Case No: 2214002/23

EMPLOYMENT TRIBUNALS

Claimant: **Mr R. Punte Candeilas**

Respondent: **Bloomberg LP**

London Central by CVP **12, 13 August 2024**

PRELIMINARY HEARING IN PUBLIC

Employment Judge Goodman

Representation:
Claimant: **in person**
Respondent: **Jude Shepherd, counsel**

JUDGMENT

1. The claimant was disabled by anxiety and depression between March 2022 and June 2023.

2. The claimant's application to strike out the response for unreasonable conduct of the proceedings does not succeed.

3. The claims for detriment and dismissal for making protected public interest disclosures are struck out because the claim that the disclosures are protected has no reasonable prospect of success.

4. No order on the claimant's application for a preparation time order or a wasted costs order.

REASONS

`Disability

1. The claimant worked for the respondent between 27th September 2021 until dismissed without notice on 11th July 2023. The respondent held that he was guilty of gross misconduct in uploading their documents to Facebook and WhatsApp even when asked not to do so.

2. The claimant has presented claims to employment tribunal that he was dismissed by reason for protecting public interest disclosure, or because of

sexual orientation or age or race or disability.

3. Disability is disputed and at this preliminary hearing I heard evidence to decide whether the claimant was disabled within the meaning of section 6 of the Equality Act 2010 at the material time.

Conduct of the hearing

4. There were several observers and the hearing bundle was made available to observers who requested a copy by e-mail, subject to a warning about use.

5. At earlier case management hearings it had been agreed that the claimant could participate in a remote hearing by switching off his camera when he was not giving evidence, having regard to social anxiety disorder. At this hearing he has kept his camera on even when not giving evidence.

6. Since being dismissed the claimant has gone to live in Portugal where he is a citizen. An earlier case management hearing was not heard in public because HMCTS staff had not confirmed whether Portugal has consented to evidence being taken from their territory by UK courts and tribunals. On April 2024,a document in the hearing bundle shows, the Foreign and Commonwealth Office advised him to seek permission from the state of Portugal and contact the RCJ. The claimant approached the Ministry of Justice in Portugal. He wrote in Portuguese, but the reply from the Director General of the Ministry of Justice includes an English translation which says:

> "Based on the information you provided, it is not possible to confirm whether there has been any a procedure for prior consultation by the court so that the testimony can be taken by video conference. All we can say is it has been common practise to inform the court of foreign states that if the request for the taking of evidence falls within the scope of the 1970 Hague convention, and the taking of evidence is carried out voluntarily, there will be no opposition to taking of evidence by video conference".

7. This tribunal understands that the Foreign and Commonwealth Office has approached a very wide number of states. The Portuguese reply suggests that there is no objection, and this hearing has proceeded on that basis.

Disability

8. The claim form relies on social anxiety disorder as the nature of the disability. In his statement for this hearing the claimant relies also on depression and post-traumatic stress disorder PTSD. The claimant has clarified that he did not identify PTSD until after he had been dismissed, although he leaves open whether some of those symptoms may have been apparent before dismissal.

Evidence

9. In order to decide the issue I have read the claimants 11 page witness statement, and he has answered questions after affirming to tell the truth. In addition the claimant supplied 192 pages by way of medical evidence.

10. Many of these pages consist of messages about arranging therapy, viewing videos and participating in webinars on helpful strategies, books the claimant has ordered about mental health, songs he has listened to on YouTube, although the contents of these materials are not in the bundle. A short extract from the NHS website about social anxiety disorder, and an article from the Harvard Business Review about the condition were reproduced. He has not supplied his general practice records. He confirmed that he was registered with a GP in London, but it seems he has not consulted his GP about his symptoms, except to fill in an online questionnaire in October 2021 which resulted in a referral for talking therapy. There was a report from Karen Bennett, a psychotherapist, dated 16th February 2024, at the conclusion of a series of therapy sessions. There is a prescription for medication to help the claimant sleep, and another from a Portuguese practitioner for antidepressants.

Findings of Fact

11. Based on this evidence the tribunal makes the following findings.

12. The NHS website says that social anxiety disorder is a "long term and overwhelming fear of social situations" which usually starts in teenage years. For many people it gets better as they grow older, but for many people it does not go away without treatment".

13. The article in the Harvard Business Review written by a clinical psychologist, Ellen Hendriksen, about managing people with social anxiety disorder. She states that nearly 50% of Americans consider themselves "shy", and 12% at some point in life will meet criteria for social anxiety disorder, which means their anxiety gets in the way of life they want, giving as examples passing up promotion because it would mean leading training sessions, or causes great distress, such as lost sleep before an annual review. The comment is made that people with social anxiety are perfectionists and self-critical, and may star in a structured situation, but are awkward at small talk.

14. The claimant studied a first degree in mathematics in Portugal, and then a one year master's programme at Newcastle University in the UK. Bloomberg was his first full-time job. Having been accepted, he had two weeks' notice that he had to move to London to take it up. He commented in evidence on how stressful this short notice was. He started work on 27th September 2021.

15. In October 2021 the claimant consulted his GP online and completed a depression questionnaire. Since moving to London he had been struggling to sleep work eat and perform day-to-day tasks. He believed these were symptoms of depression. He had been feeling quite hopeless lately. "I was not used to but this has been happening quite frequently now". He was not managing his work at all, or getting along with people. He did not smoke. He consumed one to seven units of alcohol per week. In answer to questions he

said that he drank alone, not in company.

16. The GP advised therapy first, and he was referred to Silver cloud, a form of remote therapy with general sessions about understanding and managing anxiety and depression. . He was on a waiting list for one to one sessions with a therapist, and so approached the Employee Assistance Programme run by the respondent, so that he was able to start face to face therapy by that means at the end of July 2022. Meanwhile he had been directed to videos to watch, and given a list of webinars in which he could participate, and there were more after therapy finished - 17th November 2022.

