EMPLOYMENT TRIBUNALS

Claimant: Miss Jane Marie Beresford

Respondent: Leicestershire Partnership NHS Trust

PRELIMINARY HEARING

Heard at: Leicester (in public) **On:** 17 March 2017

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For the respondent: Jennifer Danvers, counsel

JUDGMENT & ORDER

(1) By consent, the name of the respondent is amended to Leicestershire Partnership NHS Trust.

(2) By consent, the claimant has permission to amend her claim form so that the effective date of termination of her employment is 15 November 2017. There is no need for her to submit an amended claim form.

(3) All complaints other than those set out in paragraph (4) below: are dismissed because they have no reasonable prospects of success and/or because the tribunal has no jurisdiction to deal with them; alternatively, were not made in the claimant's claim form and the claimant is refused permission to amend to add them to her claim.

(4) The complaints not struck out by paragraph (2) above and/or in relation to which no decision has yet been made about giving permission to amend are:

a. an unfair dismissal complaint ("whistleblowing dismissal") relying on section 103A of the Employment Rights Act 1996 ("ERA");

b. a claim for damages for breach of contract by not paying wages in respect of the period from 9 to 15 November 2016 and/or by not giving 4 weeks' notice of termination of employment and/or by paying inadequate compensation for accrued but untaken holiday on the termination of employment ("breach of contract claim"), not including any claim relating to the period after 13 December 2016;

c. a complaint under the Working Time Regulations 1998 for compensation for accrued but untaken annual leave on the termination of employment;

d. complaints of detriment for making one or more protected disclosures ("whistleblowing detriment") under ERA sections 47B and 48;

e. complaints of harassment related to disability under section 27 of the Equality Act 2010 ("EqA") concerning comments allegedly made by Louise Martin about the claimant being "*deaf*" and having a "*memory problem*" that are referred to in section 5. of the claimant's "*Particulars of Claim*" document dated 18 February 2017 ("Particulars of Claim") ("disability discrimination claim");

f. complaints of direct discrimination because of age and/or harassment related to age under EqA sections 13 and 27 concerning the comments referred to in sub-paragraph e. immediately above and comments about a goldfish having died and about the claimant's grandchildren referred to in section 5. of the Particulars of Claim ("age discrimination claim").

(5) The complaints that by paragraph (3) above are struck out and/or the claimant is refused permission to amend to add include the following:

a. all and any complaint of unfair dismissal under the ERA other than one of whistleblowing dismissal;

b. all and any complaints under the EqA whatsoever (including any relying on the protected characteristic of marriage and civil partnership, and any victimisation complaint) other than the proposed complaints of direct discrimination and/or harassment referred to in paragraphs (4)e. and (4)f. above;

c. any complaint about the respondent, after dismissal, cancelling an Occupational Health appointment that had been arranged for the claimant;

d. any complaint for breach of contract and/or for compensation for accrued but untaken holiday relating to the period after 13 December 2016;

e. any complaint relying on the Protection from Harassment Act 1997;

f. any complaint of breach of regulations made under the Health and Safety at Work Act 1974 and/or for negligence / breach of a common law duty of care;

g. any complaint of defamation;

h. any complaint about "*public offences*" and/or under the Children Acts of 1989 and 2004;

i. any complaint about not providing reasons or adequate reasons for dismissal;

j. other than, potentially, as part of the whistleblowing detriment claim, any complaint about failure to deal properly and procedurally correctly with discipline and/or grievances;

k. other than, potentially, as part of the whistleblowing detriment claim and/or of the proposed complaints of direct discrimination and/or

harassment referred to in paragraphs (4)e. and (4)f. above, any complaint of bullying and/or stalking;

l. other than as part of remedy in relation to a successful complaint of whistleblowing detriment, whistleblowing dismissal, and/or of direct discrimination and/or harassment, any complaint about failure to comply with an ACAS Code of Practice and/or about psychological / psychiatric injury.

(6) On or before 24 March 2017, the claimant must provide the following information in writing to the tribunal and to the respondent:

a. how much additional holiday pay – or compensation for accrued but untaken holiday – would be due to the claimant if the respondent was entitled not to give her notice of dismissal, i.e. if the calculation date were 15 November 2016. She must set out how many hours in total she would be entitled to be paid for and what the relevant hourly rate was;

b. the same information as in a. immediately above, but if the respondent was obliged to give her 4 weeks' notice of dismissal, i.e. if the calculation date were 13 December 2016.

