Case Number 1300662/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss N Mokrani		**Jaguar Land Rover Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 9 May 2017

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For Respondent: **Mr T Sadiq (Counsel)**

Interpreter: **Ms AC de Sousa Mendes de Vale (French)**

JUDGMENT

The judgment of the tribunal is that:

1 The claimant's application for interim relief is refused.
2 Pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, the claimant's claim for unfair dismissal is struck out as having no reasonable prospect of success.
3 Pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, the claimant's claim for age discrimination is struck out as having no reasonable prospect of success.
4 The claimant's application for the response to be struck out is refused.
5 The claimant's application to amend the claim to include claims of sex and/or race discrimination and/or detriment is refused.

REASONS

Introduction

1 The claimant in this case is Miss Nawal Mokrani who was employed by the respondent, Jaguar Land Rover Limited, as a Senior Engineer from 5 October 2015 until 17 February 2017 when she was dismissed. The contemporaneous reason given for the claimant's dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 24 February 2017, the claimant claims that her dismissal was unfair - and automatically so, pursuant to the provisions of Section 103A of the Employment Rights Act 1996 (ERA). The claimant recognises that she is not time-served to bring a claim for unfair dismissal pursuant to the provisions of Section 98 ERA; the claim form also contained a claim for unlawful age discrimination. Having brought a claim for unfair dismissal for making protected disclosures, the claimant also seeks interim relief to prevent her dismissal having effect pending the trial of her claims.

3 The respondent admits that the claimant was dismissed: but maintains that she was dismissed for a reason relating to her conduct; and that the dismissal was lawful and fair. The respondent does not admit that the claimant made any protected disclosures such that Section 103A (ERA) is engaged; the respondent denies any discrimination. The respondent resists the claim for interim relief. In the response form, the respondent also included an assertion that the tribunal does not have jurisdiction to consider the age discrimination claim because of the absence of an ACAS Conciliation Certificate in respect of that claim. (The respondent does accept that the tribunal has jurisdiction to hear the unfair dismissal claim in the absence of such a certificate because of the ancillary claim for interim relief.)

4 Following receipt of the response form, Employment Judge Camp directed that there should be an Open Preliminary Hearing (OPH) to consider and determine the following issues: -

(a) The application for interim relief.
(b) The respondent's application for the claims to be struck out as having no reasonable prospect of success.
(c) Whether there should be a deposit order.

5 The OPH came on for hearing before Employment Judge Dean on 27 April 2017: she adjourned the hearing for lack of time; but enlarged the scope of the hearing to include the following: -

(a) The claimant's application for the response to be struck out as having no reasonable prospect of success; and/or whether the respondent should be ordered to pay a deposit.
(b) The claimant's application to amend her claim to include claims of sex and/or race discrimination; and claims for protected disclosure detriments.

6 Employment Judge Dean directed that today's hearing should proceed without oral evidence or cross examination. In considering the claims, the tribunal would take the claimant's case at its height; and in considering any necessary response, the tribunal would likewise take the respondent's case at its height.

The Evidence

7 The tribunal considered a witness statement from the claimant running to some 30 pages and 77 paragraphs in all. The tribunal was also provided with an agreed bundle of documents running to some 303 pages; and a further single document was admitted on the claimant's application on the morning of the hearing. This was an email dated 30 January 2017 from Dr Ralf Speth, the respondents Chief Executive Officer addressed to the respondent's workforce.

The Claimant's Case

Protected Disclosures

8 The claimant relies on having made a total of nine protected disclosures between 20 October 2016 and 14 February 2017. Four of these disclosures are said to have been made in writing; the remaining five are said to have been made orally at meetings. Details of the alleged disclosures are set out in the claimant's witness statement; where documents exist, copies are in the trial bundle. The alleged disclosures can be summarised as follows: -

Disclosure 1: Email dated 20 October 2016

(a) In this email, addressed to HR, the claimant raises a complaint regarding the management style of her then manager Mr Ben Neaves. She complains: "*I don't get along with my manager and his management methods. I don't want to work with him anymore. I lost any motivation to work with him and I would like to change the team and manager*." Later in the email, the claimant informs the reader that she had thanked her manager for giving her a project which she found very interesting - but he had apparently told her that he was considering removing her from the project.

Disclosure 2: Meeting with Mr John Hoyle – 3 November 2016

(b) At this meeting, the claimant simply reiterated the same complaint against her line manager from her email. She informed Mr. Hoyle that she didn't *"get along with the line manager".* The claimant alleges that she told Mr Hoyle that the line manager's *"behaviours and management style"* had *"caused concerns to other colleagues and previous team members who had left the team as a consequence"* and invited him to look into the history of the team to investigate the matter.