17. In March 2023 he emailed his GP practise asking to book an appointment as he felt tired and lacking in energy. He was asked to call or come into the surgery at 8:00 am to book an appointment as I did not make appointments by e-mail. The claimant did not follow this up.

18. The first prescription for medication appears to be the 5th June 2023, a few days after being suspended from work on allegations of data breaches on the 2nd of June 2023. He was prescribed 14 (1 or 2 a night) promethazine fluoride to help him sleep. In August 2023, in Portugal, he was prescribed Sedoxil and Mirtazapine, an antidepressant, and some more in January 2024. . Action in the bundle shows this was a 28 day blister pack. There was a further prescription on the 25th January 2024.

19. The claimant says that his long working hours -8.30 to 6.30 - he had little opportunity to socialise, even had he felt like it, but he did find a partner, whom he met several months after he started work, and he agreed he had been socialising to some extent.

20. Although the claimant consulted his GP and filled in the depression questionnaire in October 2021, his claim form dates the start of his social anxiety disorder from an episode in March 2022 when he was told he could not have a company laptop but must use his personal laptop when working from home - grounds of claim paragraph 1.1.1.5. When he provided further information about his claim in response to a series of questions from the respondent, he said that during his employment with respondent, he “developed” a long term social anxiety disorder. The respondent, he said, gained knowledge of “my newly developed disability on 18 September 2022 when I lodged my first formal grievance”. At this point he had been asked to move desk as part of a team restructure. In answer to a specific question in the hearing he said that his condition had developed over a period of time, starting in October 2021.

21. In December 2021 he emailed Madiha Ahmed, the respondent’s mental health first aider. He had not been feeling well lately. He had been struggling to adapt to Bloomberg's culture and processes and was feeling quite overwhelmed by all the information and numerous workflows that he was involved in. He was better at performing fewer and highly thoughtful tasks

rather than numerous and somewhat unstructured ones. Everything was all over the place. He was also finding it hard to establish a productive connection with some team members. especially his team leader and male colleagues. “I think I suffered from some social anxiety, but I have not been officially diagnosed with this”. He then met Ms Ahmed for discussion on the 13th December 2021. He complains that she shared the information with his team manager

22. The claimant focused on getting work tasks completed and avoided colleagues for that reason. He had less free time as a result. He began to think he could not trust anyone at work and had trouble eating. He had anxiety dreams. He preferred to work from home but his team leader refused him a company laptop and asked him to come to the office. Otherwise the witness statement does not specify when the symptoms started and whether or when they got worse.

23. He had some contact with Portuguese friends who arranged for him to have a spa day in London on 2nd March 2022, to help him feel better. He was a member of a gym in London, but his working hours precluded getting there much, although the claimant has not said how often he used it.

24. In May 2023 he volunteered to help at a school because he had been advised to engage in some social interaction.

25. There is no medical evidence in the bundle. There is a letter from Karen Bennett, a psychotherapist, dated 16 February 2024. She had nine sessions with the claimant between July and October 2022. She reports that the claimant expressed struggles with social anxiety accompanied by depressive symptoms. He avoided eye contact with others and experienced overwhelming fear of rejection. She observed this in sessions with her too. His coping mechanism of people pleasing was exaggerated, and hindered his ability to engage in necessary social interactions at work. He was also afraid of being taken advantage of. In sessions they had aimed to build resilience in not allowing other people to define him by their opinions. This included gradual exposure for development of resilience. There were some improvements in thought patterns and coping mechanisms, but there was still a significant level of social anxiety and depressive symptoms. She had suggested he might want to remove himself from the environment that caused social anxiety. The claimant says he did make a number of job applications, but was still there in June 2023 when he was suspended and then dismissed.

26. At the case management hearing before Employment Judge Hopton in April 2024 permission was given for a single joint expert to prepare a report for this hearing. That foundered however, because the doctor was not insured for consultations in Portugal rather than the UK, even when remote. The claimant was not prepared to travel to the UK. Initially he said he could not travel the cause his passport had expired. Then he described an incident when boarding a flight from Austria to Portugal a few weeks earlier, when he

believed another passenger was a terrorist and he travelled back by another means. He had travelled to Austria for three days because he was interested in Mozart. (EU citizens can travel to other EU countries on a national identity card; he did not need a passport).

27. As for his current condition, he declares that he still suffers social anxiety for fear of being unwelcome, given as example speaking to a cashier in the supermarket, ordering food at a restaurant, greeting people verbally and taking video calls.

28. It is difficult to know whether a life-long condition hitherto undiagnosed has been exacerbated by the first plunge into full time work, as there is no evidence of how the claimant socialised when at university. The claimant himself clearly dates his symptoms starting in October 2021, and bad enough to consult the first aider in December 2021, even though he states it really started in March 2022. While a medical examination may have reached some other conclusion about the claimant's condition, on the limited basis of what is known from the claimant and his documents, it is more likely that his symptoms are characteristic of anxiety and depression, rather than any social anxiety disorder, because of the date of onset.

29. The claimant suggests that all his current symptoms continue, although they may have been some improvement, judging by his participation in this hearing in which he has been fluent in expressing himself, although preferring to rely on his extensive preparatory documents.

Relevant law

30. Disability is defined in section 6 of the Equality Act 2010. A person is disabled if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on (his) ability to carry out normal day-to-day activities.
31. Employment tribunals should assess the evidence to make findings on: (1) whether the claimant has an impairment (2) whether the impairment has an adverse effect on his ability to carry out normal day-to-day activities and (3) whether it is substantial, meaning more than trivial - **Aderemi v London and South Eastern Railway Ltd (2013) ICR 591 –** and whether it is long-term.