(7) Unless the claimant complies with the order in paragraph (6) above, all and any complaints she is making or wanting to make in respect of holiday and/or holiday pay (including any claim, whether for breach of contract or otherwise, for compensation for accrued but untaken holiday) shall be dismissed without further order pursuant to rule 38, except for a claim for, or for compensation for, 7.63 hours at the rate of £9.83 per hour.

(8) This Judgment & Order took effect on 17 March 2017. Reasons for it were given orally on that date and written reasons will not be provided unless a written request for them is presented by any party within 14 days of the sending of this written record of the decision.

RESERVED JUDGMENT & ORDER

(i) For reasons set out below, and further to paragraphs (6) and (7) above, the whole claim relating to holiday and/or holiday pay (including any claim, whether for breach of contract or otherwise, for compensation for accrued but untaken holiday) was dismissed pursuant to rule 38 on 25 March 2017, apart from a claim for £75, being 7.63 hours at the rate of £9.83 per hour.

(ii) The claimant has permission to amend her claim by adding to it the following complaints:

a. a complaint that she was unfairly dismissed pursuant to ERA section 103A for making either or both of the alleged protected disclosures identified in paragraph 15 of the Reasons, below;

b. the complaints of detriment pursuant to ERA sections 47B and 48 set out in paragraph 21 of the Reasons, below, relying on the alleged protected disclosures identified in paragraph 15 of the Reasons, below;

c. complaints of direct age discrimination, further and alternatively of harassment related to age, about the comments referred to in paragraph (4)f. above and comments about a goldfish having died and about the claimant's grandchildren referred to in section 5. of the Particulars of Claim.

(iii) Permission to amend to add a disability discrimination claim is refused.

(iv) **DEPOSIT ORDERS UNDER RULE 39**

a. For the reasons set out in particular in paragraphs 17.2 to 17.6 and 18 below, the Employment Judge considers that the allegations and arguments that the claimant made relevant protected disclosures and that this was the reason or principal reason she was dismissed have little reasonable prospect of success. The claimant is **ORDERED to pay a deposit of £10 not later than 15 May 2017** as a condition of being permitted to continue to advance those allegations and arguments. If the claimant fails to pay the deposit by the date specified, those allegations and arguments shall be struck out without further order.

b. For the reasons set out in particular in paragraphs 17.2 to 17.5 and 22 below, the Employment Judge considers that the allegations and arguments that the claimant made relevant protected disclosures and that she was subjected to detriments as a result have little reasonable prospect of success. The claimant is **ORDERED to pay a deposit of £10 not later than 15 May 2017** as a condition of being permitted to continue to advance those allegations and arguments. If the claimant fails to pay the deposit by the date specified, those allegations and arguments shall be struck out without further order.

c. For the reasons set out in particular in paragraphs 30.4 below, the Employment Judge considers that the allegations and arguments that she was subjected unlawful age discrimination (as set out in paragraph 29 below), have little reasonable prospect of success. The claimant is **ORDERED to pay a deposit of £10 not later than 15 May 2017** as a condition of being permitted to continue to advance those allegations and arguments. If the claimant fails to pay the deposit by the date specified, those allegations and arguments shall be struck out without further order.

d. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposits.

e. Each of the above deposit orders is a separate order, such that if the claimant wishes to pursue all allegations and arguments to which those orders relate, she will have to pay a total sum of **£30**.

(v) The claimant must inform the respondent and the tribunal **by 16 May 2017**: whether or not the deposits have been paid; if at least one but not all of them is being paid, which are and which aren't being paid.

(vi) The parties must **by 25 May 2017** submit to the tribunal proposed case management orders for the future conduct of this matter, agreed if at all

possible, including a realistic time estimate for any further hearing(s) and any relevant dates of unavailability.

REASONS

Introduction & background

1. These are the reasons for the above Reserved Judgment & Order.

2. The claimant was employed by the respondent as a Community Nurse from 15 August 2016 until her summary dismissal, ostensibly for gross misconduct, effective on 15 November 2016. By way of background, I refer to the written record of the preliminary hearing that took place before Employment Judge Solomons on 23 January 2017 and to the Reasons, given orally on the day, for the above [unreserved] Judgment & Order. In light of that Judgment & Order, the only issues that were left to be decided by me were:

   2.1 should the claimant be permitted to amend her claim to add the whistleblowing dismissal complaint and, if so, should a deposit order [rule 39] be made in relation to that complaint?