Disclosure 3: Formal grievances against Mr Neaves and Mr Hoyle – 10 November 2016

(c) The formal grievance included the same complaints against Mr Neaves and an additional complaint against Mr Hoyle for ignoring the claimant's concerns. The claimant described their behaviours as "*moral harassment and bullying".*

Disclosure 4: Meeting with Andrew Ferritt of HR - 28 November 2016

(d) The CL simply recounted the same facts *reported in my grievance report"* She alleges that she told Mr. Ferritt that other team members had concerns about the line manager's management style and had left as a result. Again, there are no notes of this meeting.

Disclosure 5: Email to the Director of Compliance and Ethics – 29 November 2016

(e) This email was a complaint of a personal nature against Mr Neaves; Mr Hoyle; Mr Ferritt. The claimant was dissatisfied with the handling of her initial complaint and subsequent grievance.

Disclosure 6: Meeting with Amy Reynolds of HR - 14 December 2016

(f) The claimant alleges that she discussed with Ms Reynolds that others in the team had been affected by the management style of Mr Neaves and had left the team.

Disclosure 7: Grievance Meeting with Andrew Storer - 25 January 2017

(g) The claimant states in her witness statement that she simply recounted the facts *"in the report"* which is presumed to be a reference to the formal grievance.

Disclosure 8: Written Grievance Appeal - 7 February 2017

(h) At the end of the email the claimant invites the respondent to investigate the impact of the management style on former members the team who have left.

Disclosure 9: Grievance Appeal Meeting with Mark Trowbridge - 14 February 2017

(g) The notes of the grievance appeal meeting confirm that the claimant said very little. She said for example, *"I will not say anything, I am tired"* and *"I will not recount it"*

Dismissal

9 The claimant's case on dismissal is very simple: she claims that it was because of her having made the above alleged protected disclosures that she was eventually disciplined and dismissed.

10 A detailed reading of the papers demonstrates that the first reference to disciplinary proceedings is contained in a letter dated 19 January 2017 advising the claimant that Mr Ben Wicksteed is investigating an allegation of lack of engagement with her immediate line management and failure to respond to requests by management. This letter comes three months after the first of the claimant's alleged protected disclosures.

11 It is clear from the papers that concerns had been expressed from as early as November 2016 that the claimant was simply refusing to engage with her managers or undertake any meaningful work or tasks. She was not attending work meetings; not responding to communications about work; and, when spoken to, she answered that she was not willing to discuss anything. During the grievance hearing on 25 January 2017, when asked about her current relationship with her team, the claimant's response was "*I am not working with them…." a*nd later, "…. *I am focusing on my grievance and things that interest me...*".

12 The claimant failed to attend an investigatory meeting as to her conduct on 20 January 2017; and again, failed to attend when the meeting was rescheduled for 26 January 2017. The documentation indicates that Mr Wicksteed completed his investigation; and concluded that there was a disciplinary case for the claimant to answer.

13 The documentation shows that the claimant was invited to a disciplinary meeting on 8 February 2017. She failed to attend; and the meeting was rescheduled for 10 February 2017. She again failed to attend; and the meeting was finally rescheduled for 17 February 2017. The claimant failed to attend on 17 February 2017; and the dismissing officer, Mr David Glanville, concluded that, because of her non-engagement, and her continued failure to attend meetings, including the disciplinary meetings, the claimant was guilty of gross misconduct. He decided that she should be summarily dismissed.

14 I have noted that, during the period of the disciplinary process (20 January 2017 - 17 February 2017), the claimant was present in the workplace; and she did attend grievance related meetings on 25 January 2017 and again on 14 February 2017.

Age Discrimination

15 No claim of age discrimination is articulated in the claimant's witness statement. In oral submissions, she articulated the claim in the following way: that she felt that her grievances were ignored; and she was eventually subject to disciplinary proceedings and dismissal; because the respondent did not wish to disrupt or dislodge its senior managers. She therefore felt that she had been treated less favourably than the senior managers concerned; and seniority in management is clearly related to age.

The Law

Protected Disclosures

16 **The Employment Rights Act 1996 (ERA)**

Section 43A: Meaning of 'protected disclosure'

In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.

Section 43B: Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following: -

(*a*) 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, or is likely to be deliberately concealed.

Section 43C: Disclosure to 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.