32. These questions are to be decided by the employment tribunal based on all the evidence – **Adeh v British Telecommunications plc (2001) l IRLR 23**, and "it is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant is a physical or mental impairment with the stated effects." – **McNicol v Balfour Beatty Rail Maintenance Ltd (2002) ICR 1498.** Tribunals must examine and answer all four questions, then step back and look at the matter is the whole **- Goodwin v Patent Office 1999 ICR 302.**
33. Except for very specialised work, work activity can be a normal day-to-day activity –**Banaszczyk v Booker Ltd. (2016) IRLR 273.**

34. The statutory guidance on the meaning of disability says that the term mental or physical impairment must be given its ordinary meaning. The cause does not have to be established, nor must it be the result of an illness. “The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of the physical nature may stem from an underlying mental impairment, and vice versa”. The test of disability is a functional one – **Ministry of Defence v Hay (2008) ICR 1247**. It must be assessed as at the time of the discriminatory acts alleged. If an illness is being treated, the tribunal must look at the deduced effect, without treatment.
35. Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": **see Boyle v SCA Packaging Ltd. (2009) UKHL 37.**
36. In **JV DLA Piper 2010 ISR 1052,** it is confirmed that a mental impairment need no longer be a “clinically well recognised” illness, as under the Disability Discrimination Act**.** It is “impairment” that should be considered. Tribunals should be careful to consider whether a depression or similar illness is just a normal reaction to adverse life events, or an illness, though adding in general that the test is likely to be how long it has or is likely to last, as a reactive depression can develop into a depressive illness – **Ikweike v TSB Bank plc UKEAT/0119/19.**

Discussion and Conclusion

37. This claim is about a mental impairment. On the evidence I doubt that the claimant suffers from social anxiety disorder as described in the NHS document on which he relies, because he is clear that he suffered no such symptoms until he started work for the respondent. As described in his witness treatment and to the psychotherapist treating him, the symptoms appear to amount to anxiety with some depression.

38. Have his normal day-to-day activities being impaired? Most of the evidence is about his work, and of course he spent a lot of time at work. He does not however say that his work was impaired until around March 2022. He did complain he was “all over the place” but that may have been inevitable given the strains of adapting from student life to the world of work and living in London. He claims that his social activities were impaired, but clearly was able to achieve some level of interaction until the early months of 2022 because he was able to meet and form a relationship with a partner. He did describe a level of distress to the mental health first aider in December 2021, when he was anxious about the scale of the work pressure and his ability to cope. He relates that he found things easier when he was able to work from home.

39. It is not easy to assess how substantial his symptoms were. He spent a lot of time looking at videos and studying books on social anxiety and depression. The psychotherapist treating him from July to October 2022 does not make a diagnosis but she records that his account of his difficulty with social interaction,

for example not making eye contact, was evident in her his interactions with her in one to one counselling. Her report is dates from 2024, but must have been based on her notes. Whatever his symptoms were, they appear to have worsened in 2023, both because his performance deteriorated, and because he was then subject to performance management which must have increased any anxiety he already suffered.

40. The respondent invites the employment tribunal to infer from the claimant's reluctance to engage with a medical expert in June 2024 that he was not in fact as substantially affected as he claims. It may well be the case that by the summer of 2024, living a quieter life, he was not as badly affected as before. After dismissal he may well have suffered for anxiety while he disputed the decision. The appeal process concluded in August 2023. Other signs from the way he has conducted proceedings could indicate not anxiety but perhaps an uncooperative personality. The allegations of bias against a number of London Central employment judges, and that there was collusion because of Mark Carney, former Governor of the Bank of England, becoming chair of Bloomberg just after the claimant presented his claim, might cause concern about the claimant's mental state, but it cannot be said without more that everyone who holds beliefs unrelated to evidence, for example, about behind the scenes conspiracies in high places, or divine guidance of events in the world, is delusional or mentally ill. It is also the case that tribunals from time to time encounter employees who go sick with "stress" because managers make decisions that they do not agree with. The claimant's distress and level of symptoms however appear to be more than disagreements with his managers, although it may be telling that even in December 2021 he found his manager unsympathetic, and the laptop incident in March 2023 made him worse. It is particularly difficult to assess the level of symptoms and the accuracy of the claimants evidence when it is not correlated with visits to the GP, and although he has had occasional prescriptions, he does not seem to have taken medication more than on isolated occasions. That said, on balance of probability, having particular regard to the report of Karen Bennett, I conclude that the claimant's level of symptoms Impaired normal day-to-day activities in ways that were more than minor or trivial, and so meet the test of what is substantial.

41. Are they long term? They were certainly more than trivial by March 2021, when he stated his condition began. From that I conclude that they were not a substantial impairment before that date, even though he reported some sleep difficulty, and not coping with work, to the GP in October and the first aider in December. They were certainly substantial down to November 2022 when his therapy sessions ended, and the therapist concluded that he had made some improvement but had a way to go. He remained impaired as of the date of suspension on the 1st of June and dismissed on 7th of July.

42. To conclude, the claimant was disabled within the meaning of section 6 of the Equality Act between March 2022 and July 2023.

Claimant's Application to Strike out the Response

10.2 Judgment - rule 61

43. The claimant made an application on the 18th April 2024, which he has amplified in a document of the 5th August 2024, in which he asks the tribunal to strike out the response in its entirety under rule 37 (1) (b) on the basis that the respondent's conduct of the claim has been scandalous vexatious and otherwise unreasonable.

44. Tribunals are enjoined not to strike out claims except as a last resort, and if I remind myself of discussion in **Blockbuster Entertainment Ltd v James (2006) IRLR 630, CA,** which concerned the conduct of proceedings and whether a claim should have been struck out for failure to comply with various orders. It was said that this was a last resort and that wherever possible triable cases must be tried.

45. I turn to the detail on which the claimant bases his application. Large parts of this involve allegations or suspicion that various judicial decisions in the interlocutory stages of this case with which the claimant disagrees have been caused by interference by the respondent with various members of the judiciary.