   2.2 should the claimant be permitted to amend her claim to add the whistleblowing detriment complaints and, if so, should a deposit order be made in relation to any of those complaints?

   2.3 should the claimant be permitted to amend her claim to add the disability discrimination claim and the age discrimination claim and, if so, should a deposit order be made in relation to any of those complaints?

3. The issues related to amendment and making deposit orders, not to striking out pursuant to rule 37 for lack of prospects of success. The complaints with which I am concerned are not made in the claim form, which was presented on 28 November 2016 following the claimant's dismissal on 8 November 2016 and a period of early conciliation from 27 October to 23 November 2016. The only direct or indirect reference to whistleblowing in the claim form is the single word "*Whistleblowing*" in section 8.1. There is no mention of disability discrimination and the only mention of disability is in section 12, in response to questions about whether the claimant has a disability. The only reference to age or age discrimination is a cross in the "*age*" box in section 8.1.

4. However, one of the issues that this hearing was set up to deal with was whether particular complaints should be struck out as having no reasonable prospects of success; and I anyway need to consider the merits of complaints the claimant is wanting to add by amendment in relation to deposit orders. There would be no point in me allowing an amendment to add a particular complaint if the complaint to be added was liable to be struck out as having no reasonable prospects of success. If any complaint the claimant wants to add by amending her claim would have no reasonable prospects of success, I shall simply not give permission to amend. If, on the other hand, a complaint the claimant wants to add by amendment merely has little reasonable prospects of

success, but the application to amend is otherwise sound, I think I should allow the amendment and then consider making a deposit order.

5. I also note that the claimant first sought to make these claims – or at least versions of them – in the case management agenda submitted on 13 January 2017 ("Agenda").

Law

6. So far as concerns whether I should permit the claimant to amend, my starting point is the guidance given by the EAT in the well-known case of Selkent Bus Co Ltd v Moore [1996] IRLR 661. I must take all relevant circumstances into account; time limits are important but not necessarily determinative. My focus must, though, necessarily be on the overriding objective set out in rule 2, which did not, of course, exist when Selkent was decided; albeit there is no conflict between the overriding objective and the Selkent guidance.

7. In assessing the prospects of success of the complaints the claimant wants to add by amendment, I take into account, in particular, paragraph 24, part of Lord Steyn's speech, of the House of Lords' decision in Anynanwu v Southbank Student Union [2001] ICR 391 and paragraphs 29 to 32 of the Court of Appeal's decision in North Glamorgan NHS Trust v Ezcias [2007] EWCA Civ 330. When deciding whether a claim has "*no reasonable prospects of success*", the test to be applied is whether there is no significant chance of the trial tribunal, properly directing itself in law, deciding the claim in the claimant's favour. Subject to one proviso, in applying this test I must assume that the facts are as alleged by the claimant. The one proviso or qualification is that I do not make that assumption in relation to any allegation of fact made by the claimant so implausible that I think there is no significant chance of any tribunal, properly directing itself, accepting the allegation as true.

8. Striking out a tribunal claim – or, in this case, refusing the claimant permission to amend and effectively saying to her "you may not bring this claim" – is an exceptional thing to do and before I will do so the respondent has to cross a very high threshold indeed. Equally, however, the overriding objective is not served by permitting claims that are bound to fail to continue. Doing so benefits no one, least of all the claimant.

9. The law as to the meaning of "*little reasonable prospects of success*" in rule 39, which relates to deposit orders, is not as clear as perhaps it should be, but my understanding of the test I have to apply is that it is the same as that set out above in relation to "*no reasonable prospects of success*" but with the word "little" replacing the word "no" in the phrase "*no significant chance*".

10. As mentioned above, time limits are an important factor for me to take into account in deciding whether to give the claimant permission to amend. The time limits governing the discrimination complaints are set out in EqA sections 123, which I refer to and which won't set out here.

11. In terms of how, at trial, the "*just and equitable*" discretion under EqA section 123(1)(b) would be exercised, I remind myself that: all the circumstances must

be taken into account, usually including (suitably adapted so they make sense in an employment law context) the factors (a) to (f) set out in section 33(3) of the Limitation Act 1980 ("section 33"); an important, but not necessarily determinative, factor is likely to be the balance of prejudice; time limits are there to be obeyed; it is for the claimant to persuade the tribunal that it is just and equitable to extend time; if the claimant is ignorant of time limits this does not in and of itself justify extending time. I have sought to apply the law in relation to this as summarised in paragraphs 9 to 16 of the EAT's decision in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283.

