EMPLOYMENT TRIBUNALS

Claimant: **Ms L McLean**

Respondent: **Siemans Mobility Limited**

Heard at: **Birmingham (West) Employment Tribunal** **On:**11.12.2023 to 15.12.2023 (5 days) and 02.01.2024 in chambers for panel. 11.03.2023 delivering judgment.

Before: **Judge L Mensah**
Member: **Ms W Ellis**
Member: **Ms N Chavda**

Representation
Claimant: In person
Respondent: Ms S Harty (Counsel)

JUDGMENT

The Tribunal orders are:

(1) The Claimant's claims of protective disclosure/ detriment are not made out and are dismissed.

(2) The Claimant's claims for victimisation/detriment are not made out and are dismissed.

(3) The Claimant's claims for Direct discrimination are not made out and are dismissed.

(4) The Claimant has brought claims that fall outside the time limits set out within Section 123 of the Equality Act 2010 and Section 48 of the Employment Rights Act 1996.

(5) The Tribunal refused to extend time in those claims falling within (4) above applying the relevant tests of whether it was reasonably practicable to bring the claim and whether it was just and equitable to extend time as applicable.

The procedural history

1. The background to this case is set out in the various case management orders and preliminary hearings. There was also an unless order against the Claimant dated 18.05.2022. The parties have entered protracted correspondence regarding the pleadings, disclosure, and preparation of the bundle. By the start of the hearing we had before us a bundle containing all documents disclosed during standard and specific disclosure. The Claimant complained throughout that the Respondent had failed to disclose important evidence, but the Respondent's position is they have made proper disclosure as required and have not withheld evidence or that the evidence does not exist. We proceeded on that basis.

Applications made during the Hearing.

2. At the start of the hearing the Claimant sought to rely upon new grounds that had not been previously raised despite previous case management orders, an unless order and a preliminary hearing. The Tribunal decided to treat this as an application under Rules 29 and 30 of The Employment Tribunals Rules of Procedure 2013 because the Claimant acts as a litigant in person. The grounds the Claimant sought to add were as follows:

11. Did the Respondent directly discriminate against the Claimant because of sex by not allowing her utilise her holiday entitlement? Did the Respondent directly discriminate against the Claimant by approving holiday days accrued late (i.e. July-21)?

12. Did the Respondent directly discriminate against the Claimant because of sex by imposing mandatory obligation on her to carry out the duties of Andreas Weber above what has been agreed (i.e. up to 3 months)?

3. An application to amend should not usually be allowed unless the Claimant has properly formulated and particularised the amendment sought, so the respondent can make submissions and know the case it is required to meet: *British Gas Services Ltd v Basra* UKEAT/0194/14 (2014, unreported); *Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge [2016] UKEAT 0007_16_1208*.

4. In *Vaughan v Modality Partnership UKEAT/0147/20* (9 November 2020, unreported), Judge James Tayler reviewed the authorities and described the approach a Tribunal should adopt when considering an application to amend. The Tribunal should have regard to all the circumstances of the case but the paramount consideration is the relative injustice and hardship involved in refusing or granting an amendment: *Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 (NIRC)*; *Selkent Bus Co Ltd v Moore [1996] ICR 836 (EAT)*; *Transport and General Workers Union v Safeway Stores Ltd [2007] All ER (D) 14 (Jun)*; *Abercrombie v Aga Rangemaster Ltd [2013] IRLR 953*, *[2014] ICR 209*.

5. In *Selkent,* Mummery J identified three particular factors that may be relevant in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment:

(a) the nature of the amendment;
(b) the applicability of time limits; and
(c) the timing and manner of the application.

6. With regard to the first of those factors, Mummery J observed that amendments range:

"on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded, to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim'.'

7. Although he said that the Tribunal *'will have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action*', more recent cases, including *Abercrombie* and *Vaughan*, have stressed that the focus should not be on questions of formal classification but on the extent to which the proposed amended claim is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. Expanding on this point in *Vaughan*, Judge James Tayler made the following points:

- The focus should be on the practical consequences of allowing, or not allowing, an amendment: if the application to amend is refused, how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding?

- This requires a focus on reality rather than assumptions or supposition; parties should tell the Tribunal about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment.

- A party's submissions in favour of an application to amend 'should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence'.

- Where the prejudice of allowing an amendment is additional expense, consideration should be given to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

- While maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

8. Applying all of the above, we refused the amendments. The first amendment identified above involved holiday entitlement. In the claim form the Claimant has said she had difficulty taking holidays and working whilst her manager was on sick leave, At the case management hearing the Judge sought to deal with the issues and the Claimant did not raise a claim about holiday entitlement.

9. The Claimant did not raise this within the 14 days the Claimant had, to provide any variations to her complaints in accordance with the Judge's order. The Claimant made no applications or requests to have a holiday complaint included in the list of issues and says that she did not ask at the preliminary hearing. The Respondent says they had to secure furthers and betters from the Claimant and the Tribunal issued an unless order. Despite various attempts to secure an agreed list of Issues and multiple further particulars by the Claimant did not pursue this claim.

10. Further, the claim is not clearly particularised. The respondent points to the prejudice at this stage given they have not addressed this issue in their witness evidence or called any witnesses to this issue, they have not searched for evidence regarding this issue and are not even clear when the Claimant says this occurred. We accept the Claimant has failed to explain why she has delayed until the start of the hearing before seeking this amendment. We find the delay has caused significant prejudice to the Respondent which would not reasonably be overcome by any modification to the hearing and would not be ameliorated by costs. The impact would be to derail the hearing or cause significant delay to it. This is not a minor amendment but a wholly new issue and it is not sufficiently particularised even as of this hearing to understand the extent of the claim.

11. The second amendment is lacking sufficient particularity for the Respondent to understand the case it must meet. It therefore fails at the first hurdle. However, and in addition all the same factors we have set out above also apply to this amendment.

12. We refused both amendments.

Application to adduce further evidence.

13. At the start of day two of the hearing the Claimant sought to adduce new documentary evidence that was not within the bundle. This was whilst the Claimant was in the middle of giving her own evidence. The Claimant did initially suggest she had spoken to a legal representative overnight but when probed said it was about a different case. We found it odd the Claimant would tell us she had spoken to a lawyer overnight and it does not have any bearing on this case. Further we note The Claimant was clearly highly focused on wanting to go back to questions the Claimant had been asked on Day one and wanted to refer to documentary evidence in the bundle. We agree with Counsel, the Claimant does appear to have spoken about this case to a legal representative whilst in the middle of giving her evidence, despite being specifically told not to talk about the case with anyone. However, nothing turns on that because of the decision we have made. There is no actual prejudice to the Respondent.

14. The Claimant explained she wanted to adduce pay slips, but these were in relation to the holiday claim she had not admitted on Day one. The Claimant wanted to file LinkedIn profiles for some of the witnesses because the Claimant said they gave different periods of employment than in the witness statements and when probed told us she would seek to ask us to infer this meant those witnesses where 'Liars.' We did not consider this evidence and that assertion to be one we would be willing to make and so we considered this evidence had no material bearing on the case.

15. The Claimant suggested she had been given permission to adduce video evidence which she said showed the opening for "traction switchgear" but we could find no material bearing on the case given the Respondent's position. The Claimant sought to adduce screenshots from a forum of 'rail enthusiasts' where she says one of the individuals is an engineer who confirmed some of the work from Phase 1 (PSU) had not been completed. This was again not material because of the Respondent's position. In both cases they accept the work is not completed but explain why and accept the project was an internal one. Ultimately, we refused the application to adduce any of the documents at this stage as we is not need to see any evidence

regarding the project being internal and we not need to see the video evidence regarding the works from Phase 1 still being outstanding because of the Respondents position. We could not reasonably attach any weight to the Linked In evidence regarding dates in a role and the pay slips were irrelevant.