46. First, there is an allegation with respect to Judge Adkin who is a salaried employment judge of about five years who previously was in chambers in 42 Bedford Row with Susan Chan, and now Jude Shepherd, who at various stages of this case have represented the respondent. It is said that he improperly colluded with them as a former member of chambers. Ahead of the first case management hearing in October 2023 the claimant indicated on his case management agenda that he wanted to amend the claim. He was sent a letter on the instruction of Judge Adkin asking him to put this in writing and explain why it not been in claim in the first place. The claimant responded briefly that he had put it in writing. When the hearing at the end of October 2023 at first floated and then was sent away for want of judicial resource, he concluded that judge adkin had had the case management hearing postponed to delay his case. I was asked to look at a LinkedIn entry in which Judge Adkin had noted a lecture on Common Law at 42 Bedford row and had passed it on to other members of LinkedIn who followed him; this was said to be evidence of their friendly relationship and collusion. The claimant said too that that when there was a case management hearing in January conducted by Employment Judge Davidson and there was no decision on the application to amend. A few days later Judge Adkin handled the claimant's request for disclosure of documents by answering that limited documents were needed for the preliminary hearing and general disclosure not yet taken place. It is suggested that this is sinister and Judge Adkin was once again interfering with proceedings when it was for Judge Davidson to make the decision. In answer to a question, he said he had made a complaint about Judge Adkin's conduct which has been investigated and he has had the outcome, but as it is a private matter he did not wish to tell the tribunal the outcome. I respect that. On this issue I conclude there is no evidence that the respondent has colluded with Judge Adkin. It is not uncommon that on any particular day there are more cases on the list than there are judges and panels to hear them. The tribunal waits to see how many cases settle, how many have to be sent away

because they are not ready for hearing, and will then, if there are still not enough judges for that day's list will reluctantly send them away, and will mark the files "must not float" to ensure it does not happen a second time. There is nothing untoward in this postponement. Nor is there anything untoward in Judge Adkin directing that the claimant should set out his application in more detail, having regard to **Chandok v Tirkey** and **Cox v Adecco**. Sometimes although lengthy, pleaded cases do not convey what they are really about. They must however set out exactly what case it is that the respondent has to meet. The claimant as being asked to say what exactly his amendment was. Nor is it sinister that Judge Adkin was dealing with correspondence outside Judge Davidson's hearing. Judge Davidson is a fee paid judge. She is not expected to deal with correspondence arising after her hearings unless it is essential, for example an application to reconsider her decision. Judge Adkin was almost certainly the duty judge that day, that is the judge assigned to deal with correspondence on any particular hearing day. Finally, it is not unusual for judges to hear cases where the advocate may have been in the same chambers before they were appointed judges. Where the relationship was collegial rather than anything more personal, that is permitted.

47. Next it is suggested that Judge Hopton, who conducted a case management hearing in April 2024, acted wrongly in allowing the respondent to amend the response as they did not provide the detailed the content of their proposed amendment until a month later. The claimant, who is a litigant in person, not unnaturally considers it unfair that he had to prepare a text before he could apply to amend, but the respondent was allowed to amend when it was not clear what they would be saying. The explanation is that until April 2024 it was not clear exactly what the claimant's case was on particular parts of his claim. Following two case management hearings much of that had been clarified in discussion. Judge Hopton had been able to prepare a detailed list of issues as pleaded and explained (although omitting some of the disability issues, which remained to be explained at this hearing. it is quite normal to allow a respondent to amend a response to plead to newly clarified matters. Such an order is standard procedure. (If of course the respondent had added something to their response which had nothing to do with the a clarifications or amendments, then an employment tribunal would consider whether they should be allowed to do that.) Making this order does not even begin to establish that the respondent had unlawfully attempted to interfere with the judiciary.

48. This is followed by a 'suggestion' about Mark Carney, formerly Governor of the Bank of England, became the chair of the respondent a few days after the claimant presented his claim to the employment tribunal. The claimant said in his written application that this was "intriguing". Asked to clarify what he was suggesting, he eventually said that he thought that Mr Carney would have networking opportunities within the United Kingdom which would enable him to interfere with the judiciary. The claimant was reluctant otherwise to set out how this might occur. This is fanciful, and it remains fanciful even after the claimant's attempt to explain what he meant. There are no facts which suggest that his appointment had anything to do with these proceedings. It is hard to understand

how or why an independent judiciary would pay any attention to the views if a serving Governor of the Bank, let alone a retired one. Without any facts, only random coincidence, this suggestion is absurd.

49. The claimant then complains about the respondent's conduct in relation to changes to two documents from the investigation of the disciplinary matter. When he got them on the data subject access request, they appeared to have been amended in some way, although examination the document does not show when this amendment was made. He added that both the people involved were South Africans but the in discussion account with unable to clarify what it was about being South African, but asked why this was significant, he could only suggest that two people of the same ethnicity were more likely to collude in making unlawful changes. This is so threadbare that it is fanciful. The best way to deal with a text which may have been changed is to leave it to the final hearing when the judge panel non-legal panel members hearing the case can consider the integrity, validity and significance of this evidence in the context of all other evidence If it was changed at some point, it does not necessarily follow that this was done before the claimant was suspended or dismissed. It is a matter for the final hearing. If it turns out that the respondent has unlawfully changed a document After getting to know about proceedings so as to improve their case, the tribunal may not believe much of their evidence.

50. Next the claimant says that there have been there have been five attempts from the USA and one from Russia to hack into his LinkedIn account. This used to be public (as are most LinkedIn accounts, as their purpose to provide information, principally about a career) but which he had made private. The claimant says that because Bloomberg has a Russian CEO and is mainly based on the USA these attempts to look at his LinkedIn profile must have been unlawful interference by Bloomberg. This is a difficult basis for striking out a response. Both are very large countries. Anyone could be trying to look at his account. They could be people to whom he has applied for a job, wanting to check his history. They could be the respondents wanting to see his profile in case it reflected on his schedule of loss. It could have been idle curiosity on anyone's part . The claimant does not say that anyone broke into his account. He says any attempt to look at his account when they should have notice that it was private indicates that it was unlawful attempt. Given that most LinkedIn accounts are public, a curious person may not have notice that. In any case, nothing suggests that this was the respondent, and even if it was, it is not grounds for striking out the response.