12. Following the decision in Rathakrishnan, it is often suggested that the "*just and equitable*" discretion should almost always be exercised in the claimant's favour unless the respondent can show significant prejudice. I disagree. If this were so: it would effectively mean it was no longer the claimant who has to persuade the tribunal to exercise its discretion but, instead, the respondent who had to persuade it not to; it would in practice make the limitation period for discrimination complaints significantly longer than 3 months, because a respondent is rarely, if ever, going to be able to demonstrate that it has been significantly prejudiced by a delay in bringing proceedings of less than a year or two.

13. So far as concerns the time limits issue in relation to the whistleblowing detriment complaints, I note: the wording of ERA sections 48(3) and (4); in relation to whether there was "*an act* [that] *extends over a period*" or "*a series of similar acts or failures*", Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358.

Whistleblowing dismissal

14. An important preliminary question is: what is the whistleblowing claim the claimant wants to bring? The full answer to that question did not become clear until this hearing. Indeed, the bulk of the hearing – which lasted a full day, to 4.45 pm – was spent trying to clarify with the claimant what her case is.

15. The claimant ("C") wishes to rely on the following alleged protected disclosures:

    15.1 on or about 17 August 2016, she did a home visit on a particular child with a colleague called Jane Wright ("JW"). Afterwards, C asked JW if she had noticed anything in particular about the child. C said she was concerned about the child's weight and noted that the child's underwear was very dirty. JW did not respond, or otherwise show any interest in what C was saying. That is all that was said. I'll call this "disclosure 1";

    15.2 on or about 24 August 2016, C spoke to one of her managers, Louise Martin ("LM"). She told LM that she had a concern about a child she had seen with JW on 17 August, that JW would not talk to her about it, and that she wanted the matter looked into. She did not say what the concern was. LM said nothing more than something about there having been a breakdown in communication between C and JW and that communications between the two of them needed to be better. That was the extent of the conversation between them. I'll call this "disclosure 2".

16. Both alleged protected disclosures are relied on in relation to the proposed whistleblowing dismissal complaint.

17. The following arguments are put forward in opposition to the application to amend to add this complaint:

    17.1 the first time disclosure 2 was put forward as a relevant alleged protected disclosure was in the Particulars of Claim of 18 February 2017 (more than 3 months after the effective date of termination) and despite being ordered to do so by Employment Judge Solomons, the first time the claimant identified what the alleged protected disclosure(s) consisted of was orally, at the hearing before me, nearly a month later. She has put forward no explanation at all for her failure to provide this information sooner;

    17.2 it is difficult to identify – and the claimant has not really attempted to do so – what parts of ERA section 43B(1) are potentially engaged by the disclosures. If, in relation to disclosure 2, it is said to be subsection (b), what is the "*legal obligation*" that the claimant alleges she reasonably believed JW had failed to comply with?;

    17.3 protected disclosures come in all shapes and sizes. It is not necessarily the case – not remotely – that any protected disclosure of any kind made in any circumstances provides a possible motive for somebody to subject the maker of the protected disclosure to a detriment. If whistleblowers are persecuted it is almost always for one of two reasons: either they have caused some inconvenience or embarrassment, or something of that kind, by blowing the whistle and the person subjecting them to detriment is punishing them and/or making an example of them; or they have blown the whistle to a certain level and the person subjecting them to detriment is doing so by way of threat, with a view to dissuading them from blowing the whistle again and/or to other people such as senior managers within a company or the regulatory authorities. When asked by me why, in her view, either JW or LM would have wanted to get at her for making disclosure 1 or disclosure 2, the claimant didn't really have an answer; indeed, she said she didn't know. The best she could come up with was speculation that, perhaps, JW hadn't liked being questioned by someone who had just started and that LM perhaps wanted to stick up for JW. She did not suggest there was any evidential basis for this speculation in relation to LM and, even putting the claimant's case at its reasonable highest, there is barely any evidential basis for what she is alleging about JW;

    17.4 this is not a case where it is suggested the motive was a cover-up. And if this were being suggested, it would be highly implausible. If an employer wants to keep a whistleblower quiet, summarily dismissing her without compensation and a compromise agreement is almost the last thing to do. It is likely to be counterproductive if that is the aim;