The Claims

16. The claims are already set out in the List of issues before us and so we do not repeat them here but address them in the findings below. In effect the Claimant brings claims for protective disclosure/ detriment, victimisation/detriment, and Direct discrimination.

Jurisdiction

17. The Tribunal must decide whether the Claimant has brought claims within time limits set out within Section 123 of the Equality Act 2010 and Section 48 of the Employment Rights Act 1996.

1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2. If not, was there conduct extending over a period?

3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable/ reasonably practicable? The Tribunal will decide:

5. Why were the complaints not made to the Tribunal in time?

6. In any event, is it just and equitable in all the circumstances to extend time?

7. In any event, was it not reasonably practicable?

18. It is for the Claimant to show that it would be appropriate to extend time. The exercise of discretion has been said to be the exception, not the rule **(Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**). LJ Auld stated at paragraph twenty-five.

'It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

19. As confirmed by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, Underhill at paragraphs 37 and 38 stated that the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, factors such as:

- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.

- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

<u>Eligibility</u>

20. Sex is a protected characteristic section 11 Equality Act sets it out thus:

"*In relation to the protected characteristic of sex—*
(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

21. According to section 212(1), "*man"* means a male of any age, and "*woman*" means a female of any age. The scope of the protection is found in sections 39 and 40 of the same:

"39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)-

in the arrangements A makes for deciding to whom to offer employment;
as to the terms on which A offers B employment;
by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B) - as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer, or training or for receiving any other benefit, facility, or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

40 Employees and applicants

An employer (A) must not, in relation to employment by A, harass a person (B) -

(a) who is an employee of A's;

(b) who has applied to A for employment."

22. For the purposes of section 39, discrimination includes all the forms of discrimination prohibited. This varies according to the protected characteristic involved, but in the case of sex discrimination includes direct and indirect discrimination as defined in section 13 and section 19.

23. The definition of employer is contained in section 83 and is broad enough to encompass "employees" and "workers" as defined in the Employment Rights Act 1996. Similar provisions to section 39 and 40 apply for contract workers under Part 5. The parties agree the Claimant is eligible for protection as a contract worker.

Direct Discrimination (section 13)

24. Section 13 defines direct discrimination as follows:

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

25. There is no defence of justification for direct discrimination. Direct discrimination is based on the concept of less favourable treatment and therefore envisages a comparative exercise and consideration of appropriate comparators.

26. Section 23(1) provides that:

"*On a comparison of cases for the purposes of section 13 [direct discrimination] … there must be no material difference between the circumstances relating to each case."*

27. This means that the comparator must be "*in the same position in all material respects as the victim, save only that he, or she, is not a member of the protected class*". The relevant circumstances include those that the employer took into account when deciding to treat the employee as he did. Therefore, determining an appropriate

comparator involves asking the "reason why" the employer treated the employee as he did.

28. The fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator […] by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing the inference that the victim was treated less favourably than Claimant would have been treated if the Claimant had been the seven comparator.

29. Overall, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim.

30. The next important aspect requiring consideration is the link between the reason for the treatment. This is a subjective test and a question of fact. This requires us to consider why the alleged discriminator acted as he or she did, whether consciously or unconsciously. This requirement is only dispensed with if the reason is obviously sex or if the criterion exactly corresponds to the protected characteristic. If, '*the reason why'* cannot be clearly determined on the evidence, the initial burden is on the Claimant to prove, on a balance of probabilities, a prima facie case of discrimination. **Royal Mail Group Ltd v Efobi** [2021]

31. The protected characteristic need not be the *only* reason for the less favourable treatment. It may not even be the main reason. Provided that the decision in question was significantly (that is, more than trivially) influenced by the protected characteristic, the treatment will be because of that characteristic.

32. The burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from

which (in the absence of any other explanation) an unlawful act of discrimination can be inferred.

Protective disclosure Section 43B

33. The starting point is that the disclosure must be a "*disclosure of information*". There are two separate requirements here –

(a) a genuine belief that the disclosure tends to show a relevant failure in one of the five respects (or deliberate concealment of that wrongdoing); and
(b) that belief must be a reasonable belief. Reasonableness involves applying an objective standard to the personal circumstances of the discloser.

34. The reason the belief must reasonably tend to show the failure being alleged, is because, simply belief in wrongdoing is not enough. The disclosure needs a sufficient degree of factual content and specificity before that belief is likely to be regarded as a reasonable belief (*Kilraine* at paragraph 36).

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

36. The threshold is not fixed. The test can vary depending on whether the discloser was a lay person or an expert. For example, a consultant surgeon would generally be expected to check medical records before it would be reasonable for them to believe their disclosure tended to show medical malpractice.

37. A lay observer may reasonably believe the same disclosed information indicated wrongdoing without first making such checks (*Korashi v Abertawe Bro Morgannwg Local Health Board* 2012 IRLR 3, EAT).

38. Further and as important, we are concerned with what the Claimant believed at the time when they made the disclosure, not what they may have come to believe later on (*Dodd v UK Direct Solutions Limited* at para 55 [2022] EAT 44 (18.3.22)).

39. The disclosure may still be a protected disclosure even if the information does not stand up to scrutiny. A belief may be a reasonable belief even if it is wrong: ***Babula v Waltham Forest College*** **[2007] ICR 1026**.

40. Where a disclosure is made to the Claimant's employer there is no additional requirement that the claimant must have had a reasonable belief that the information disclosed, and any allegation contained in it, were substantially true. Therefore, the Tribunal will not usually need to determine whether the employee believed that the disclosed information was correct or not. That said, in many cases, the determination of the factual accuracy of the disclosure will be an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure (*Darnton v University of Surrey* [2003] IRLR 133).

41. To be a qualifying disclosure there must be a reasonable belief the information being disclosed is in the public interest and tended to show one of the allegations as set out in 43B(1)(a) to (f) as follows:

(a)that a criminal offence has been committed, is being committed or is likely to be committed,
(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d)that the health or safety of any individual has been, is being or is likely to be endangered,
(e)that the environment has been, is being or is likely to be damaged, or
(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
it is immaterial whether the relevant failure occurred, occurs, or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

42. Further the disclosure under 43C can be made to the employer or other responsible person,

(1)A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —
(a)to his employer, or
(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—
(i)the conduct of a person other than his employer, or
(ii)any other matter for which a person other than his employer has legal responsibility, to that other person.
(2)A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

Victimisation

45. Section 27 Equality Act 2010:

"A person (A) victimises another person (B) if A subjects B to a detriment because-

B does a protected act, or

A believes that B has done, or may do, a protected act.

Protected acts are defined in subsection (2) as:

Bringing proceedings under the Equality Act 2010

Giving evidence or information in connections with such proceedings

"doing any other thing for the purposes of or in connection with this Act" and

"making an allegations (whether or not express) that A or another person has contravened this Act."

43. We note that an employee can acquire protection by complaining that somebody else has been the victim of discrimination. They do not have to complain on their own behalf. It is not a protected act to make a false allegation in bad faith. The Claimant is not protected against victimisation for simply complaining about unfairness in a general sense.

44. If it is established that:

(a) the employee did a protected act (or was about to do one) and
(b) the employer subjected the employee to a detriment,
45. 48. Then the critical question will be:
46. Why did the employer subject the employee to that detriment?
47. Was it because they had done (or might do) the protected act?
48. Or was it wholly for other reasons? (**see *Chief Constable of West Yorkshire Police v. Khan* [2001] ICR 1065**).

49. This is essentially the same question as in direct discrimination. We also consider again:

(a) the dangers of subconscious motivation
(b) the need to identify the decision-maker
(c) the "significant influence" test and
(d) the burden of proof provisions.

50. We can look at whether there was any change in the employer's treatment of the employee, before and after the protected act? If the employer was already treating the employee unreasonably, was there a marked turn for the worse?