51. The claimant says that he received a phishing e-mail of the type originating from Russia concerning Royal Mail. I can only say that this is a very common scam. Many people have had them. Nothing links it to Bloomberg.

52. Then there are some complaints about the respondent's assembly of the bundle for this the public preliminary hearing. They had omitted some documents. He objected. They had not considered the documents relevant, but when the claimant did object they added them. That shows cooperation rather than obstruction. There is a complaint about the index lacking logic; the guidance and

case management orders state that documents should be inserted in chronological order. The respondents say they have tried to group them by themes. The claimant also says they have not been inserted chronological order but it turns out that these are not out of date order, but that a series of emails is not in the right time order and so misleading. This is not skulduggery. In any case judges are careful readers of documents, and if this were likely to mislead the claimant will be able to correct any false impressions that might be given by documents appearing in a different order. Common sense and a sense of proportion are required here.

53. Then it said that they have delayed in compliance with orders of the employment tribunal. One of these is where the respondent filed a case management agenda not one week ahead of the case management hearing but only six days, while the claimant filed his seven days ahead as required. The claimant as not demonstrated how this put him at a disadvantage or that they had stolen a march on him. By itself it is a very minor error. The other order he says was not complied with in time relates to the orders about instructing a single joint expert. The parties were to report back the employment tribunal if there was difficulty drafting the letter or instructing or choosing an expert. Having been through the correspondence, there was a great deal of correspondence between claimant and respondent over this. The claimant first wanted a woman doctor, then he was not prepared to travel to the UK. He said his passport had expired. Then he said he was too frightened to travel because of a recent incident. On investigation, the doctor's insurance did not cover him to interview someone in Portugal, even remotely. I cannot see that this is any wilful failure to comply, or that it has disadvantaged either the claimant or the tribunal. There were good reasons why the respondent could not say there was a difficulty becaused owner around 10th June the claimant has said that he would see their chosen Dr and it was only over the next fortnight it became clear that that was not practical because the claimant was to remain in Portugal.

54. This brings me to the final complaint of unreasonable conduct on the part of the respondent. The claimant says that he wrote on two or possibly three occasions about getting permission to appear at the public preliminary hearing in April from Portugal, and the hearing had to be postponed to August because in fact the tribunal staff had not heeded or processed these applications. This was explained to him by Employment Judge Snelson. The claimant says this is further evidence of collusion by the respondent with the employment tribunal staff -it is not suggested that Employment Judge Snelson colluded. I can only comment from my own experience as a salaried judge that HMCTS staff in London Central employment tribunal are depleted in numbers, that there has been a very high degree of turnover of staff, and long standing deficits in training, and it happens all too often that correspondence, often quite important correspondence, is overlooked, not filed, and not referred to any judge, and I can only conclude that that is what happened here

55. In conclusion the claimant has not shown unreasonable conduct, whether taken item by item or as a whole. His complaints are either implausible conspiracy

theories which do not hold water, or minor errors such as happen from time to time in the course of proceedings, pr not even errors. They do not approach the threshold of seriousness where I should consider striking out and I decline to do so.

Respondent's Application to Strike out Protected Disclosure Claims

56. I turn now to the respondent's application to strike out claims arising from protected disclosures. The list of issues prepared by Judge Hopton has claims of direct discrimination because of age, sexual orientation, sex and race, indirect disability discrimination, failure to make reasonable adjustments for disability, discrimination arising from disability, and harassment related to disability, together with a claim for victimisation. The remaining three claims are whistle blowing (protected public interest) detriment, automatic unfair dismissal, and wrongful dismissal. Both the automatic unfair dismissal and detriment claims are founded on a number of protected disclosures. The respondent asserts that none of those disclosures could as a matter of law be protected and they ask the tribunal to strike them out under rule 37.

57. Order 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

> 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;

Striking out claims at a preliminary stage, before evidence has been heard, is a draconian measure, only to be taken in an obvious case. The approach must be to take the claimant's case at its highest, that is, assume that it could be established after hearing the evidence, and with the assistance of incontrovertible contemporary documents, and then consider the prospects of success. In any case where there is a "crucial core of disputed facts", those should be decided after hearing the evidence, and not at some kind of "impromptu trial" based on pleadings and written statements – see **Twist DX Ltd v Armes UKEAT 0030/20/JOJ**. In whistleblowing (public interest disclosure) and Equality Act cases, which are both fact sensitive and especially important in a democratic society, over and above the interest of the individual claimant, tribunals should be especially careful – **Anyanwu v South Bank University and another UKHL (2001)1;**, **Tayside Public Transport Company Ltd v Reilly (2012) IRLR 755; Ezsias v North Glamorgan NHS Trust (2007) IRLR 603**. The tribunal must first decide whether there is no reasonable prospect of success, and then whether to exercise discretion to strike out – **Balls v Downham Market High School and College (2011) IRLR 217.** What is a reasonable prospect of success? It must be "realistic not fanciful" – **Ezsias**. Extra care is needed where a claimant is not represented, and even more when he has limited command of English – see **Carr v Bloomberg LP(2021) UKEAT 00784.**

58. In this case the claimant is not represented, and although there have been two case management hearings, and although he has done much legal research, I have been careful to ask him about his disclosures, especially how they tended to show danger to health and safety, which we want exception arose from discussion in the case management hearing rather than the 50 page particulars of claim. I add that he speaks excellent English, though not his first language, and that he relies on extensive written arguments prepared for the hearing.

59. The relevant law in respect of protected disclosures is set out in section 43B of the Employment Rights Act 1996:

> 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) hat 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.