    17.5 it doesn't even seem to be the claimant's case that the principal reason for dismissal – or a reason for any other alleged mistreatment – was the claimant 'blowing the whistle'. Instead, what she appeared during the hearing to be saying was that she didn't know why she had [allegedly]

been targeted for mistreatment and that she thought this could be the reason – but, equally, it might have been something else. I note that she suggested, at more than one point during the hearing before me, that JW appeared not to like her when they first met, i.e. before she made any disclosure – although she also, at other points during the hearing, suggested otherwise. What the claimant is really complaining about [it is said on the respondent's behalf] is nothing more than allegedly unfair and unreasonable treatment. She is using the vehicle of a whistleblowing claim to get around the fact that she can't bring an 'ordinary' unfair dismissal complaint because she had less than 2 years' service with the respondent;

17.6 the decisions to dismiss and, on appeal, to confirm the dismissal were not taken by JW or by LM. Nowhere in her claim does she make any specific allegations against the decision-makers. She doesn't even make a general allegation that the decision-makers themselves were influenced by her 'blowing the whistle'. Her case, to the extent I understand it, is that she was disliked by the people she worked with because she made disclosure 1 and disclosure 2 and that this caused them to make things up about her, things that ultimately led to her being disciplined and dismissed. Although claims of this type – so-called 'Iago cases' (see Co-operative Group Ltd v Baddeley [2014] EWCA Civ 658, at paragraph 42) – may be possible in theory, the present case couldn't (it is said on the respondent's behalf) succeed as a matter of law on the facts as alleged by the claimant.

18. I accept that for all of the above reasons, the claimant's case is weak and I think she is very likely lose if she takes the case to trial. The whistleblowing dismissal complaint has little reasonable prospects of success, in other words. This is because the claimant would probably fail to satisfy the tribunal at trial that: either alleged disclosure was a qualifying disclosure; the reason for any mistreatment at the hands of JW, or LM, or anyone else at their instigation, was the making of any protected disclosure(s); the principal reason for dismissal was the making of any protected disclosure(s).

19. However, I give her permission to amend to add to her claim a whistleblowing dismissal complaint based on the two alleged protected disclosures set out in paragraph 15 above, mainly because:

19.1 I am not satisfied it has no reasonable prospects of success;

19.2 the claimant applied to amend at an early stage, and well within three months of the date of dismissal;

19.3 the Agenda, which contained her first amendment application, included quite a lot of detail about her proposed complaint, even if it didn't include everything it should have done.

20. I shall consider separately, below, whether to make a deposit order in relation to this or any other complaint.

Whistleblowing detriment

21. The claimant's proposed whistleblowing detriment complaints are based on the same two alleged protected disclosures as form the basis of the whistleblowing dismissal complaint. The alleged detriments relied on are:

    21.1 on or about 17 August 2016, JW refused to give the claimant a lift in her car and told her she would have to make her own way;

    21.2 on the same date, JW 'reported' C to management for taking the bus to work;

    21.3 on or about 19 August 2016, C arrived at the Children's Community House at Melton Mowbray. JW said she was not expecting C and did not want her to be there, and that C should go to Rutland. C was required to sit separately from JW and another nurse who was there with JW called Kim;

    21.4 on the same date, later in the day, every time C went to sit at a particular table, JW told her she couldn't sit there, leaving C having to stand in the middle of the office;

    21.5 on or about 24 August 2016, shortly after allegedly making disclosure 2, LM shouted at C telling her she was "*deaf*" and had "*memory problems*";

    21.6 from around this time, other staff began talking about the claimant behind her back and making allegations about her, referring unpleasantly to the number of grandchildren she had, about her grandson's goldfish having died, about her not having a partner, having a memory problem, being deaf, not being 'with it', not being 'on this planet', being vacant, 'zoning out', having poor presentation and being unprofessional etc.[1]

    21.7 on or about 25 August 2016, LM instructed C not to come back into work until she had a road-legal car and was driving;

    21.8 on or about 30 August 2016, LM again shouted to the claimant that she was deaf and had "a memory problem", falsely accused her of having taken unauthorised absence on 26 August 2016, told C have to take unpaid leave; then, after a telephone call in which LM said of C – in an unpleasant way – "*aahhh, she can't live without her salary*", told C to take the afternoon of 31 August and the whole of 1 September as annual leave in order to sort her car out. More details of what was allegedly said are set out in page 8 of the Particulars of Claim;

    21.9 when C attended work on 1 September 2016, having sorted her car out, LM falsely accused her of having taken unauthorised absence the previous afternoon;

    21.10 on or about 2 September 2016, LM falsely accused C of not following instructions to attend the Children's Community House that day, but in fact LM had instructed her to work elsewhere;

[1] This, including the "*etc*.", comes principally from the "*Bullying, Victimisation, Stalking and Harassment*" section of the Particulars of Claim, at the bottom of page 6 and the top of page 7. There is some cross-over between the complaints in this paragraph and those identified in paragraph 21.13.