Detriment

51. The EHRC Employment Code paragraphs 9.8 and 9.9, drawing on this case law, says:

‘Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage……. However, an unjustified sense of grievance alone would not be enough to establish detriment.”

52. Accordingly, the test of detriment has both subjective and objective elements. The House of Lords case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 still provides the most succinct guidance on the scope of detriment. Lord Hope stated:

‘*33 Lord Hoffmann also dealt with the question whether, assuming there was discrimination under section 2(1) of the 1976 Act, Mr Khan was subjected to “detriment” within the meaning of section 4(2)(c) He pointed out, at pp 1077–1078, para 53, that being subjected to detriment (or being treated in one of the other ways mentioned in section 4(2)) is an element of the statutory cause of action additional to being treated “less favourably” which forms part of the definition of discrimination:*

“A person may be treated less favourably and yet suffer no detriment. But, bearing in mind that the employment tribunal has jurisdiction to award compensation for injury to feelings, the courts have given the term ‘detriment’ a wide meaning. In ***Ministry of Defence v Jeremiah*** *[1980] ICR 13 , 31 Brightman LJ said that ‘a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment’.’*

53. As May LJ put it in **De Souza v Automobile Association** [1986] ICR 514, 522, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

“*35 …one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?”*

54. An unjustified sense of grievance cannot amount to "detriment": **Barclays Bank plc v Kapur** (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in **Lord Chancellor v Coker** [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. If the discrimination is made out the causative link is not difficult to establish,

"… there will be very few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes, or is reasonably likely to cause, distress or upset will reasonably be perceived as a detriment by the person subject to the discrimination even if there are no other adverse consequences." **Deer v University of Oxford** [2015] ICR 1213

55. 'Detriment' under section 39 can also include less favourable treatment 'as to [an individual's] terms of employment'. It is not limited to a situation where those terms of employment ultimately delivering lower pay on aggregate. It is sufficient to show that an individual is being deprived of a choice he values, without it being necessary to prove that that option is in fact superior to the one available, see **Birmingham City Council v Equal Opportunities Commission** 1 AC [1989] 1155 at pp1193H – 1194A, which concerned the availability of grammar school places for girls in Birmingham.'

56. "Detriment" must be a detriment in the employment field: **Tiplady v. City of Bradford [2019] EWCA Civ 2180**

FINDINGS OF THE TRIBUNAL

57. The Tribunal make the following findings and we have used the List of issues to focus attention on those matters we consider material. There was considerable evidence of matters we consider not material to the issues, and we have focused on the key evidence we consider allows us to explain our reasoning. That does not mean we have not taken all evidence into account, but we are not required to set out all of that evidence if it is ultimately not necessary to explain our decision.

58. The Claimant was looking for work and secured an agency known as Vital Limited. Through that agency the Claimant signed a contract exhibited in the bundle. The contract is clearly a contract for services and seeks to secure the Claimant's services to third parties. There is no dispute this was the intention of the parties, and this was the nature of the relationship. The contract is adopted by both the parties as the complete terms and conditions. No variations were filed in evidence before us.

59. The Agency prepared a curriculum vitae on behalf of the Claimant and with her input. This was used to seek agency work with the Respondent business. We have seen this document at pages 225 onwards. It sets out the Claimant experience as a Project Accountant with ten years consultancy experience. The document sets out the rate at which the agency is willing to provide the Claimant as £310.65 charge rate and £285.00 pay rate per day. The difference being the agency fees.

60. This document is used to negotiate the services of the Claimant. The Respondent offered the Claimant a role as a temporary Finance Manager. This is because the actual employed Finance Manager Mr Phani Pingili has been seconded to the logistics division. There was some dispute as to the start date of the Claimant's contract, but we are content to prefer the Respondent's date of the 19 June 2020 as we find their evidence overall was more reliable. The role involved working on the Respondent's rail electrification business with the client, National Rail. The Claimant had not previously worked on a rail contract.

61. We do not accept the termination date was the 31.10.2021. It is clear from the decision to terminate (see below) the termination was in fact the 18.10.2021 "with immediate effect" but the Respondent agreed to pay the Claimant a further period and a week's notice pay. Nothing turns on the four-day difference and it is an advantage to the claimant when looking at jurisdiction.

62. The Claimant's line Manager was Mr Andreas Weber. He was employed in the capacity of Finance & Commercial Manager. He was therefore responsible for addressing any concerns the Claimant might raise and to oversee her role. He made the decision to terminate her agency contract.

63. Mr Weber unfortunately was diagnosed with a serious illness which required him to take time off work for treatment including Radiotherapy. It also meant that he went off sick for a period initially thought to be for four months, but we understand was six months. He went off shortly after the Claimant was working in the business. In his absence Mr David Peralta, a Financial Controller stepped in to assist the Claimant as part of a supporting role on the Respondent's rail electrification business.

64. Mr Paul Harris is employed as the Respondent's Head of Commercial (Electrification). The parties agree he was the expert on the commercial side of the contract with National Rail. He had contact with the Claimant during her time in the business.

65. Finally, Mr James Benjamin Small, often referred to by the parties as 'Ben', is employed as a Commercial Manager and had cause to work with the Claimant or have contact with her through their respective roles on the rail project.

66. We heard evidence from all the above witnesses. The only other individuals of some relevance are two staff members referred to herein as Ms Cortez and Mr Mistry. We understand they worked under the Claimant and so, she was effectively their line manager. Mr Olcay Yilmaz, the Finance Director who had truly little involvement in the material case, Mr Lee Shimwell the Senior Finance Manager and Mr Jonathan Humpherson the Head of Operations. Finally, Ms Lorraine Cope who worked in the Human Resources department. The comparators are also relevant, and we address the details about them below. None of these individuals gave evidence but they feature repeatedly in the documents.

67. The Claimant brings claims based upon having made protective disclosures. We address each in turn and use the same references as set out in the List of Issues:

(a) In February or March 2021, the Claimant disclosed to David Peralta her concerns regarding billing for non-existent costs on the PSU2 project.

68. At the hearing the Claimant admitted she had not raised this concern in the Project Review meetings but said she felt would have been sacked if she had. Instead, she says she sought to raise it with more senior Management and chose Mr Peralta.

69. His response to the Claimant was to tell her it was normal in such projects for bills to be raised against pre-agreed rates for future works and he believed the Claimant was displaying commercial naivety. When questioned at the hearing about whether this was within the terms of the contractual arrangement with the client the Claimant gave contradictory evidence suggesting she had read the contract and then that she had read the parts relevant to this issue. We have the Respondent witnesses making it clear in their evidence the contractual terms of the contract allowed for pre-agreed billing, and this is addressed later in more detail.

70. The words used in this disclosure are not detailed in any of the pleadings, or her witness statement and the Claimant has not particularised what she says the contract said and why this was a breach. During cross-examination of Mr Peralta the Claimant suggested his evidence; that these where matters clearly covered the in the contract, which the Claimant could have asked for at any time, was not true. We prefer Mr Peralta's account. As we have set out in this decision, there are numerous examples that satisfy us the Claimant had not looked at the contract or looked at it before or after she had spoken to Mr Peralta to enable her to check if the contract allowed for this. If she had, we would have expected such checks to have featured heavily in her witness evidence.

71. The Claimant asserts she has twenty years' experience in project finance and so held herself out before us as someone with the relevant expertise to know this was not a lawful arrangement. The Claimant reiterated in her own evidence and in cross-examination of the Respondent witnesses that there had been a lack of understanding of her experience. Her position is she might not have had rail experience, but she had worked on large scale projects "all my life" and refused to accept she had been commercially naive and struggled to understand the contractual position. The Claimant referred the panel and the Respondent witnesses, several times, to the extent of her CV and work experience. This was an organisation dealing specifically with Network

rail and the contractual terms agreed with this organisation in a large-scale network rail.