Section 103A: Protected Disclosure Dismissal

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

17 **Decided Cases – Protected Disclosures**

Cavendish Munro –v- Geduld **[2010] IRLR 38 (EAT)**
Smith –v- London Metropolitan University **[2011] IRLR 884 (EAT)**
Goode –v- Marks & Spencer Plc **UKEAT/0442/09**

The making of a protected disclosure must involve the disclosure of **information**; this involves the communication of **facts**. It is not sufficient merely to make allegations, to raise grievances about working conditions or simply to state an opinion.

Darnton –v- University of Surrey **[2003] IRLR 133 (EAT)**
Babula -v- Waltham Forest College **[2007] IRLR 346 (CA)**
Korashi –v- Abertawe Bro Morgannwg University Local Health Board **[2012] IRLR 4 (EAT)**

In order to bring a claim in respect of a protected disclosure it is sufficient that the employee reasonably believes that the matter he relies upon amounts to a relevant failure even if it turns out that this belief is wrong. What is important is the employee's reasonable belief in the factual basis for the disclosure. There are both objective and subjective elements to the question of whether a belief is reasonable. An uninformed lay person may reasonably believe that a set of circumstances suggest a relevant failure; whereas an expert may realise that further information would be required before such a conclusion was reasonably available.

Harrow London Borough Council v Knight **[2003] IRLR 140 (EAT)**

In order for liability to be established, the tribunal had to find that the applicant had made a protected disclosure; that he had suffered some identifiable detriment; that the employers had "done" an act or omission by which he had been "subjected to" that detriment; and that that act or omission had been done by the employers "on the ground that" he had made the identified protected disclosure.

The "ground" on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which caused him so to act. It is necessary in a claim under Section 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not to act) in the way complained of. Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough.

Orr –v- Milton Keynes Council **[2011] ICR 705 (CA)**

The tribunal is concerned with what is in the mind of the manager who actually makes the decision complained of.

Fecitt & Others v NHS Manchester **[2012] IRLR 64 (CA)**

Regarding the causal link between making a protected disclosure and suffering dismissal, Section 103A ERA will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower.

Kilraine v London Borough of Wandsworth **[2016] IRLR 422 (EAT)**

Langstaff J cautioned against determining the issue by asking whether the relevant words are "information" or an "allegation" since "very often information and allegation are intertwined…" and it is the words of the statute which must be applied namely whether it is disclosure of information. The question is whether there is sufficient by way of information to satisfy s43B and that is a question of fact for the tribunal. If the disclosure consists of a vague and unsupported allegation, it is less likely to qualify. The EAT considered whether the "third allegation" of bullying and harassment in a letter which said that *"since the end of last term, there have been numerous incidents on inappropriate behaviour towards me, including repeated side-lining, all of which I have documented"* amounted to a qualifying disclosure. It upheld the ET's view that it did not because it was too vague and said nothing specific, and it was difficult to see how what was said came within one of the sections. The EAT held that the ET was also entitled to reject the "fourth allegation" as a qualifying disclosure that

the claimant's line manager had not supported the claimant when she had raised a safeguarding incident; there was no obvious reason why what was said by way of information, assuming it to be such, could fall foul of any duty under the sections.

Eiger Securities LLP v Korshunova **[2017] IRLR 115 (EAT)**

As regards s43B(1)(b) and failure to comply with any legal obligation, the EJ must identify the source of the legal obligation to which the claimant believes the respondent was subject and how they failed to comply with it. Whilst the identification of the legal obligation does not have to be detailed or precise it must be more than a belief that certain actions are wrong. Actions may be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.

Parkins v Sodexho Ltd **[2002] IRLR 109 (EAT)**
Chesterton Global Ltd v Nurmohamed **[2015] IRLR 614 (EAT)**

The requirement to show that the disclosure was made in the public interest was introduced in 2013 by amendment to s43B(1) ERA. The effect was to reverse the decision in ***Parkins*** which held that a breach of a legal obligation owed by an employer to an employee under her or his own contract of employment might constitute a protected disclosure. The words "in the public interest" were introduced to prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. In ***Chesterton***, Supperstone J held that the public interest test was satisfied on the facts involving a disclosure that the bonuses of 100 senior managers would potentially adversely affected by account manipulation by the respondent's management and that a well-known firm of estate agents was deliberately mis-stating £2-£3 million of actual costs and liabilities throughout the entire office and department network.

Age Discrimination

18 **The Equality Act 2010 (EqA)**

Section 4: The protected characteristics

The following characteristics are protected characteristics:

age;

Section 13: Direct discrimination

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

Section 19: Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if

(*a*) A applies, or would apply, it to persons with whom B does not share the characteristic,
(*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(*c*) it puts, or would put, B at that disadvantage, and
(*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are

Age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(*a*) 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.