21.11 on or around or after 2 September 2016, the respondent / LM falsely accused C of not having provided documents showing she had a road-legal car, but in fact C had emailed them to LM on 31 August 2016 and gave originals to an administrator called "Mel" on 2 September 2016;

21.12 making the allegations that led to the claimant's suspension on 2 September 2016, and suspending her;

21.13 making the allegations that led to the claimant being disciplined and ultimately dismissed, and, more generally, making the allegations that were made during the investigation that formed part of the disciplinary process (whether or not they were allegations that led to dismissal).

22. Much the same points can be made on both parties' behalf about the whistleblowing detriment claim as about the whistleblowing dismissal claim. An additional point in the claimant's favour is that most of the allegations of fact she relies on in relation to the detriment claim are made in the claim form. An additional point in the respondent's favour is that for those allegations not in the claim form, there is potentially a limitation issue. My decision in relation to both claims is the same:

22.1 the complaints of whistleblowing detriment have little, but not no, reasonable prospects of success because the claimant is very unlikely to satisfy the tribunal both that she made qualifying disclosures and that any disclosure was the reason for any mistreatment that she suffered[2];

22.2 I nevertheless give her permission to amend to add these complaints because all or almost all of the factual allegations she relies on were made in the claim form and/or in the Agenda, the claimant applied to amend at an early stage, and any time limits point seems to be a bad one because if the claimant succeeds on the facts, the detriments she complains about will almost certainly be "*an act* [that] *extends over a period*" or "*a series of similar acts or failures*".

Disability discrimination

23. What I am deciding is, again, whether the claimant should be given permission to amend. In light of the decisions I made at the hearing, recorded in the above [unreserved] Judgment & Order, the only potential disability discrimination complaint that I am considering is of harassment related to disability under EqA section 27, concerning comments allegedly made by LM about the claimant being "*deaf*" and having a "*memory problem*" that are referred to in section 5. of the Particulars of Claim.

24. The relevant part of the claim form states, "*I was told in a shouting, patronising manner, that, "You are deaf", "You have a memory problem.*"; but no complaint of disability discrimination is made. In the Agenda, the closest the claimant comes to alleging disability discrimination is, on page 8, under the heading "*Discrimination*", stating, "*Hearing – LMartin stating "you are deaf", arranging*

[2] In a detriment claim, unlike in a dismissal claim, the claimant does not have to prove the principal reason for the mistreatment and can take advantage of ERA section 48(2), which reverses the legal burden of proof. Nevertheless, the claimant still has an evidential burden to discharge: see Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/14/MC (20 November 2014).

OH appointments but then respondents cancelling appointment made for 7/12/16 prior to hearing level being established. Implied meaning issue with hearing but not established." No disability discrimination claim was mentioned to Employment Judge Solomons at the case management preliminary hearing on 23 January 2017.

25. At the hearing before me, as explained above, C specified that LM allegedly made the relevant comments on 24 and 30 August 2016. No remotely clear disability discrimination complaint was put forward until the Particulars of Claim were presented, on 27 February 2017. Taking early conciliation into account, a complaint about something that happened on 30 August 2016 should have been presented to the tribunal on or before 26 December 2016. The claimant has never properly articulated a relevant application to amend. In so far as such an application was implicit in the Particulars of Claim, it was made over 2 months' 'late'. The claimant has put forward no explanation at all for not making it sooner, nor for not including the complaint in her claim form in the first place.

26. There is at least one further problem with the proposed disability discrimination claim, which may explain why the claimant did not originally bring it: is telling someone she is deaf and has a memory problem, even if done with a raised voice and in a patronising manner, disability-related harassment as a matter of law? LM evidently believed the claimant had or might have a hearing problem because she referred her to Occupational Health; and it turns out she was right – the claimant (so she told me) has something like 50 percent hearing loss. I query whether telling someone she is deaf in such circumstances would satisfy the test under EqA section 26(1)(b). In addition, I am very far from sure that either comment was "*related to*" disability. The comment about the claimant being deaf was related to a perception that the claimant was or might be hard of hearing, but that isn't the same thing. The comment about a "memory problem" is alleged by the claimant to be malicious; she denies having any memory problems. Falsely alleging someone has "*a memory problem*" is very different from falsely alleging that they have a disability. I don't think the memory problem comment can properly be said to be related to disability at all.