72. This in our view, and on her case, and evidence, placed her in the position of someone who would be expected to check records before it would be reasonable for them to believe their disclosure tended to show fraud and misappropriation of funds. We do not accept, and the Claimant has failed to explain, that she made any checks beyond the conversations she seeks to rely upon as disclosures. There is no suggestion from either side the Claimant would have been prevented from checking the records. In the hearing the Claimant told us she did not raise any questions in the PRM (Project Review meeting) because she said she was scared of any repercussions, but we do not accept this explanation.

73. There is clear evidence the Claimant has throughout been unafraid to challenge matters she considered inappropriate or to ask questions. Further, we can see no rational basis for her failure to ask questions in these meetings about how the contract and the billing worked if the costs were not apparent to her. We consider her failure to ask was not because she was afraid of the repercussions but because the Claimant really did not consider these matters as significant at the time and has, since her termination, sought to frame what were normal conversations about the business as protective disclosures. This is a theme throughout this case.

74. We found her evidence demonstrated a fundamentally flawed and incomprehensible opinion of what was going on and an unwillingness to make reasonable enquiries. Her evidence as to her rationale for making the allegations in these proceedings and some of the assertions the Claimant made during evidence bordered on absurd. We return to this below.

75. We considered whether, despite her own evidence, we should in fact treat the Claimant as a lay observer who may reasonably believe the same disclosed information indicated wrongdoing without first making such checks, but the emphasis the Claimant placed her experience and multiple references to her Curriculum Vitie led us to find the Claimant was not simply a lay observer. Her role as Finance Manager was sufficiently senior to place her in the position of someone, we would have

expected to make reasonable checks (*Korashi v Abertawe Bro Morgannwg Local Health Board* 2012 IRLR 3, EAT).

76. Whilst the allegations in these proceedings are that the costs billed in PSU 2 did not exist, the Claimant struggled to identify what information she has disclosed to Mr Peralta making such an allegation, beyond asking him about the billing. Her witness statement failed to particularise this and when asked in cross-examination the Claimant instead claimed she had secured evidence by way of "*screenshots, analysis of costs and bills raised in 2020 to 5.5 million and this was 11.2 million shortly before she left*" but the Claimant did not say she presented or disclosed any of this by way of information to Mr Peralta, or in fact suggest she said anything further to him on the point. We note none of this evidence was before us by way of documentary evidence or any details in the Claimant's witness statement.

77. The Claimant does say she asked Mr Peralta about the billing, and he told her it was front loaded. It was put to the Claimant, this was normal against pre-agreed rates, and whilst she accepted this was a commercial reality for some projects, she said it was not on this because the project was *massively behind*.

78. Mr Peralta in his evidence was a clear and cogent witness who we find gave us the best evidence on the history of this case. He explained that he did not recall using the term 'front loaded' when discussing the billing with the Claimant. He said he recalled several conversations with the Claimant, but he felt she lacked understanding around the business model and was trying to use layperson terms to explain in a very simple way the commercial position.

79. He says he may have used some similar expression. Mr Peralta explained the contractual mechanism in PSU 2 to us, and in simple terms how the contract was a government preference to move to target cost contracts to share risk between the supplier and purchaser, so the incentive is to be efficient and share the gain and if there is, say, an overspend, to share the loss. This, he says, is referred to in the contractual arrangements as a gainshare. He also explained how the business is externally audited. He accepted they do not audit every project, but as the statutory auditors they are a reporter to the regulator, and so go through a whole range of tests

such as checking a sample of costs, tracing sales involves and analysis across the business, so they are comfortable in stating the accounts are accurate. As the audit threshold was £500,000, he said it was irrational to suggest there was such a wrongdoing. Further, as the client (national rail) also benefited from gainshare it was contradictory for the Claimant to allege gainshare is fraud by way of non-existent billing.

80. We prefer his evidence about the way the Claimant approached him and the explanations that he gave to the Claimant, and they gave a rational basis for the billing which was in our view part of normal business discourse. We do not accept the Claimant has shown she made a protective disclosure, as she now frames it. We do not accept she framed this as non-existent billing, but rather that she made no more than an enquiry which she appeared satisfied with as she took no further steps to challenge what Mr Peralta had said, or to explain why this was not a reliable explanation.

81. We do not accept the Claimant was seeking to give information that one of the five factors covered by Section 43B(1)(a) to (f). In fact, we concluded she never intended to make any disclosure but has retrospectively sought to frame it as such.

Detriment

82. The Claimant was unable to identify a detriment caused by this alleged disclosure. Initially when pursued by Counsel about this point, she suggested the detriment was lack of career progression as pleaded. However, it became clear the first role she referred to having discussed with Mr Peralta was chronologically prior to the disclosure (January 2021) and therefore could not have been caused by the disclosure and whilst there was an issue regarding the role of Finance Manager, in her own witness statement the Claimant says she effectively didn't apply for that role because the Respondent would not guarantee that Mr Phani would not be successful if he applied.

83. In other words, we take it that the Claimant wanted a guarantee she would be given the role if she applied. However, we accept the Respondent's evidence that it

was an open competitive process, and ultimately the role was not given to Mr Phani but a third party who in fact turned out to be a woman. The awkward attempts by the Claimant to try and bring in career progression undermined her reliability and gave the appearance of someone trying to create a detriment out of the historical facts when there in fact is none.

84. Eventually the Claimant suggested her fear of not being able to apply because she had made the disclosure was the detriment to her career progression and that she had not in fact applied for any roles or been dissuaded from making such an application. We find the claimed detriment is not made out.

(b) In or around July 2021, the Claimant disclosed to George Hunt concerns as set out in subparagraph (a).

85. The Claimant says she raised the same issue with Mr Hunt, saying she raised 'concerns about billing for non-existent cost.' and his response was to say he said he had no power or influence so she had no further discussion as this was not part of his business area. This suggested to use she did not really seek to make a disclosure at all.

86. The Claimant must have known the lack of involvement of Mr Hunt in this project. Further, the Claimant was clear she did not provide any information beyond raising the issue of billing for work not done and once he said it was not in his power and domain, she left it there. We do not accept she was seeking to make a disclosure. He appeared fairly senior but was not involved in the specific contractual nature of this concern. The Claimant was again vague and inconsistently particularised what she said to Mr Hunt and why it was a disclosure. This claimed disclosure adds no weight to the claimed earlier disclosure to Mr Peralta.

87. The Claimant seemed unable, or unwilling to answer questions around what information she was giving to Mr Hunt, and she did not again particularise any specific allegation. We are not satisfied she did give any information beyond asking about the billing. It did not assist the Claimant when she claims she was making further checks with a more senior manager by speaking to Mr Hunt given what we have found. The

Claimant went to someone who knew nothing about the subject, did not depart any information that could amount to a disclosure and did not pursue the matter after Mr Hunt said he knew nothing about the contract.

Detriment

88. The Claimant is adamant she suffered no detriment due to her discussion with Mr Hunt as she says he would not have acted upon it. Therefore, we find no detriment.

(c) In or around July 2021, the Claimant disclosed to Paul Harris, the Respondent's Commercial Director that she had concerns regarding unlawful profiteering. The Claimant raised concerns that approximately £7million profit was being made outside of the contractual agreement on the IPS programme.

89. The Claimant accepted in the hearing that beyond telling Mr Harris she thought there may have been seven million pound profiteering she did not provide any further information because he said to her, that is not how we do things. At paragraph 5 of his witness statement Mr Hunt says the Claimant did raise a concern about seven million, but he says it was in the context of the Claimant suggesting the Respondent could use the excess profit to reduce costs for the future to benefit taxpayers and not to raise a concern about wrongdoing.

90. When asked to identify the detriment resulting from this disclosure the Claimant suggested it was working in a business that did not promote or support whistleblowing. Not only is that not pleaded but it was not her case until her oral evidence. The Claimant had not previously asserted any case based upon a lack of whistle blowing policy and so the Respondent had not addressed that issue.

