



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs I. Esteves

v Imperial College Healthcare NHS Trust

Heard at: London Central (in public; CVP)

On: 27 February 2024

Before: Tribunal Judge RE Peer acting as an Employment Judge

Representation

For the Claimant: In person assisted by her husband Mr. F. Fernandes
For Respondent: Ms G. Nicholls of Counsel instructed by Capsticks LLP

JUDGMENT

- (1) The claimant's application to strike out the response on the ground of non-compliance is refused.
- (2) The claimant's application to strike out the response on the ground that it has no reasonable prospect of success is refused.
- (3) The claimant's allegations of direct race discrimination, direct age discrimination, harassment related to race and harassment related to age other than the allegation that she was told 'when you people come here, your DBS should be checked' are struck out because they have no reasonable prospect of success.
- (4) The claimant's allegation of direct race discrimination that she was told 'when you people come here, your DBS should be checked' has little reasonable prospect of success and the claimant is ordered to pay a deposit of £50 as a condition of continuing to advance that allegation.
- (5) The claimant's allegation of harassment related to race that she was told 'when you people come here, your DBS should be checked' has little reasonable prospect of success and the claimant is ordered to pay a deposit of £50 as a condition of continuing to advance that allegation.

- (6) The claimant's allegations of victimisation are struck out because they have no reasonable prospect of success.
- (7) The claimant's allegations of being subjected to detriments for making protected disclosures are struck out because they have no reasonable prospects of success.
- (8) The claimant's claim that she was subjected to less favourable treatment because she was a part-time worker is struck out because it has no reasonable prospects of success.
- (9) The claimant's application to amend her claim is refused and discretion is not exercised to permit the amendments sought.

REASONS

INTRODUCTION - CLAIM AND PROCEDURAL HISTORY

1. The claimant is Mrs I. Esteves. The claimant worked on an assignment as a ward administrator on 21 and 23 March 2023 and a second assignment on 3,4,5,9 and 10 May 2023 for the respondent, an NHS Trust.
2. Early conciliation started on 19 June 2023 and ended on 31 July 2023. By way of her claim form presented on 20 August 2023, the claimant brings complaints of direct race discrimination, direct age discrimination, harassment related to race and harassment related to age, victimisation, less favourable treatment because of part-time worker status and detriment due to making a protected disclosure.
3. By way of Notice of Claim dated 29 August 2023, the respondent was required to submit any response by 26 September 2023. The respondent presented an application to extend time for the filing of its response, a draft response form and accompanying grounds of resistance on 5 October 2023. At a preliminary hearing on 25 October 2023, Judge Plowright granted the respondent's application for an extension of time for presenting a response.
4. A public preliminary hearing with a time allocation of three hours was listed and as the matter comes before me there are the following issues to consider and determine:
 - 1.1 The respondent's application to strike out the claimant's allegations on the basis that they have no reasonable prospect of success or, in the alternative make deposit orders that the claimant pay a deposit as a condition of continuing to advance allegation/s that have little reasonable prospects of success.
 - 1.2 The claimant's application to strike out the response for non-compliance/no reasonable prospects of success.
 - 1.3 The claimant's application to amend her claim.

- 1.4 Case management orders to prepare the case for final hearing and listing the final hearing.
5. At the preliminary hearing on 25 October 2023, the claimant was given permission to amend her claim to include an additional alleged protected disclosure. The respondent is recorded as having raised no objection to this amendment at the preliminary hearing. The claimant's proposed amendment to the draft list of issues to rely upon certain facts relied upon for some of her claims in relation to other of her claims was regarded as clarification of her claims and the facts relied upon in support. The respondent had raised no objection to this approach.

THE PRELIMINARY HEARING

6. The hearing was a remote hearing. The form of remote hearing was fully remote by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The parties agreed in advance to the hearing being held as a remote hearing.
7. In the ordinary way, it was confirmed at the outset of the hearing that all participants could see and hear each other clearly. I record however that although the claimant was clearly sat beside her husband, who is assisting her in these proceedings, in front of the device they were using she was not visible on screen for much of the hearing. The respondent was represented by Ms Nicholls of Counsel. The hearing proceeded effectively as a remote hearing and no party raised any objection.
8. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.
9. There was a bundle of 139 pages. The bundle contained copies of the claim form and particulars of claim, response form and grounds of resistance, tribunal correspondence, Record of Preliminary Hearing and Case Management Orders, Notice of Preliminary Hearing, Amended Grounds of resistance (clean and tracked versions), respondent's application for strike out, claimant's application for strike out, and documents relevant to strike out application.
10. A copy of the list of issues prepared by the parties was also available.
11. I read the evidence in the bundle to which I was referred and refer below to the page numbers of key documents that I relied upon when reaching my decision.
12. I heard submissions from each party in respect of all the applications before me and reserved my decision.