27. A further issue that potentially arises if a disability discrimination complaint of any kind is to be pursued is whether it would be necessary to investigate whether the claimant was actually a disabled person at the time the comments were made. My view is that it would not, because the claimant's proposed claim is about her being perceived as having a disability, alternatively about trying to use the word and phrase "*deaf*" and "*memory problem*" as insults. I think the proposed claim is akin to claims by heterosexual people about homophobic abuse. However, I can envisage a different Employment Judge / tribunal seeing it differently.

28. For all these reasons, and notwithstanding the fact that the amendment application to add a disability discrimination claim is little more than a re-labelling exercise, I refuse permission to amend.

Age discrimination

29. This, too, is a question of whether I give permission to amend. The proposed claim consists of complaints of direct discrimination because of age and/or harassment related to age under EqA sections 13 and 27 concerning the same alleged comments of LM and comments about a goldfish having died and about the claimant's grandchildren referred to in section 5. of the Particulars of Claim. The claimant's case is that LM and colleagues were trying to paint a picture of her as decrepit and incompetent due to her age.

30. Comparing the position relating to the proposed age discrimination claim with that relating to the proposed disability discrimination claim:

    30.1 age discrimination is expressly mentioned in the claim form, but the proposed amendment is significantly more than a simple relabelling exercise;

    30.2 the proposed age discrimination claim is, however, largely set out in the Agenda, on page 8;

    30.3 how the primary 3 month (plus an extension to take early conciliation into account) would apply to the proposed age discrimination claim is less clear-cut, in that the claimant may possibly be complaining in part about written comments made after she was suspended. Most of what she is complaining about, however, occurred in late August 2016 and the primary time limit would have expired in late December. Taking the date of the Agenda as the date when I deem the claimant to have made the relevant application to amend, she therefore made it about 2 weeks' late. Once again, there is no explanation for the failure to set this claim out in the claim form, nor for the delay in applying to amend;

    30.4 it is difficult to see how the comments the claimant complains about have anything to do with her age, or with age more generally. Her case is that people were nasty to her and about her because she 'blew the whistle', not because of her age. In examining whether there was any less favourable treatment, in accordance with EqA sections 13 and 23, the tribunal at trial would have to ask itself whether another person, similarly disliked (whether because she blew the whistle or otherwise) would have been more favourably treated. The answer to that question is almost certainly "no". Talking about someone having lots of grandchildren and about one of their grandchildren in particular, commenting on them being deaf (particularly when they do in fact have significant hearing loss) and falsely alleging they have memory problems isn't really anything to do with age, to my mind.

31. By the narrowest of margins, I have decided to give the claimant permission to amend to add this claim. An age discrimination claim was raised in the claim form, part of the facts relied on in relation to that claim were also in the claim form, and particulars of that claim were provided in the Agenda, which came, at worst for the claimant, only 2 weeks or so after the expiry of the primary limitation period. Although I think it highly improbable that the claimant will win this claim, and think it has little reasonable prospects of success (for the reasons set out in paragraph 30.4 above), I am, on balance, not satisfied that it

has no reasonable prospects of success. If the claimant proceeds with the whistleblowing detriment claim, the tribunal at trial will be considering the allegations of fact on which the age discrimination claim is based anyway. Adding this age discrimination claim is therefore unlikely to add significantly to the length and complexity of trial, and having to deal with such a claim is unlikely to put the respondent to significant extra time, trouble, and expense.

Deposit orders

32. The next question for me is: having decided that various complaints have little reasonable prospects of success, would it be in accordance with the overriding objective for me to make one or more deposit orders? The short answer is: yes. I can think of no reason why, having assessed the complaints' prospects of success as I have, it would not be appropriate to make such orders in this case. No such reason has been suggested to me.

33. Since the 'new' (2013) rules came into force, the purpose of making a deposit order has been two-fold: first, to focus the mind of the claimant, and make her really think about whether it is really worth her while pursuing a claim that at least one independent Employment Judge thinks she is very unlikely to win, with all the stresses and strains and time and expense involved; secondly, to change the normal costs rules that apply in the tribunal and put her at significant risk of having to pay some or all of the respondent's legal costs if she pays the deposit, takes the case to trial, and then loses.