60. The claimant relies on (d) – danger to health and safety.

61. It has been confirmed that when striking out protected disclosures "What is involved is a more technical exercise in applying the statutory criteria, as opposed to assessing whether the factual circumstances can lead to a particular conclusion as to the alleged wrongdoer's reasons for acting".

62. In **Williams v Michelle Brown AM UKEAT/0044/10/OO,** it was said that the tribunal must take a structured approach. All five elements must be present for a disclosure to qualify as protected.

63. The first element means a tribunal must consider whether there has been a disclosure of information, not a bare allegation - **Cavendish Munro Professional Risks Management Ltd v Geduld (2010) ICR 325**, although an allegation may accompany information. **Kilraine v L.B. Wandsworth(2018) EWCA Civ 1436** makes clear that the disclosure must have "sufficient factual content" to make it a disclosure of information and not just an allegation. specifically that the claimant's "information" had to be read with the

qualifying phrase, "which tends to show" one or more of the matters that listed as wrongdoing in section 43B.

64. A tribunal must then consider whether the worker held a belief that the information tended to show a class of wrongdoing set out in section 43B (the subjective element), and whether that belief was held on reasonable grounds (the objective element) – which is not to say that belief in wrongdoing must have been correct, as a belief *could* be held on reasonable grounds but still be mistaken - **Babula v Waltham Forest College (2007) ICR 1026, CA.** Then the tribunal must assess whether the claimant believed he was making the disclosure in the public interest, and finally, whether his belief that it was in the public interest was reasonable. The belief in wrongdoing or public interest need not be explicit. As was said by the EAT in **Bolton School v Evans**, "it would have been obvious to all but the concern was the private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to potential legal liability".

65. Public interest need not be the predominant reason for making it. Public interest can be something that is in the "wider interest" than that of the whistleblower- **Ibrahim v HCA International**. It must be believed to be in the public interest, not just in the worker's interest, but it can be about a section of the public - **Chesterton Global Ltd v Nurmohamed (2017) IRLR 837.**That case also confirms that a claimant's genuine belief in wrongdoing, the reasonableness of that belief, and his belief in public interest, is to be assessed as at the time he was making it. The whistleblower may have a different motive for making the disclosure, but the test is whether at the time he believed there was a wider interest in what he was saying was wrong.

Discussion and Conclusion

66. Having set out the relevant law I consider the protected disclosures. They are listed by Judge Hopton in four groups.

67. Taking these group by group, the first is:

<u>Sound and lack of subtitles in training videos:</u>

5.1.1.1 The claimant notified Rani Narayanan and Serdar Sonmez by email on 21 March 2023 about the lack of sound and subtitles in training videos.

5.1.1.2 In a formal grievance of 9.6.23 about the lack of sound and subtitles in training videos.

68. The claimant was asked to undergo a performance improvement ("milestone") plan. As part of this, in early March 2023 he was invited to watch training videos, which are recordings made by the respondent at training sessions so that other staff can access them for revision or because they were not able to be present. The claimant says that 2 out of 24 of these videos did not have sound or subtitles, they were simply pictures. He made a screen shot of that and sent it to

his managers on 21 March 2023. He also included it in a formal grievance on 9th June, after he was suspended for data breaches but before he was dismissed.

69. The grievance is in the hearing bundle and it is very long. All the claimant says about the videos is: " (21 March 2023) ..After sharing with Rani and Serdar some of my previous challenges and my confusion/unclear knowledge on the responsibilities of the new role after the department restructuring, Serdar and Ram developed a milestone plan. This milestone plan relies mostly on training materials I do not find helpful. Some of the training videos do not provide sound nor subtitles (check screenshot and video recording). It is not possible to follow nor learn from the training videos without these….I shared my concern with Rani and Serdar about this, but no actions were taken.

70. Asked to explain how this amounted to a disclosure of information tending to show that the health and safety of an individual was endangered and that it was in the public interest, as neither can be discerned in the documents or what is in the grounds of claim , the claimant did not add anything. This 9 June document (and it has to be assumed it adequately states what he said n 21 March as the grievance is otherwise very detailed) does not contain any information or facts which would tend to show that anyone's health and safety was endangered, nor any feature indicating any public interest in the adequacy of this particular training video as a danger to health. The nub of the grievance is that he was at a disadvantage when his performance was found wanting and he was supposed to be improving that at least one of his videos was not adequate for the purpose, especially when they were two recordings out of a larger batch. There is information that two videos lacked sound, but nothing tending to show health and safety was in danger, and no reference to colleagues being disadvantaged. I conclude that there is no reasonable prospect of showing these disclosures qualify for protection. The claimant will say that the respondent ought to have deduced from that that his health would go downhill because he could not access this video. That was not a reasonable inference.

71. The next group of disclosures is this:

<u>Performance ratings</u>

5.1.1.3 In a formal grievance of 9/6/23 about the Respondent's refusal to explain how employees' performance ratings were reached (paragraph 3.2.6 ET1).

5.1.1.4 On 31 May 2023 in a meeting with Sedar. The claimant said it was not correct that employees had their own personal ratings without the employee's knowledge.

72. Th e claimant had made an application under the Data Protection Act for subject access request. As a result was able to see not just the verbal feedback on his performance rating (which he had already had) but also the figures for an overall score by which his remuneration was affected, which the respondent does not disclose to individual employees. He had discussions with his manager about

the scores, in that they had gone down numerically and yet his remuneration had gone up. It was explained to him that the number going down meant that his score had improved, and when he doubted that and asked them to put it in writing it was, and it was signed in his presence. Innhis 9 June 2023 grievance he said on this:

73. 5/31/23- I met with Serdar and he refused to sign the statements he agreed with during meeting wilh Emma. He mentioned, however, he would send an e-mail confirming his knowledge on the manager rating scale interpretation. Serdar did not send this.

74. An earlier passage in the grievance says about the ratings: "I initiated the conversation about the manager rating scale interpretation. Emma signed a statement I proposed confirming her knowledge that a lower rating value corresponds to a better performance. Serdar confirmed this vocally through Zoom as well. I do not think this is true, given the circumstances.

