it doesn't. We consider that such a conclusion would be unsatisfactory and unjust.

76. We first consider what exactly the nature of a grievance procedure is. We would have no hesitation in finding that subjecting an employee to a disciplinary process would constitute a detriment. However, subjecting an employee to the disciplinary process would involve a discretionary decision by the employer as to whether or not the disciplinary process should be invoked.

77. Best employment practice requires employers to have a grievance procedure. There is, of course, the ACAS Code of Practice on disciplinary and grievance procedures. The purpose of a grievance procedure is to provide a mechanism whereby employees can raise grievances and have them investigated and dealt with, as appropriate, informally or more formally in the workplace. The intention is to have a neutral procedure whereby an impartial and independent assessment of the grievance can take place. It is that that we consider differentiates the grievance procedure from the disciplinary procedure.

78. We have asked ourselves the question as to whether having a grievance made against oneself and investigated is something which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage.

79. On the one hand, we can see that an individual might not like a grievance being raised against them. It is probable that no-one would want to be accused of conduct that warranted an investigation being undertaken into what had or had not happened.

80. However, on the other hand, we have examined whether having a grievance made against oneself and it being investigated in reality and objectively changes an individual's position for the worse or puts them at a disadvantage. In this context we have looked at the position from the view point of an individual doing a protected act. A protected act does not stand in isolation. The individual making the protected act must realise and indeed expect that the employer will take it seriously and act upon it. It must be within the reasonable contemplation of the individual doing the protected act that his complaint will be investigated by the employer. It must be within the reasonable contemplation of an individual that the employer will investigate the complaint, not only with the individual who has raised it, but also with the person(s) against whom the allegation of discriminatory conduct has been made. Within that investigation it is entirely foreseeable that those complained about may complain about this individual doing to the protected act. As such, it may well be completely irrelevant as to whether a formal grievance has been raised against the individual doing the protected act as all issues will be investigated. The wording of section 27 must contemplate there being an investigation as Parliament has legislated that giving false evidence or information or making a false allegation is not a protected act if the evidence or information given or the allegation is made in bad faith.

81. It has not been argued in front of us that the first respondent is not vicariously liable for the actions of the second respondent in making the grievance. In our judgment once the grievance had been made by Mr Duru, the first respondent had no option other than to investigate it. We have rejected the suggestion that it had a discretion to refuse to investigate such a grievance.

82. We have concluded that having a grievance raised against an individual and investigated does not constitute a detriment for the purposes of section 27 of the Equality Act 2010. In our judgment the claimant could not reasonably consider that being subject to a grievance complaint and investigation changed his position for the worse or put him at a disadvantage. The investigation of the protected act is neutral and does not change an individual's position for the worse or put them at a disadvantage. Even if the claimant subjectively felt he was placed at a disadvantage, we find that objectively such a view is not reasonable in all the circumstances. In our judgment it is not reasonable for the claimant to complain about that treatment.

83. Although we have found that the claimant was not subjected to a detriment, we nevertheless go on to consider whether the making of the grievance and its investigation were because of the protected act.

84. It is quite clear to us that had the claimant not sent the email of 28 November 2016 making allegations that included race and disability discrimination, then Mr Duru would not have raised his grievance against the claimant. However, the race and disability discrimination allegations were not the only ones that angered and distressed Mr Duru. He was being accused of fraud, favouritism and bad management. Further, we find that in the email of 28 November 2016 the claimant was making threats to escalate the matters of concern to management levels well above Mr Duru, to his potential detriment. However, it must be the case that the race and disability discrimination allegations were a significant part of the allegations made in that email.

85. In our judgment, the mere fact that the email of 28 November was the starting point for Mr Duru lodging his grievance does not necessarily mean that the grievance and ensuing investigation was because of the protected act.

86. We find that before the protected act there was a strained working relationship between the claimant and Mr Duru, his Line Manager. Prior to the making of the protected act, we find that the claimant, on a fairly regular basis, claimed disability discrimination and breach of the compromise agreement. On the evidence before us that had reached a point where Mr Duru, in frustration, had sought advice as to how he was to manage the claimant concerning sickness reporting and absence.

87. We find that the email of 28 November 2016 raised a raft of very serious allegations against Mr Duru as to his personal conduct and managerial skills. These were reiterated by Mr Ali on behalf of the claimant, characterised as 'Alleged fraud' and escalated to Mr Duru's Line Manager, Mr Painter. We find that Mr Duru was genuinely upset and angry about these allegations being made against him. Mr Painter on the face of it dealt with the underlying issue that had prompted the claimant's allegations, namely the filling in of the variation sheet. Thereafter, the matter reasonably appeared solved as far as the first respondent is concerned in that the claimant and Mr Ali did not follow up the response from Mr Painter in anything other than an irrelevant way.

88. We find that Mr Duru found himself in a position of very serious allegations having been made against him that were hanging in the air and did not appear to be going to be investigated further. Mr Duru made enquiries of PMA as to how he should go forward. He was advised that the matter could be dealt with informally or formally and that if he wanted it investigated formally then he would have to make a grievance against the claimant. Mr Duru wrote but did not submit his grievance prior to the email exchanges on 22 and 23 December 2016.

89. The immediate cause of the claimant's sending in his grievance concerning the claimant was Mr Ali, on behalf of the claimant, making a complaint to

senior management about the unfair allocation of Rest Day Work by Mr. Duru.

90. We have endeavoured in these circumstances to ascertain what the real reason for the filing of the grievance complaint was. The grievance was lodged in relation to both Mr Ali and the claimant. It is very far ranging in that it includes matters that pre-date the protected act, the contents of the email of 28 November 2016 and events after it. It is clear that Mr Duru wanted an apology from the claimant and a finding that the allegations made against him were baseless and without merit. Further, he requests firm, legal and official guidance as to what disciplinary/management sanctions himself and any other managers could impose on the claimant.

91. We find that the real reason Mr Duru lodged the grievance against the claimant was in order to have the claimant's allegations properly investigated and hoping that the outcome would be an apology tendered, an acknowledgement that the allegations made against him were baseless and without merit and guidance on future management of the claimant. We find that that reason can properly be treated as separable from the protected act itself.

92. Consequently, we find that the claimant was not victimised and the claim is dismissed.

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Employment Judge Alliott

Date: 6 / 6 / 2018

Sent to the parties on: .....

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For the Tribunal Office