(5) A duty to make reasonable adjustments applies to an employer.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

19 **Decided Cases – Age Discrimination**

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**
JP Morgan Europe Limited –v- Chweidan **[2011] IRLR 673 (CA)**

There can be no question of direct discrimination or discrimination arising from disability where everyone is treated the same.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Rihal –v- London Borough of Ealing **[2004] IRLR 642 (CA)**
Anya –v- University of Oxford **[2001] IRLR 377 (CA)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
R –v-Governing Body of JFS **[2010] IRLR 186 (SC)**

In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on the hypothetical comparator but to ask the crucial question "why did the treatment occur?" In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Interim Relief

20 **The Employment Rights Act 1996 (ERA)**

Section 128: Interim relief pending determination of complaint

(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or
(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met,
may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

Section 129: Procedure on hearing of application and making of order

(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or
(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and
(b) in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or
(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and
(b) specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and
(b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) fails to attend before the tribunal, or
(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),

the tribunal shall make an order for the continuation of the employee's contract of employment.

Section 130: Order for continuation of contract of employment

(1) An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force—

(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and
(b) for the purposes of determining for any purpose the period for which the employee has been continuously employed,

from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.

(2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.

(3) Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—

(a) in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and
(b) in the case of a payment for any past period, within such time as may be specified in the order.

(4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.

(5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, goes towards discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.

(6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.

(7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.

21 **Decided Cases – Interim Relief**

Taplin v Shippam Ltd **[1978] ICR 1068 (EAT)**

The meaning of “likely” for the purposes of Section 129(1) ERA means that the Claimant must show that she has a “pretty good” chance that she will win at the full hearing, which is more than a merely a 51% probability.

Ministry of Justice v Sarfraz **[2011] IRLR 562 (EAT)**

In the context of an interim relief application involving a Section 103A ERA automatic unfair dismissal claim, a Judge has to decide that it is likely that the tribunal at the final hearing would find five things: (1) that the claimant had made a disclosure to his employer; (2) that he believed that the disclosure tended to show one or more of the things itemised at (a)-(f) under s43B(1); (3) that the belief was reasonable; (4) that the disclosure was made in the public interest; and (5) that the disclosure was the reason or principle reason for dismissal. “Likely” connotes something nearer to certainty than mere probability.

Strike Out / Deposit

22 **The Employment Tribunals Rules of Procedure**

Rule 37: Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) That it is scandalous or vexatious or has no reasonable prospect of success;
(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) For non-compliance with any of these Rules or with an order of the Tribunal;
(d) That it has not been actively pursued;
(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in Rule 21 above.

Rule 39 Deposit orders

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

23 **Decided Cases – Strike Out/Deposit**

Anyanwu –v- South Bank Students' Union **[2001] ICR 391 (HL)**

Highlighted the importance of not striking out discrimination claims except in the most obvious cases - as they are generally fact sensitive and require a formal examination of the evidence to make a proper determination.

Ezsias –v- North Glamorgan NHS Trust **[2007] ICR 1126 (CA)**

A similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why employer took a particular step. It will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when central facts are in dispute.

Shestak –v- RCN **EAT 0270/08**

An example of an exception may be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The tribunal was upheld when undisputed documentary evidence in the form of emails which could not, taken at their

highest, support the claimant's interpretation of events. This justified a departure from the usual approach that discrimination claims should not be struck out at a preliminary stage

Balls –v- Downham Market High School and College **[2011] IRLR 217 (EAT)**

The test is not whether the claim is "likely to fail".
The test is not whether it is "possible that the claim will fail".
The test cannot be satisfied by consideration of the respondent's case.
The tribunal must take the claimant's case at its highest.

Discussion

24 I have considered the claimant's case as presented to me at its height: I have approached the task in the following way: -

(a) I have asked myself the question what are the prospects of the claimant establishing at trial firstly, that she made protected disclosures to her employer; secondly, that she was dismissed by reason of having done so; and thirdly, whether or not she suffered discrimination by reason of her age?
(b) If the answer to this question is that she has no reasonable prospect of establishing these matters then the correct course is for her claims to be struck out pursuant to Rule 37(1)(a).
(c) If the answer is that there is little reasonable prospect of success then the correct course is for me to consider making a deposit order pursuant to Rule 39.
(d) If, however, it appears that the claimant is "likely" to succeed in her claim for automatic unfair dismissal, then she would be entitled to the interim relief sought.