91. The Claimant had pleaded Mr Harris had ignored her and not engaged with her in the same way. However, it was put to the Claimant, that the reason for this is because her line manager Mr Weber had returned from sick leave and resumed his role as the Claimant's direct line manager. Therefore, he would, by virtue of this change, have little to do with the Claimant directly from this point onwards. The Claimant seemed to waiver between accepting that explanation and suggesting she

would have thought she would have some contact. On the other hand, Mr Harris gave straightforward evidence he had not ignored the Claimant but had little reason to engage with her directly after her line manager returned to his role.

92. We prefer Mr Harris's evidence and find the Claimant did not in reality make a protective disclosure but instead raised the question of a profit being used in a different part of the business finance. We also accept his explanation for the reduced contact with the Claimant and find there was no detriment.

(d) In or around September 2021, the Claimant disclosed to James Small (known as Ben) her concerns that Network Rail falsely communicated on their website that the project had been completed (PSU1 Power Supply Upgrade) when that was not the case (link https://www.networkrail.co.uk/running-the-railway/our-routes/east-coast/power-supply-upgrade/).

93. We accept under section 43C a disclosure can be made about a third party. The Respondent's position both at the time and today is the work left to do was agreed on the instructions of Network Rail as the client, to be moved from Phase 1 over to Phase 2. This was specifically instructed by Network Rail for ease of reporting and to keep all of the PSU works under one contract. This is the evidence of Mr Small on oath before us.

94. It was put to the Claimant, that when she raised with this Mr Small, he told her the same. The Claimant appeared at first to accept the decision was Network Rail's as the client but claims she was suggesting this was a fraud because a publication by Network Rail would have made the general public believe Phase 1 had been complete. The Claimant alleges the Respondent should have effectively known this was a fraud.

95. When asked if she has sought to provide any information to Mr Small about why it was a fraud, she accepted she had not. She has not given information which tended to show anything. She simply raises the existence of the publications, and that Phase 1 was not complete. In effect she says she felt she could not take it any further. She did not use the words 'fraud' to Mr Small or categorise it in any such manner. She

admitted the categorisation of fraud came later after she had spoken to a criminal lawyer during the proceedings and as she supplied furthers and betters.

96. During her evidence and in putting her case to Mr Small, the Claimant's case became inexplicable when she appeared to assert that the twenty plus substations as part of PSU 1 did not exist. The Tribunal, more specifically the judge, asked the Claimant if she was putting to Mr Small that the twenty plus substations National Rail had said were Part of Phase one did not exist. At first, she persisted with this and then she resiled from this and admitted she was not an engineer and had not carried out any checks. We note this bizarre position only came about as a reaction to the noticeably clear and rationale evidence of Mr Small who explained that the publications had specifically stated that PSU 1 had completed, and this was the building of the twenty plus substations.

97. In the light of the pleaded allegation of fraud, he told us he did not view it as anything fraudulent and we found this categorisation was not appropriate, albeit we accept this was not the categorisation in any event at the time. Effectively the movement of some of the works from Phase 1 to Phase 2 was a contractual agreement with Network Rail and on their request. The fact the publications then stated Phase 1 was complete was not misrepresenting the truth. There was nothing before us to show the public would have been even privy to the level of detail required to have understood that the works moved to Phase 2 had been originally labelled under Phase 1. It is clear the information the Claimant was passing on any view did not tend to show any criminality. At best, her concern was misrepresentation to the general public.

98. The information could have potentially fallen into one of the five categories to be a qualified disclosure, but we are satisfied this is not reasonable. We do not accept the Claimant gave information of anything like a fraud. We prefer Mr Small's evidence. The deliverables, we are told, were the sub-stations, and the Claimant did nothing to show she could or would reasonably have thought otherwise. We do not accept she did or did reasonably believed she was making a disclosure tending to show a wrongdoing.

Detriment:

(c) Ben Small applying detrimental treatment to the Claimant during the Ernest and Young external audit, as per electronic evidence submitted.

99. This seems to come down to Mr Small declining a meeting with the Claimant. We were taken to the email chain and any reasonable reading shows Mr Small admitted he could not attend the meeting as he had not completed his forecasting and Mr Hunt confirming he should focus on the forecasting and the meeting could wait. The Claimant's complaint is that she needed access to a PCR report which she says was in Ben Small's gift. Mr Small said it was generally available in organisation and it wasn't his role to give to the Claimant anyway.

100. There is no detriment. We prefer the Respondent's evidence that the lack of a meeting was no more than a day-to-day management issue that GH had the authority to resolve as he did. The Claimant did not deny the PCR report was available to her through other means and in any event, it is clear that GH had made allowance for the meeting not going ahead by prioritising BS's forecasting. The Claimant suffered no detrimental treatment and we do not accept this event led to any reasonable detriment. The Claimant at best might have been mildly annoyed. Further, any behaviour was not connected in any way to any disclosure.

(d) Ben Small stating in the meeting 'perhaps it's time for you to leave the business.'

101. This is the second claimed detriment. Mr Small explained the Claimant had expressed dissatisfaction with her position in the Respondent business and with the Respondent. He knew she was an agency worker and so was not in the same position as an employee and could simply leave. He told us it was in this context and in response to her complaints he made this comment. We accept such a comment might amount to a detriment and that the Claimant was upset by it. However, we do not accept this comment was connected in any way to the claimed disclosure. We accept and prefer Mr Small's evidence that it was simply a response to a conversation he was having with the Claimant. There was no ulterior motive.

2(e) In or around September 2021, the Claimant raised concerns to James Small (known as Ben) her concerns about invoices issued on PSU2 project of £11.2m for the non-existent costs.

102. This is linked to 2(a), this is the second time the Claimant says she approached Mr Small regarding this issue. We note there is a gap from March 2021 through to September 2021 and the Claimant does not say she carried out any further checks on the contract or documentation after the first alleged disclosure and if she had, she didn't clearly say so before us. The Claimant says she did not raise this with anyone else in the interim but spoke to Mr Small as he was the key person regarding this topic as the Quantity Surveyor. Effectively, the Claimant admits that if anyone could explain the invoices and costs, she was concerned were non-existent then he could. In her oral evidence she claimed for the first time that she had gone back and read the terms of the contract.

103. This is not in the Claimant's filed evidence or in her witness statement, and only came out in her oral evidence and in response to Counsel's questions. Her explanations for her understanding of some of the terms of the contractual relationship with National Rail are matters the Respondent say are industry standard and in the contract. Having heard the comprehensive evidence of JS we concluded the Claimant had not read the contract when she said she did or to consider whether gainshare was detailed within it. We prefer the Respondent's evidence as to the contractual terms. One of those is the term "gainshare."

Question from Counsel: You mention gainshare in your witness statement, what do you think it means?

Claimant answer: Across contracts if had a contract IPS programme, this profiteering or efficiency would be gainshare.

Question from Counsel: In your view is it an industry standard term or jargon invented by Siemens?

Claimant answer: It exists and used by Siemens to cover profiteering as so easy to say gainshare.

Question from Counsel: Do you know technical definition?

Claimant answer: If the project gains in terms of margin it is a gainshare.

Question from Counsel: there is nothing illegitimate to take additional margins through efficiencies?

Claimant answer: Technically inaccurate if project is one million and margin is 20% £200. The cost analysis as part of the bid can be fraud, say need ten engineer and five project but only need half it is flawed and should not happen and so if efficiency is true, I am all up for it. I welcome it.

Question from Counsel: Gainshare was part of the contract?

Claimant answer: Yes

Question from Counsel: It is s payment mechanism in the contract?

Claimant answer: It is not mentioned in the contracts. It mentions order and contract value.

93. When this matter was addressed by Mr Small he said,

"I recall some concerns regarding costs in the internal accounts. My position the same now I would say I cannot discuss them because of the armed length nature of the internal contract so I am not privy to those internal costs. If they have invoiced eleven million, I have no visibility, but I know for the 11.2 million deliverables have to be met and milestones issues ordering and designs and delivery of materials. The internal product team say we have achieved pay us. I would say have they be met and then satisfy auditor. For example, delivery of equipment to the UK and went into storage and paid us eight million."