13. I reserved my decision because there was insufficient time at the public preliminary hearing on 27 February 2024 to deliberate and deliver decision in relation to each of the applications before me. There was also insufficient time and it would have been impractical in any event to make case management orders to prepare and list the case for final hearing.
14. Notwithstanding the order in which matters are addressed below, I gave consideration to all matters before reaching my decisions on the applications before me.
15. The parties will note that not all the matters that they told me about are recorded below. That is because I have limited them to points that are relevant to the issues for determination. I take account that in deciding whether or not to strike out claims, the claimant's position is to be taken at its highest rather than settling disputes of fact if any.

CLAIMANT'S APPLICATION FOR STRIKE OUT OF RESPONSE

16. **Strike out power general and non-compliance ground**
Rule 37 of the Employment Tribunals Procedure Rules gives the tribunal the power to strike out a claim or a response in whole or part at any stage of the proceedings on any of the grounds set out at rule 37 but the power must be exercised in accordance with reason, relevance, principle and justice, **Williams v Real Care Agency Ltd 2012 ICR D27, EAT**. Reasons for any strike out must be given.
17. In relation to strike out on the ground of non-compliance with Tribunal rules or an order of the Tribunal, all relevant factors must be considered including: the magnitude of non-compliance, whether the default was the responsibility of the party or the representative, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible, and whether striking out or some lesser remedy would be an appropriate response. The Tribunal must consider whether strike out is proportionate.
18. The Presidential Guidance on General Case Management for England and Wales 2018 sets out that: *"In some cases parties apply for strike-out of their opponent at every perceived breach of the Rules. This is not a satisfactory method of managing a case. Such applications are rarely successful. The outcome is often further orders by the tribunal to ensure the case is ready for hearing."*
19. **Claimant's application for strike out on ground of non-compliance**
On 19 February 2024, the claimant applied for the respondent's response to be struck out on the basis of non-compliance with case management orders. The respondent was ordered to file its amended response and any written application for strike out by 27 January 2024. The respondent was given time to enable completion of an internal investigation. The amended response and written application for strike out was filed on 22 February 2024.

20. The respondent apologises for its non-compliance. The respondent updated the claimant as to the progress of the internal investigation in December 2023 and the outcome was provided on 16 February 2024. The respondent submits it would be severely prejudiced if it were not able to defend its position where it has acted reasonably in the proceedings and there is no overall delay or impact on proceedings by the timing of the provision of the amended response.
21. The claimant identifies what is essentially a single incident of non-compliance by the respondent failing to file its amended response and any application for strike out by 27 January 2024 as ordered. Although the respondent applied for an extension of time for the filing of its original response, this was granted by the Tribunal and those circumstances are thus not relevant to a consideration of whether to strike out at this point. As 27 January 2024 was a Saturday, Procedure Rule 4(2) provides that the amended response would have been filed in time if filed on Monday 29 January 2024. The amended response was filed more than three weeks later on 22 February 2024 in a context where the usual requirement is for a response to be presented within 28 days of notice of claim and the respondent had been provided with a period of three months for the filing of its amended response.
22. The reason for the delay relates at least in part to the reason the respondent was given permission to file an amended response by the tribunal namely to complete an internal investigation. It was also the case that at the preliminary hearing the claimant had been permitted to amend her claim and she had clarified her claims such that the respondent was then in a position to understand fully the claims being brought against it. The outcome letter for the internal investigation into the claimant's complaints is dated 15 February 2024 and the amended response (and application for strike out) was filed reasonably promptly thereafter and in advance of the preliminary hearing.
23. On 26 February 2024, the claimant amended her application for strike out of the response to request the response be struck out on the ground of no reasonable prospects of success. By way of the amended application and at the preliminary hearing, the claimant submits that the 'short notice severely limits my ability to prepare adequately' and that 'delay has deprived the claimant of the opportunity to seek legal counsel, causing unnecessary stress and anxiety that is likely to worsen.'
24. The claimant does not explain how the timing of the presentation of the amended response has deprived her of the opportunity to seek legal advice and assistance. The claimant is a litigant in person but has been assisted by her husband in these proceedings to date. Unrepresented litigants are provided with information sheets as to sources of legal advice and assistance at the outset of proceedings and it is of course open to them to seek legal advice and assistance at any stage and if they engage legal representation for that representation to go on record. There was no information provided to me as to any steps taken or proposed to be taken or difficulties with regard to accessing any legal advice and assistance by

the claimant at any point in these proceedings. There was no application before me for any adjournment to enable the taking of legal advice and assistance.