Disclosure of Information

25 I have carefully considered the content of each of the claimant's alleged disclosures. I find that they were not disclosures of any information tending to show any of the matters listed in Section 43B(1)(a) – (f) ERA. Merely to complain that the claimant *did not get along with her manager* or that *she disapproved of his management methods* or even that she had been subject to *moral harassment or bullying* does not amount to a disclosure of information. Nowhere is there any information provided as any specific incidents of unacceptable behaviour; or details of anything which may be regarded as moral harassment or bullying.

26 It is the claimant's allegation that at her meeting with Mr Hoyle on 3 November 2016 when she thanked him for the opportunity to work on a particular

project he immediately threatened to remove her from the project - stating that the fact that she was complaining would impact on her performance. Disclosure of this would potentially have been a disclosure of specific information as to unacceptable behaviour on Mr Hoyle's part - but there is no reference to this threat when the claimant raised a formal grievance about Mt Hoyle (Disclosure 3).

Public Interest

27 Even if the claimant could establish that she had given specific information about specific instances of unacceptable behaviour on the part of Mr Neaves and/or Mr Hoyle, then, even on the claimant's analysis, the relevant section would be Section 43B(1)(b) ERA - namely the breach of the claimant's own contract of employment. Disclosures showing or tending to show such a breach are not necessarily made in the public interest as opposed to the claimant's private interest. The claimant has attempted to bring these matters within the public interest by reference to others who had previously left the team by reason of the same alleged management failings. However, whilst in her witness statement the claimant recalls a considerable amount of such information provided by others to her, she does not allege that she passed on that detail to the respondent. She provided no names; and no instances of any other individual who had left the team for these reasons. Indeed, in the main the claimant is simply challenging the respondent to investigate the circumstances under which others have left; and predicting that upon such investigation they would unearth evidence consistent with her own complaints. Accordingly, in my judgement, she did not provide any information which can properly be regarded as having been in the public interest.

28 For these reasons I find that there is no realistic prospect that the claimant will establish at trial that she made any disclosures qualifying for protection.

Dismissal

29 I have nevertheless gone on to consider the prospect of the claimant establishing that the complaints and disclosures that she did make were causally linked to her dismissal. The evidence is clear on the papers: that from as early as November 2016 the respondent's managers were concerned that the claimant had withdrawn all co-operation. They felt that she was undertaking no meaningful work; she was not responding to legitimate communications; and, by her own admission at the grievance meeting on 25 January 2017, *she was not working with her managers; she was not working; and was focusing only on her grievance and things which interested her*. It is clear that managers concluded that the claimant was simply unwilling to cooperate with anyone unless and until her grievance was resolved to her satisfaction (she wished to be transferred to

another team). This conduct was regarded as gross misconduct and was the reason for the claimant's dismissal.

30 In my judgement, there is no realistic prospect of the claimant establishing that the reason for her dismissal was the fact of have her having made complaints and raised grievances regardless of whether these constituted protected disclosures (which I have found they do not).

Age Discrimination

31 Even on the claimant's account contained in her detailed witness statement, there is no basis to conclude that the manner in which the claimant's grievances were dealt with; the decision to discipline her; and the decision ultimately to dismiss her; were in any way related to her length of service or that of her line managers. The suggested link between the outcome of the grievances; the decision to dismiss; and the claimant's age; is wholly speculative and even if one engages in the required speculation the link remains very tentative.

32 In my judgement, there is no realistic prospect that the claimant will establish facts before the tribunal from which discrimination on grounds of age could be properly inferred.

Conclusions

Strike-out

33 For the above reasons, I find that the claims have no reasonable prospect of success and pursuant to Rule 37(1)(a) they are accordingly dismissed.

Deposit

34 In view of my ruling under the provisions of Rule 37 it is clearly unnecessary to go on to consider the possibility of a deposit order.

Interim Relief

35 For the same reasons, I inevitably find that it is not "likely" that the tribunal will find for the claimant under Section 103A ERA; and she is not therefore entitled to interim relief under the provisions of Section 129 ERA.

Amendment

36 The claimant's claims having been struck out in their entirety it is not now possible to move permit the admission of fresh claims by way of amendment. If

the claimant wishes to pursue such claims it will be necessary for her to present new claim forms - no doubt she will take advice and have regard to relevant time limits which may by now have expired.

Claimant's Strike-out Application

37 It also follows from the above that I find that there is no basis to strike out the response to the claims which appear to me to have been appropriately made.

Employment Judge Gaskell
2 August 2017

Judgment sent to Parties on

4 August 2017
C Campbell