Claimant question: ASG 25 modules is the fraud I am saying?

JS answer: PSU 2 modules would be manufactured and delivered to site. The internal product team purchase materials from supplier in Germany and make and deliver in big box to send to site. Lots of cost and they exist and on site and can be seen.

104. The Claimant did not point to any evidence she had seen at the time, or since which suggested Mr Small was wrong and that the deliverables had not been met and been paid for. We find the Claimant effectively relies upon an allegations of non-existent costs but without ever having sought to check the contract. The Claimant does not say why such an explanation as Mr Small had given was not sufficient to demonstrate no profiteering had taken place or what it was therefore the Claimant was disclosing that had not been explained. Mr Small also explained how the external audit is performed across the business and this was designed to pick up any inconsistencies. It is wholly incredible in our view for the Claimant to have believed at this point there was any profiteering to this scale and which both internal and external auditors had missed. This was not more than a mere allegation with no reasonable foundation. However, even if we had accepted there was some potential for a qualifying disclosure, we have already concluded no determent flowed from it (see below).

Detriment

(e) Terminating the Claimant's contract.

105. The Claimant referred us to an email exchange regarding a vehicle (van) This extended exchange about a van appeared to us a perfectly normal exchange about cost allocation. Whilst we have no doubt such exchanges take up time and may be frustrating and generate emails there was nothing in that exchange which we found was a detriment.

106. The Claimant reacted badly to the way it was handled, and she accepts her response was angry. The Claimant says this was because she was under

a lot of stress due to personal problems outside of work with the ultimate bereavement of two close family members within a relatively brief period of time. In effect she accepts she mishandled the situation but says this behaviour was out of character for her.

107. What the Claimant did however is declare that she would no longer be willing to work with Mr Small. This is on top of the Claimant having previously suggested she could not work with Mr Phani. This is addressed in the evidence both by the Claimant orally and Mr Weber. The evidence from Mr Weber is that the Claimant had made her position untenable. By refusing to work with Mr Small as a contract worker, knowing she was not applying for Mr Phani's old role or any other role, he decided there was no reasonable way forward and terminated her contract.

108. The Claimant also alleges Mr Weber was supporting Mr Phani and colluding with him. We have seen an email thread beginning at pages 368 onwards dated 15 October 2021. We can find no evidence of collusion. What we have seen is evidence the Respondent through Mr Weber and Ms Lorraine Cole of Human Resources offered mediation and resolution between two staff members Ms Cortez and Mr Mistry and Mr Phani regarding concerns the Claimant had raised about those staff saying there had been mismanagement and abuse by Mr Phani before she joined. However, once those individuals were interviewed it became clear there was truly little real complaint and neither individual wanted to pursue any formal complaints or any form of mediation. This is not collusion. It is standard employment practice. There would be no basis to take any action against Mr Phani on that basis. It is also rather contradictory to allege collusion to protect Mr Phani when he didn't even get his old job back when he reapplied, and it went to a woman.

109. Further, we could not find any connection between the decision and reasoning of Mr Weber, which we accepted is true, or any of the Claimant's claimed disclosures. There is not a shred of reliable evidence and no reasonable basis to depart from the actual reason Mr Weber gave for terminating the Claimant's agency contract. We do not accept the termination had anything to do with any public disclosures.

Victimisation

110. DETRIMENTAL TREATMENT – Section 27 of the Equality Act 2010

111. The Claimant alleges that the following are Protected Acts for the purposes of Section 27 (2) of the Equality Act 2010:

(a) *The Claimant raised concerns to Andreas Weber her concerns regarding late approval of timesheets in September 2020*.

112. We find this is not a protective disclose of being victimised. It was no more than a query about pay and there is no reasonable evidence before us to suggest the Claimant asserted to Mr Weber that he had delayed because she was a woman at the time or that he had delayed because she was a woman. We accept his explanations.

113. The Claimant says,

"Towards the end of Aug-20 I've noticed that my timesheets are being approved late. continuously by Andreas Weber which has impacted me being paid on time. (Tribunal Bundle p30 – 31, 66). There was a particular instance around Sep-20 when multiple weeks were failed to be approved and even after chasing still remained outstanding. So, I've emailed Andreas Weber again and have asked him firmly to approve my timesheets. He emailed me back and approved my timesheets. In the same email he apologised for the delay and advised that he has a growth on his arm and would need to be off work for couple of months, up to 3 months maximum."

114. Mr Weber says,

"When it came to approving timesheets, these would have been done as soon as was practicable, mostly on the same day when I received the approval request email. If there was ultimately a delay in the Claimant being paid, this would not necessarily be attributable to the Respondent and fault could have lied with the agency."

115. The contract says.

“8.2 The Company shall pay the Contractor weekly in arrears by BACS on the Friday in the following week or as soon as possible thereafter.”

116. The Claimant accepts this. There is no contractual requirement to pay on a certain date. The payment to the Claimant required her to make her submission to the agency. As it was not electronic this caused delay that differentiated between Claimant and other agency staff. There were also emails in the bundle showing the Claimant was sending bundles of two or three weeks invoices combined to the respondent, rather than on a weekly basis.

117. The Claimant appeared to be saying she was submitting her requests late, and this was acceptable but then when the Respondent was late this was because she is a woman. We also accept the explanation by Weber regarding his own health being a genuine factor in respect of some delay. The Claimant’s own evidence is when she raised delays with Mr Weber prior to him going off, he apologised and said he was not well and that a lump had been found in his arm.

118. A sample of time sheets was before us for the four-month period before the Claimant’s employment was terminated. Given the pleaded case is about September 2020 anything after September 2020 is not directly relevant. However, the Claimant was taken through those time sheets in cross examination and despite having suggested delay was caused by Mr Weber during this period and because she was a woman; after he returned back to the business, in fact the evidence shows there were multiple reasons for the delay including her own late submissions of her time sheets. Having been taken though this evidence the Claimant says the real delays occurred prior to this period. This means more than 3 months before her contract was terminated and raises jurisdiction, which we address below.

119. The background to the delay can be summarised briefly. Mr Weber was unfortunately taken ill with a serious condition. He therefore was away from the business receiving radiotherapy and treatment for some six months. Whilst away the job of approving time sheets fell on Mr Harris. He accepts he was not always able to process the time sheets straight away but points to the fact the Claimant often

submitted them on a Friday afternoon, and this was too late for an immediate response. The Claimant does not gainsay this.

120. There is clearly no ulterior intent from Paul Harris. This was simply a management issue created by the absence of Mr Weber, the fact the Claimant's agency had a distinct set up from all the other agency workers (a paper submission rather than electronic) and the timing of the Claimant's submissions. The Claimant has shown she asked for pay to be sorted out because Mr Weber had delayed in September 2020 but not that the reason had any connection to her being a woman. We accept and prefer his evidence. Further, as Counsel pointed out. It would be a rather odd position for Mr Weber to have delayed the Claimant's pay because she was a woman to then pay her promptly on his return to work.

(b) The Claimant raised concerns to David Peralta concerning pay disparity in January 2021.
(c) The Claimant raised concerns to Lee Shimwell concerning pay disparity in January 2021.
(d) The Claimant raised concerns to Jon Humpherson concerning pay disparity in May 2021.

121. We have taken these three allegations together as they deal with the same subject. As we have set out above, the Agency negotiated on the Claimant's behalf for this role as per the contract. They produced a curriculum vitae. The Respondent offered the Claimant the rate proposed but for a different role. The Claimant and the agency accepted that rate. The rate was £275.00 to the claimant and a percentage to the agency. The Claimant knew and accepted this rate and worked to this rate between June 2020 and January 2021. This was a commercial arrangement for the supply of the Claimant's services in a temporary role. It was not a negotiation for employment.