75. The claimant has not explained how in complaining about or asking for clarification of the numbers he suggested in any way that this was information which tended to show danger to health and safety, his or anyone else's, or that his belief that it would do so was reasonable, or indeed that it was in the public interest. The claimant now argues that because employees did not have access to their numbered scores their health or safety was endangered. This is a fanciful argument. The claimant might suggest that because he was being pushed by a performance plan there was likely to be an impact on his psychological health, but it is hard to see his being reassured that actually his score had improved would damage his health, and he certainly does ot say so or even imply it. He does not show that belief in such an effect on his health and safety was reasonable. He does not show how he made this in the public interest, or how it can be understood as such. I conclude that these disclosures do not qualify for protection under section 43B.

76. The third group of disclosures is:

Disciplinary and grievance policy

> *5.1.1.5 C's emails of 15/6/23 and 16/6/23 asking for copies of the R's Disciplinary and Grievance policies and pointing out discrepancies between the claimant's employment contract and the respondent's disciplinary and grievance policies (paragraph 3.3.4 ET1).*

77.

78. These June 2023 emails are after being suspended but before he had been dismissed. I was taken through the correspondence on this. The claimant queried whether the UK Supplement document that he was referred to as containing the policies actually contained the policies that applied to him. The respondent replied that they did. The claimant queried it. He got another reply saying yes, they are there. It is not easy to understand what the

claimant was saying. In this hearing he has said that his contract referred to these policies as ones he could use, but the policies in the UK Supplement stated they were not contractual – so he considers there are other policies he is not being allowed to see.

79. Even with his explanation there is no disclosure of information here that tends to show danger to his heath. It was simply a dispute about whether the processes that he could see in one part of the website were in fact the processes that applied to him. He was reassured that these were the policies. Even if he had disclosed some effect on his health (and he did not) I cannot conclude that this was belief was reasonable. I cannot see either how it is in the public interest. In his particulars of claim at 3.3.5, the claimant asserts that this endangered the health and safety of Bloomberg staff, but there is nothing to show how he suggested to his respondents at the time. He says now that as these were standard terms for Bloomberg staff they could all have been impacted, so it was about more than him, but there is no evidence from which he or his managers could have deduced that was what he was saying. I conclude that this too is not a disclosure that qualifies for protection.

Ethics hotline

80. The last disclosure is :

5.1.1.6 C's complaint on 22/06/2023 regarding the non-confidentiality of the Bloomberg Ethics Hotline (paragraph 3.4.2 ET1).

81. After the claimant lodged his wide-ranging grievance he used the respondents Ethics hotline. The tribunal was taken to the document explaining how the hotline works. It explains that it is a hosted by a third party so that if the person calling the hotline chooses to be named it will be referred on to Bloomberg for investigation, but that the caller can remain anonymous The claimant concedes that this is correct, and that he may have been mistaken about it not being confidential. The matter he communicated to the hotline duplicated the grievances submitted the previous day, uploading the same documents, and it ended up going to the same member of staff to investigate. Here it is just not clear in any way how the claimant conveyed information that there was anything here endangering health and safety. He concedes that the document is clear, so any belief that the hotline lacked confidentiality if he gave his name was not founded on fact, that is, his belief was not reasonable. In any case nothing about his complaint suggests danger to health. This disclosure too does not qualifiey for protection.

82. The claimant now argues that the respondent decided to dismiss him because they *anticipated* that he would make a protected disclosure, even if the existing matters he has relies on were not in fact protected. He relies on **Onyango v Barclays solicitors UKEAT/0407/12** where an employee was dismissed after the employer found that he was looking up how to approach a regulator to make a disclosure. It was held there that protection should

perhaps extend to those who were dismissed for approaching regulators to make a disclosure. Nothing in the facts of this case suggests that this is what the claimant was doing, or that the responded would have anticipated he was going to add material to make a disclosure protected (for example, saying it was about danger to health). The tribunal was taken to a document on 22nd August mentioning health and safety in relation to an earlier matter. That of course postdated by several weeks his dismissal and cannot have caused it. There remiss nothing in what he did say that shows the respondent anticipated additional material to make a disclosure protected.

83. I concluded that none of the protected disclosures qualify for protection. I also consider that it is in the interests of justice to strike these claims out. It is. They will occupy further time in tribunal, both in examining each one to decide if it was protected and then whether they materially influenced anything pleaded as detriment or were the principal cause of his dismissal. That will increase costs and time spent. In consequence, the claim of automatic unfair dismissal under section 103A of the Employment Rights Act 1996, and the claim of detriment for making protected disclosures under section 47 of the Act are struck out as disclosing no reasonable prospect of success.

84. In the grounds of claim document under the heading automatic unfair dismissal, he pleaded also that he was dismissed for asserting a statutory right under section 104 . One statutory right claimed was his complaint of discrimination. It is a duplicate of the victimisation claim made under the Equality Act. Such claims are protected there. It cannot be said that making a complaint of discrimination is asserting a statutory right. The other basis of this claim is that the respondent understood that he was asserting his statutory right to make a claim of “ordinary” unfair dismissal. It makes little sense that the respondent should dismiss him because they thought that he was going to make a claim that they had dismissed him. The claimant only makes this claim because he lacks the two year qualifying service required to make a claim for “ordinary”unfair dismissal under section 98 of the Employment Rights Act 1996. It is not coherent as a claim of dismissal for asserting statutory right. The section 104 claim is therefore dismissed as well because it has no reasonable prospect of success

Costs

85. The claimant has applied for a preparation time order. Costs do not follow the event in the employment tribunal as is the normal rule in courts, but such an order can be made under rule 75 if the conditions set out in rule 76 are satisfied. Rule 76 says:

> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

87. The claimant argues that the respondent conducted these proceedings unreasonably when, in the amended response filed after permission was given by Employment Judge Hopton at the April case management hearing, they deleted paragraphs 3.3 – 3.6, which is about employees working from home.