25. The timing of presentation of the amended response has not impacted on the progress of the claim overall or caused particular disruption being filed at this time and it does not impact on the fairness of the hearing. I do not consider there is any unfairness or prejudice to the claimant given the proceedings are still at an early stage with no directions to prepare the case for hearing yet set. The amended grounds of response set out the respondent's response to the claimant's allegations based in part on the investigation outcome which was known to the claimant as of 16 February 2024 and there is no significant change to the defence as pleaded in the original response.
26. The fairness of the hearing would be affected if the respondent's response is struck out and the respondent would be severely prejudiced by not being able to present any defence to the allegations raised. The claimant is not prejudiced if the application to strike out the response on grounds of non-compliance is refused.
27. In all the circumstances, it would be disproportionate and not in the interests of justice or fair for the amended response to be struck out on the basis of the incident of non-compliance identified.
28. Accordingly, the claimant's application to strike out the response on the ground of non-compliance is refused.

Strike outs general and no reasonable prospects of success ground

29. In appropriate cases, strike outs can minimise the anxiety, expense and time inherent in taking claims to trial, **Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT.**
30. In relation to strike out on the ground that a claim or response has no reasonable prospect of success, the test is not whether the claim or response is likely to fail and the tribunal must be able to properly conclude that the claim or response has no reasonable prospect of success on consideration of the available material. The facts relied on by the claimant (or indeed a respondent) must be taken at their highest and where there are conflicts of fact, a tribunal must be cautious to strike out at the preliminary stage.

Claimant's amended application

31. The claimant amended her application for strike out the day before the preliminary hearing. The respondent reasonably and pragmatically did not raise any objection to considering this amended application at the hearing notwithstanding the short notice of the application. The claimant's amended application sets out numerous points as to alleged procedural flaws and unfairness said to be inherent in the respondent's internal investigation and on this basis applies for the response to be struck out on the ground of no reasonable prospect of success.

32. The claimant contends that the respondent has 'misled' the tribunal – which is a serious allegation in circumstances where the respondent has legal representation - because the internal investigation has not yet concluded and it is not clear how long it will take the appeal to be concluded. The respondent's position is that the claimant, as a bank worker, is not entitled to any appeal although the respondent has agreed to consider the points raised. The internal investigation has clearly completed and an outcome letter has been issued. The allegation raised by the claimant is misconceived.
33. The claimant alleges that her grievance was improperly concluded in that the final decision was reached by the Associate Director of People instead of Elisabeth Grogan 'which is a clear deviation from the agreed upon grievance procedure. This raises concerns about the impartiality and integrity of the process and the accuracy of the conclusions drawn.' The claimant submitted that an examination of the document properties of the outcome letter evidenced this. A screenshot shows that a document was created by Colleen Sherlock on 16 February 2024 @ 1328 (HB 137). The respondent says Colleen Sherlock did prepare the document for sending and there is nothing unusual about this. Full assessment of factual matters is for any final hearing but the respondent's explanation chimes with the ordinary course of handling such matters and presents as entirely reasonable and plausible. In any event, the claimant has raised no allegations against Colleen Sherlock at all by way of her claim.
34. The claimant's internal complaint raised allegations similar or the same to those raised in her claims before the tribunal. The respondent did not uphold any of her allegations apart from one that was partially upheld. The partially upheld allegation was that the respondent accepted that the provision of feedback by Sharron Holder as to the claimant's unsuitability for the role and that the claimant was 'more suited to back office work, not a face to face job' and being told that her assignment would not continue may have been disappointing to hear and it was understood that the claimant may have felt an element of humiliation but this did not appear to be connected to race or age.
35. The respondent submitted at the preliminary hearing that it is not surprising that the claimant disagrees with the outcome of her complaints further to the internal investigation and the respondent's position in relation to the allegations she raises in that the respondent denies discrimination as alleged or at all. That of itself does not mean the response has no reasonable prospects of success given those circumstances arise in every contested tribunal case. In order to decide contested factual matters and consider the claimant's points as to procedural irregularities, the tribunal will need to hear oral evidence and see the relevant documents and make its assessment at a final hearing.
36. The respondent denies the allegations of discrimination raised against it. The claimant disagrees with the respondent's grounds of resistance given the areas of disagreement but beyond that disagreement does not detail in

what way in particular the grounds of resistance have no reasonable prospects of success. The material presented and points raised fall far short of meeting the threshold that the respondent has no reasonable prospect of success with its defence. In all the circumstances, the threshold for strike out of the response on the no reasonable prospect of success ground is not made out.