34. In the present case, the claimant seemingly has no significant earnings, savings, or assets at all, and (unless there were a dramatic change in her circumstances), even if a costs order were made in the respondent's favour against the claimant, it is doubtful whether the respondent would derive any benefit from enforcing it. I assume – and this is just my assumption and the claimant should not rely on it – this would mean the respondent would probably not enforce any order made.

35. However, the first of the potential reasons for making a costs order that is mentioned above is very much in play. I would urge the claimant to discuss her claim with close friends and family, and if possible take some expert independent advice (perhaps from a Citizens Advice Bureau), and think about how she would feel, and what the effect on her health would be, if she were to pay the deposits, take her whistleblowing and age discrimination claims to trial, and then lose – which is what I think would happen. I have deliberately specified a date some weeks into the future for her to pay the deposits, if that is what she decides to do, in order to give her ample time to think, to discuss things, and to take advice.

36. The amount of the deposit orders needs to be enough as to give the claimant real pause for thought, but not so much as to be punitive or prohibitive. To achieve this, as set out in the above Reserved Judgment & Order, I have made deposit orders of £10 each for the three types of claim to which the orders relate: whistleblowing dismissal; whistleblowing detriment; age discrimination.

37. As is emphasised on the face of the deposit order, if the claimant pays something but pays less than £30 she MUST inform the tribunal in writing which of the complaints her payment relates to. If she doesn't do this, the tribunal will have no way of knowing which complaints she is pursuing and which have been dismissed.

38. I should like to make clear to the claimant that although I take the view that her claim is weak, I don't for a moment mean to suggest she has been treated well or reasonably and/or has no legitimate cause for complaint against the respondent; nor that she does not genuinely believe everything she has said and written about her case. What I mean is no more and no less than that I don't think she will win the whistleblowing and age discrimination claims she has put before the employment tribunal. For example: she may well, through no fault of her own and for no good reason, have been badly treated by many people, but she will only win her employment tribunal claim if the reason for this mistreatment was something to do with her age or with her 'blowing the whistle'.

Notice pursuant to rule 38(1)

39. The 'unless' order I made on 17 March 2017 – paragraphs (6) and (7) of the above [unreserved] Judgment & Order – was not complied with by the relevant date (24 March 2017), or at all. Although the claimant emailed some further information about her holiday pay claim to the tribunal on 20 March 2017, the information was not what I ordered her to provide. In so far as I can make sense of the information she provided, it seems to be information to support a claim I dismissed as having reasonable prospects of success, namely a claim relating to the period after 13 December 2016. (To remind her: the reason that claim had no reasonable prospects of success is that the respondent had a contractual right, come what may, to terminate her contract of employment by giving her 4 weeks' notice; the reason I made an 'unless' order was that a significant amount of time had already been spent trying to get to the bottom of the holiday claim, the claimant was unable fully and properly to explain it to me, and I had asked her to get together with respondent's counsel at lunch time to discuss it and, despite counsel's best efforts, the claimant had not done so). The order therefore took effect first thing on 25 March 2017. This means that all of the claim in respect of holiday and/or holiday pay – including any claim, whether for breach of contract or otherwise, for compensation for accrued but untaken holiday – has been dismissed pursuant to rule 38, apart from a claim for, or for compensation for, 7.63 hours at the rate of £9.83 per hour – £75.00.

Summary & conclusions

40. I have given the claimant permission to amend to add particular complaints of whistleblowing dismissal, whistleblowing detriment, and age discrimination; but I have made deposit orders in relation to all of those complaints.

41. If the deposit orders are not paid, the claimant's only remaining complaints will be:

    41.1 a claim for £75 holiday pay / compensation for accrued but untaken annual leave;

    41.2 a claim for wages for the period 9 to 15 November 2016;

    41.3 a claim for 4 weeks' notice pay.

2601994/2016

30 March 2017
EMPLOYMENT JUDGE CAMP

SENT TO THE PARTIES ON
.....

.....
FOR THE TRIBUNAL OFFICE

NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

When to pay the deposit?

3. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

4. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

5. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

6 Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

7. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

8. Payment must be made to the address on the tear-off slip below.

9. An acknowledgment of payment will not be issued, unless requested.

Enquiries

10. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

11. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 916 5015. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

✂----------

DEPOSIT ORDER

To: **HMCTS**
Finance Support Centre
Spur J, Government Buildings
Flowers Hill
Brislington
Bristol
BS4 5JJ

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order