88. It was clear from the claimant's application for the response to be struck out for unreasonable conduct of the claim, which I heard and decided yesterday, that the claimant was upset that he was refused permission to amend his claim unless he first set out the amendment in writing, but the respondent has been given permission to amend without first having produced a written text, and then deleted 5 paragraphs of the original response when they did. As I explained yesterday, that is because when a claim is initially brought it may not be entirely clear what the issues are that must be responded to. If those issues are then clarified in subsequent case management hearings (as they have been, indeed were necessary to discuss the issues apparent in the claimant's 50 page particulars of claim, then it is permitted for the respondent to amend the response to plead to the clarified claim. That is what happened here. The discussion showed that the material the respondent included in paragraph 3.3 to 3.8 was no longer relevant to the pleaded claim. The claimant objects on the basis that the respondent is seeking to remove or otherwise confuse evidence on whether the respondent did or did not have did not have an informal work from home policy, and I understand that that relates to the refusal of a company laptop, so the claimant had to use his own laptop to work from home. The claimant acts in person, and it is understandable that he may confuse material contained in a pleading, and what is evidence in a witness statement. The claimant can include references to this correspondence in his own witness statement; it may well appear in with the witness statement of one or more of the respondent's witnesses, and he can cross examine about what has been deleted if it suggests the respondent's witnesses have changed their point of view . Whether he can do so of course will depend on the relevance of those questions. That is a matter for the final hearing judge, who can decide what evidence is actually relevant to what has to be decided.

89. I do not consider that respondent acted in any way unreasonably in deleting those paragraphs from the amended response, which they did pursuant to an order of an employment judge. It is not "abusive disruptive or otherwise unreasonable" conduct such as should sound in costs.

90. The claimant has also applied for wasted costs. Wasted costs are provided for in rule 80. An employment tribunal may order that the respondent's legal representatives pay the costs where it is considered that has been "improper, unreasonable or negligent conduct of the proceedings".

91. The claimants application here relates to the four matters.

92. First it is argued that the correspondence about uploading the preliminary hearing bundle to the document upload centre, in particular on uploading some videos for what was to be an open preliminary hearing in April 2024 (although converted to a case management hearing because of failures by the tribunal to address the issue of whether the claimant could give evidence from Portugal in

an open hearing) was unreasonable conduct. I was referred to correspondence about this. There was a dialogue, which is shown in different coloured text between respondents and the claimant. I can see that the respondent's solicitor was addressing the difficulties of uploading a video and I have been taken to the tribunal's Professional Users Guide which they states that only PDF's can be uploaded. It was therefore a reasonable area for doubt as to whether a video could be uploaded. The respondent made a practical suggestion that the claimant could compress one or more recordings so that it could be transmitted by e-mail separately. There is also a question about delay. I am told by the respondent although all her bundles should be uploaded a week before the hearing, such a link is rarely provided until the day or so before the hearing. I do not know what occurred in this case but I can state from my own experiences as duty judge that this is frequently what happens, as different clerks are responsible for different tasks. I conclude not only did respondent not intend to obstruct or mislead the claimant, or keep these videos away from the tribunal, but that the respondent acted entirely cooperatively and sought to explain to a litigant in person what the difficulty was. In this the respondent's representative did not improperly, unreasonably or even negligently.

93. The second point raised by the claimant is about the arrangements to appoint a single joint expert. The parties were ordered to report to the tribunal by the 10th June if they could not agree on the appointment of an expert. The claimant says that it was not until the 1st July that such a report was made. The position is more complicated. The claimant told the respondent on 10th June that they could instruct the doctor they had chosen, but difficulty arose because the claimant was in Portugal, and was unwilling or unable to travel to the United Kingdom. The respondent then explored whether the doctor could examine remotely but there was a difficulty with the doctor's insurance. As explained when I found that this was not unreasonable behaviour, when deciding the application to strike out the response, this being one of the grounds, I do not hold that this was in any way unreasonable conduct. It was a difficulty not foreseen by the respondent, one that the claimant only notified later. The delay was in any case very short. The respondent's legal representatives did not in any way act improperly or unreasonably in this.

94. It is also suggested that there was unreasonable behaviour in instructing the doctor, including personal information about the claimant, before it was clear that the doctor could accept instructions- the unforeseen insurance difficulties. It seems to me that the respondent was acting reasonably, in that they were trying to speed up a process which had to take place in a quite a short time span, given the difficulties most doctors experience in examining and preparing reports in time for hearings, and to instruct in June for an August hearing was a tight time scale. I see nothing unreasonable there. In any case I doubt that there is any harm caused to the claimant. Doctors have their own regulators and are well aware of that patient information must be kept confidential – it is highly likely that the doctor has already deleted any information he received on this.

96. The final conduct complained of is that an extra 19 pages were inserted into the middle of the preliminary hearing bundle, rather than being added at the end as the standard order directs. As a result the claimant had to spend extra time going back through his skeleton argument to revise the relevant page references. The respondent explains that they did this because they were adding in correspondence about the medical expert which had arisen after the original bundle was prepared, and that they wanted to make sure that it was inserted in a logical order, so that it followed on from the earlier correspondence, rather than having to move to the end to review it. This is a not an unreasonable departure from the order, It is a hazard of litigation that bundles have to be updated from time to time and may require re-ordering. Annoying it may have been, but it was not so unreasonable as to merit a wasted costs order. In any case the claimant decided to rewrite his skeleton argument, so some of the time spent earlier was already lost. The second version was submitted shortly before this hearing, on 5 August 2024.

97. None of these matters establish anything approaching the threshold for an order for wasted costs.

Employment Judge Goodman
14 August 2024

JUDGMENT AND REASONS SENT to the PARTIES ON

19 August 2024
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FOR THE TRIBUNAL OFFICE