37. Accordingly, the claimant's application for strike out of the response on the ground of no reasonable prospect of success is refused.

RESPONDENT'S APPLICATION TO STRIKE OUT CLAIM

Approach to strike out of discrimination claims

38. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL** the House of Lords emphasised that discrimination claims should not be struck out save in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.
39. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126, CA**, the Court of Appeal referred to protected disclosure cases as requiring a similar approach to discrimination cases and that when the central facts are in dispute, it will be an exceptional case where strike out is appropriate. An example of where strike out may be appropriate is where contemporaneous documents are undisputed and inconsistent with the facts pleaded by a claimant, **Shestak v Royal College of Nursing and ors EAT/0270/08**.

Respondent's application for strike out

40. On 22 February 2024, the respondent applied for strike out of the claimant's claims on the grounds of no reasonable prospects of success and/or orders that deposits be paid as a condition of the claimant continuing to advance allegations on the basis those allegations had little reasonable prospects of success.

Claimant's claims and particulars of claim

41. The claimant claims direct race and age discrimination, harassment related to race and harassment related to age. She says she was 60/61 years old at the time of the alleged incidents and compares herself with persons aged under 45. She says she is of Indian origin and compares herself with white British persons.
42. The list of issues includes eight allegations in relation to the claims of direct discrimination and harassment.
43. There are five allegations about comments and conduct of Sharron Holder (Outpatients Manager for Children's Services). The claimant says that Sharron Holder:
- (i) told her she could not train her or refused to and was openly critical and mocking towards her and her small notebook;
 - (ii) accused of her lying in her CV and about her experience in front of another staff member;

- (iii) said to her in front of other staff members, when you people come here your DBS should be checked;
 - (iv) left her CV on the office table by the printer and told the claimant that she printed her CV to see her phone number;
 - (v) terminated her assignment without giving her a week's notice and withheld her wages.
44. There are three further allegations as follows:
- (vi) the Trust not shortlisting the claimant for the paediatric ward administrator's role which she applied for on 9 May 2023;
 - (vii) the Trust forcing the claimant to leave her assignment and Michelle Graham tearing up her training notes;
 - (viii) Marina being rude, disrespectful and shouting at the claimant in front of staff, patients and family.
45. Allegation (iii) is only relied upon in relation to race but all other allegations are relied upon as incidents of direct race discrimination, direct age discrimination, harassment related to race and harassment related to age.
46. The claimant also relies on the above allegations other than (vi) as allegations of less favourable treatment due to part-time worker status.
47. The claimant's claim of victimisation relies on two protected acts: (i) on 11 May 2023, phoning and messaging Michelle Graham to inform her that she was not coming to work due to Marina's unwanted conduct; and (ii) on 22 May 2023, making a complaint by email to the respondent's HR Advisors team. The claimant alleges that she was subject to two detriments because she had done the protected acts: (i) not being shortlisted for the paediatric ward administrator's role further to application on 9 May 2023; and (ii) Michelle Graham tearing up her notes on 10 May 2023.
48. The claimant's claim of detriment due to making a protected disclosure relies on three protected disclosures: (i) on 21 March 2023, the claimant asked for her CV to be kept in a locked drawer; (ii) on 22 May 2023, the claimant complained by email to the HR Advisors team; and (iii) on 10 May 2023 speaking to Michelle Graham in person and complaining about the behaviour of Marina. There are three alleged detriments said to be because she made the protected disclosures: (i) Sharron Holder terminating the claimant's assignment, not giving a week's notice and withholding wages; (ii) not being shortlisted; and (iii) being forced to leave her assignment and Michelle Graham tearing up her notes.

Respondent's position

49. The respondent's position is that the alleged treatment occurred over the course of two shifts and that even if the claimant can establish that the alleged treatment occurred, there is no basis on which to conclude the reason for the alleged conduct is either race or age and the particulars do not set out the link to race or age. There must be circumstances from which the Tribunal could conclude absent any explanation or other reason that the reason was discrimination. The claimant will be unable to discharge the

burden of proof or, in relation to the harassment allegations, show it would be reasonable for the alleged conduct to have the required effect. At the very least, deposit orders ought to be made.