122. In the Claimant further case at page 31 of the bundle she says,

"*Just to be clear that I've contacted Lee Shimwell, Senior Finance Manager for the Rolling Stock during Andreas Weber's sick leave and explained the pay gap. His words were ''I'm sure it's only an oversight, speak to Andreas, I'm sure he will sort it out.' In*

addition, I've also contacted Jon Humpherson, Head of Operations and he said the same. 'Speak to Andreas, he will sort it out'."

123. Mr Peralta says,

"10.I received an email from the Claimant to myself and Lee Shimwell in January 2021 querying her rate as compared with two other contractors. Lee Shimwell was acting as her line manager and took up the discussion with her. I heard nothing further in my many conversations with her so assumed the matter was mutually resolved."

124. In the email dated 29 January 2021 at page 242 the Claimant says,

"*I have found out today that a contractor who was onboarded at the same time I did and who was given a lower-level role within the EL Finance Team has in fact being paid £50 more per day that I'm. I'm definitely comparing basic day rates (also confirmed with Randstad) and excluding any mark-up. I've only accidentally came across this after conversation with Olcay, so wanted to check the rate… I have written to Andi about it, but unfortunately unable to forward you an email, as sent encrypted and my Smart Card is currently not working."*

125. We note the Claimant does not saying or suggest this is because she is a woman. However, the Claimant does say "*I hope some sort of valid excuse can be provided."* We accept this implies she wants some explanation as it is potentially in her mind unfair but not that the unfairness is because she is a woman. The Claimant does not suggest in this email she had any basis to believe this difference with this one individual was because she was a woman.

126. At page 277 we have seen the email the Claimant had sent to Mr Weber but he is off sick, and we accept it was not unreasonable for him not to have responded to that email at that time. He also points out that when he returns to the business the Claimant does not take this up with him but go above his seniority. The Claimant has not explained why she did this. What the emails show is that the Claimant sought to use the information she says she accidently acquired about the pay of another person

as leverage to negotiate a new rate. In the course of those negotiations the Claimant says,

"I get paid a rate of day rate of £275 per day whilst other Project Accountants who are TPW in the team have been paid £300 per day. I've been given the responsibility by Andi to lead the team whilst paid less than my direct reports who are also TPW. You can imagine what this does to you on a daily basis. My agency has initially contacted Siemens regarding my rate, but Siemens (assume Andreas or Phani) have rejected to increase the rate even to what we pay other Project Accountants in the team who are TPW's (e.g. Colin Sagar was on £300 pd and so was Alex Hurd).
Proposal for resolution. Please can my rate be reviewed retrospectively and be brought to the level we pay other TPW's Project Accountants in the team, so £300 pd. In addition, an increased rate should be applied because I've been put by Andreas to lead the team and my work deliverables and hours had to reflect that. So, proposed shy increase of £30 per day to £330.
I'd be grateful if you could please discuss the above with Andreas. If you have any queries regarding this, happy to discuss it further as needed."

127. The response is that Mr Weber agrees to these new terms and backdates the Claimant's pay on these new terms to January 2021 when she first asked. He told us he did this because he accepted his sickness absence had caused a delay in his addressing this request. We do not accept this had anything to do with the Claimant being a woman. The reality is these were commercial negotiations, and the original rate was agreed. Despite the Claimant seeking to use three comparators before us we note, see Direct discrimination claim, that in fact they are not appropriate comparators (see below). Further, the Claimant made it clear in her evidence to us that she suffered no detriment by raising the pay issue with these individuals.

(e) The Claimant raising an official complaint into Siemens HR in July 2021, together with Ms Cortez and Ms Mistry and supporting their disclosure that he had mistreated them.

128. We have been referred to emails within pages 280- 295 which show the Claimant had been involved in supporting these two staff members in putting forward

some historic concerns regarding PP's management style. There is no evidence she raised an official complaint if this is meant to mean a formal complaint. At its highest the Claimant is telling the Respondent that staff have raised concerns with her. Upon receipt of that information the Respondent initiates its internal procedures to hold a meeting with the individuals and Human Resources. Mr Weber confirmed that little in the way of actionable complaints came out of those meetings. The individuals did not raise any formal complaints and did not take up the Respondent's offer to go through mediation. We conclude it is inaccurate to characterise what the Claimant did as raising an official complaint. At best she signposts the staff to HR and management without getting into any of the particulars. In fact, we note that in the email exchange she made it clear that, as she had no knowledge of the historic issues, she did not wish to be involved in the process going forward.

129. The Claimant says she was supporting her staff as a line manager but in fact we note that she had earlier in the process been very critical of those staff members and their working practices. In her witness statement she seems to admit that this changed when they complained about Mr Phani. Mr Weber points to the fact the Claimant had a motive to want the staff to pursue a complaint against Mr Phani and that was because she was only temporarily in his role and on his return, she would no longer be required. He said,

"18. Problems really began to escalate in my view when it became apparent that that Phani Pingili may be returning to the department because his secondment was ending and naturally it would have meant also the end of the Claimant's engagement. The Claimant made it clear that she was unhappy at the prospect of Phani Pingili returning. This may be naturally expected if the Claimant were afeared that the return of Phani Pingili would result in her assignment coming to an end. However, the prospect of Phani Pingili's return displacing the Claimant's role is not something I discussed with her. In fact, I had an aspiration to grow the finance team. I did explain the new planned team structure to the Claimant which also included a new Finance Lead role which would be reporting into the Finance Manager. I specifically encouraged the Claimant to apply for the new permanent role, but the Claimant decided not to do so."

130. We do not accept the Claimant made a protective qualifying disclosure. We also do not accept she believed she was passing on information that tended to show the same. We accept the Respondent's evidence and conclude she was motivated to refer her staff to the Respondent and create the appearance of issues around Mr Phani's performance because she wanted his job.

(f) The Claimant raising a complaint alleging that Phani Pingili had been behaved unprofessionally in the course of a meeting.

131. In the Claimant's witness statement she says,

"In Aug-21 I've had a meeting with Jonathan Humpherson and Andreas Weber to review the cost centres performance. Phani Pingili was invited into the meeting. I've experienced the worst, most humiliating, direct, loud personal attack targeted against me since I've started my career. He's attacked me saying how my work is substandard, that the utilisation analysis is wrong…Effectively he attacked me in an open, blatant, and forceful manner in front of Jonathan Humpherson and Andreas Weber. After 2-3 minutes I said that I'm going to make coffee/tea, as this is not. productive. Jonathan Humpherson and Andreas Weber did nothing about it. Jonathan left the meeting and Andreas Weber supported Phani's open and direct victimisation towards me. Total failure of the management/leadership.(Tribunal Bundle p.68, 80, 295)."

132. The Claimant does not particularise what was said or done that was taken by her in this way. Mr Weber told us,

"29. When the Claimant complained to me that she felt that Phani Pingili's conduct during the course of the meeting was unacceptable (Email on Page 146), I took the view that there while nothing untoward or unprofessional transpired at the meeting. It was clear that the Claimant took work related discussions as a personal slur. In response to the Claimant's email, I stated that it is important that we strive to work as a team. The conduct of the meeting was not unprofessional and merited no further steps from me as far as I was concerned. The Claimant did not allege that the conduct of Phani Pingili was discriminatory in any way, and I would deny that my response was in any way discriminatory toward the Claimant."

133. We felt strongly that if the behaviour or language had been as claimed by the Claimant, Mr Weber he would have dealt with it. He dealt with pay issues when aware of them, he dealt with staff complaints by involving HR. We prefer his account and find the Claimant has not shown the event was as she claimed. We are satisfied the Claimant would have raised a formal complaint if this had been the case. We also observed the manner in which she conducted herself in the hearing underlined the way she took any management discussion she didn't like as a personal criticism. There are multiple examples and Counsel took us through some of them. For our purposes it is sufficient to refer to three. Firstly, even on reflection the Claimant was unable to accept the discussions around the costing for the vehicle (van) were not a personal attack on her. Any reading of the emails shows there was no personal attack.

134. The Claimant became fixated during the hearing on the evidence from Mr Weber that he has categorised her as an individual with more central finance experience and a person with no rail experience. The Claimant suggested this was lies but in fact it was no more than his personal view about her curriculum vitae. The Claimant clearly took this personally and out of context and was offended when it was not offensive. Mr Weber was saying no more than that was his view. During the hearing when he saw how fixated the Claimant had become on this issue, he even offered her an apology and tried to explain again this was his view. The Claimant's submissions about this border on paranoid and in our view are entirely misconceived because nothing really turned on that point.

135. Finally, the Claimant accepted she had no rail contract experience but became overtly defensive about her project experience instead of accepting the same. The Respondent did not seek to suggest she did not have extensive project experience, but this was their way of seeking to understand why the Claimant would make the allegations she does in this case.

6. Did the Respondent subject the Claimant to detrimental treatment because of a Protected Act for the purposes of Section 27 (1) of the Equality Act 2010 by:
(a) Andreas Weber chastising the Claimant for emailing Jon Humpherson in May 2021.

136. The Claimant says " *I've emailed Danny Aisthorpe and Jon Humpherson Jun-21 hoping that they would speak with Andreas Weber about it. However, Jonathan Humpherson forwarded my email to Andreas Weber who consequently told me off for contacting Mr. Humpherson."*

137. Mr Weber told us he accepted a discussion took place, but he was simply telling the Claimant she did not need to go to Jon Humpherson. We do not accept this is accurately characterised as chastisement. He explained "*I was not telling you off and I asked you why not just speak to me. I missed the email in January and could have discussed it much earlier.*" We find there was no detriment.

(b) Andreas Weber refusing to backdate a Claimant for the period between June 2020 and December 2020.

138. We have already addressed this issue, but we find Mr Weber did not refuse, he simply backdated her pay to the date of her request. We find no detriment.

(c) Andreas Weber conspiring with Lorraine Copp to ignore complaints that Phani Pingili had mistreated Dipti Mistry and Talita Cortez.

139. We conclude there was no evidence of any conspiracy. The emails show standard employment practice holding meetings with the individuals who were employees with HR. It was perfectly normal not to invite the Claimant, either as a line manager or agency staff members when the individuals had their meetings. No detriment is shown.

(d) Andreas Weber playing down the Claimant's complaints that Phani Pingili had behaved unprofessionally in the course of a meeting, stating "The important thing is to listen to each other and communicate positively."

140. We refer here, back to our conclusions on this meeting as above. This is another example of the Claimant taking entirely appropriate management guidance as a personal attack. There was no detriment to the Claimant. We accept and find Mr

Weber was performing his role as the more senior manager in seeking to progress a working relationship in an appropriate manner.

(e) Terminating the Claimant's contract.

141. We have already addressed this. See above.

6. Did the Respondent subject the Claimant to detrimental treatment because of a Protected Act for the purposes of Section 27 (1) of the Equality Act 2010 compared to;

(a)Colin Saga

(b) Alex Hurd

(c)Malkit Niijher

142. It was the Respondent's evidence that Colin Saga had sought through his agency to negotiate an initial rate of £500 because he had specific rail experience. The Claimant could not gainsay this. As shown by page 459, once the Claimant had her pay backdated to January 2021, she ended up on a higher rate of pay than Colin Saga by £5 and remained on that rate until her termination in October 2021. He is therefore not a comparator on our findings.

143. The Claimant was involved in the negotiations for Mr Hurd's pay and so knew he was given £300 but also had many years rail experience. The Claimant therefore knew about his pay from the outset and did not query this vis a vie her own pay. In any event it was clear that when you took into account the agency rates, he was actually paid less than the Claimant and had been throughout and so could not be a comparator.

144. The evidence shows at page 478 that Mr Niijher was actually paid significantly less than the Claimant. He was paid £250 from the £283, paid to the agency. He therefore could not be a comparator.

145. 119. In the face of this evidence the Claimant suggested at the hearing that these individuals were not similar comparators, but this was her case. We find on the evidence the Claimant is not treated less favourably than any of her comparators and there was no evidence any difference was because the Claimant was a woman.
146. 120. There was no detriment to the Claimant.

8. Did the Respondent directly discriminate against the Claimant because of sex by failing to authorise time sheets promptly? The Claimant relies on the comparators as set out in Paragraph 7.

147. We have already addressed this with our findings above. This claim fails.

9. Did the Respondent directly discriminate against the Claimant because of sex by failing to properly address her concerns regarding pay discrepancy? The Claimant relies on the comparators as set out in Paragraph 7.

148. We have already addressed this above. The answer is no.

10. Did the Respondent directly discriminate against the Claimant because of sex by terminating her contract?

149. We have already addressed this above. The answer is no.

Jurisdiction

150. The Tribunal must decide whether the Claimant has brought claims within time limits set out within Section 123 of the Equality Act 2010 and Section 48 of the Employment Rights Act 1996.

Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

If not, was there conduct extending over a period?

151. The Respondent suggests anything that occurred before the 22 August 2021 is out of time. In fact, we believe this may be an earlier date because the Claimant lodged a claim with the Employment Tribunal on the 17 November 2021. Her ACAS period was 1 day from the 3 November 2021 through to the 4 November 2021. Three clear months would have been the 16 August 2021, but this does not account for the further period between the 4 November 2021 and the 17 November 2021. In the end nothing turns on the difference because we refused to extend time and those claims that are in time failed. However, for the sake of completeness and following Counsel for the Respondent submission:

2 (a) is out of time
2(b) and (c) are potentially out of time because there is no clear evidence as to the date when the discission took place.
2(d) and (e) is in time.

5(a) (d) out of time
5(e) potential in time but ultimately t official complaint
5(f) is in time as it is august 2021.

6(a) out of time
6(b) did not refuse to backdate pay but out of time June 2021
6(c) potentially in time as an act that might have been an act over the period.
6(d) in time August 2021

8. Out of time September 2020
9. The pay issue is resolved by 5 July 2021 and so is out of time
10. Termination of the employment is in time

If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
Why were the complaints not made to the Tribunal in time?

152. The Claimant has given no explanation for why the complaints to the Tribunal are not made in time in her case or in her witness statement. The Claimant has

throughout shown she has and can utilise legal advice, has shown her ability to access ACAS advice. The most we have is what the Claimant said when this issue was put to her,

"*My legal advisor never advised and when contract finished busy looking for a new job and family bereavement and sister passed away in October and you can imagine funeral and new job and father passe away September and sister October and very difficult time for me and whole family."*

153. The Claimant does not say any of the above prevented her from pursing any claim or how it had such an impact. She also told us,

"Put it as soon as realise important after spoke to legal advisor and had limited legal advice solicitor on fixed rate basis. Lay man can only action."

154. We accept in principle such close family bereavement might have the consequences of preventing an individual from being able to cope with pursuing or claim or taking legal advice. However, in this case there is inadequate evidence to show the Claimant fell within that category. We note she was able to make new job applications in October 2021 and was performing her role prior to that without any apparent impact beyond the way he accepts she handled herself just before termination. There is no medical or other evidence upon which we could draw a positive view. We therefore concluded the evidence did not show it would be just and equitable in all the circumstances to extend time. As we have said this is rather academic because we have decided after hearing all of the evidence. However technically this decision comes before any decisions on the substantive claims and so all those claims that are out of time fail.

155. For the same factual reasons as set out above (as applicable) and given the lack of any other evidence, we find the claims were not made in time as set out above and the Claimant has failed to show it was not reasonably practicable for the claims to be brought in time or within the period between the expiry of the time limit and the claim.

Employment Judge **Mensah**

Date 11.03.2024

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