50. The respondent referred to and set out the definition of a 'protected act' at section 27(2) of the Equality Act 2010 which covers bringing proceedings under the Act, giving evidence or information in connection with proceedings under the Act, doing any other thing for the purposes of or in connection with the Act, and making an allegation (whether or not express) that a person has contravened the Act. The respondent acknowledged that the email of 22 May 2023 could potentially be construed as a protected act. The 11 May 2023 communication (HB 91) at its highest is an allegation of bullying without any connection to any protected characteristic. The detriments relied upon however occurred before the protected acts relied upon.
51. The respondent referred to and set out the requirements at section 43B of the Employment Rights Act 1996 for a 'qualifying protected disclosure'. A qualifying disclosure is a 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 of six listed matters including failure or likely failure to comply with a legal obligation. The respondent acknowledged that the email of 22 May 2023 could arguably be construed as a qualifying protected disclosure. The oral communications on 21 March 2023 and 10 May 2023 cannot amount to qualifying protected disclosures not least as cannot be considered as raising matters in the public interest as they relate solely to the claimant's own interactions with another member of staff. Section 47B requires the tribunal to find causation in that the detriments must be on the ground that the worker made a protected disclosure. All of the alleged detriments occurred before the 22 May 2023 protected disclosure relied upon.
52. The respondent maintains that the claimant is a casual or bank worker, does not have part-time worker status and cannot rely on the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The assignments were full-time engagements. There is no causal link between the allegations and the alleged part-time status.
53. A Bank Registration Agreement for Temporary Workers was before me (HB 75-87). This is a sample agreement dated May 2012. At the hearing before me, the claimant submitted that this was not the agreement that applied to her because it did not have her name and she had not signed it. I sought to clarify the claimant's position but the claimant continued to maintain not merely that the agreement in the HB did not have her name but that the agreement did not set out the relationship between her and the respondent at all. Allowing for some confusion as to the question asked and the context of the hearing, this was a surprising contention inconsistent with the claimant's own pleadings in which she refers to herself as a bank worker.
54. The claimant's claim form records at 8.1. the statement 'TLF because I am bank staff and/or part time'. The claimant's particulars of claim refer at paragraph 1 to status as 'a Bank administrator- band 2' although also to

'employed' and at paragraph 29 'Less favourable treatment because I am bank staff and/or part-time staff'. The claimant's pleadings are predicated on her status as bank staff and related to work on separate assignments in March 2023 and May 2023. The non-acceptance at the preliminary hearing that the Bank Registration Agreement is the relevant agreement was not accompanied by any detail or suggestion as to what the relevant agreement might be such as any other or updated agreement for bank staff or bank administrators. In all the circumstance given the material available to me and the claimant's own pleadings, the claimant is to be considered as having the status of bank staff.

55. The respondent submitted that in relying on the same factual allegations in support of a number of heads of claim, the claimant's argument is unsustainable in that the claimant suggests conduct occurred because of race, age, doing protected act, making a protected disclosure and part-time status.

Assessment and conclusions on respondent's strike out application.

56. I accept that the claimant was aged 60/61 at the date of the alleged incidents and that she is, as she refers to herself, of Indian origin. I acknowledge that taking the facts as pleaded at their highest, the claimant portrays conduct which presents as unpalatable, difficult and unpleasant for the claimant. However, other than in relation to allegation (iii), there is no discernible basis at all on the allegations as pleaded and set out in the particulars of claim to understand how the conduct complained of relates to race or age in any way. The claimant does not set out any basis on which the burden of proof might be discharged. I reflected on the purpose of strike out and that strike out can in appropriate cases minimise the time and anxiety inherent in taking claims to trial. I reflected very carefully on the draconian nature of strike out and particularly in the context of discrimination claims.
57. In all the circumstances taking the facts pleaded by the claimant at their highest, I have concluded that there are no reasonable prospects of the claimant's allegations of direct age discrimination and harassment related to age succeeding and further, no reasonable prospects of the claimant's allegations of direct race discrimination or harassment related to race succeeding other than in respect of allegation (iii).
58. On 22 May 2023, the claimant sent an email to HRADVISORS (HB 93-94) and relies on this as both a protected act and the making of a protected disclosure. In the email the claimant refers explicitly to complaining about Sharron Holder for 'age and/or Race discrimination, victimising for whistleblowing and for not paying me two days' worth of salary'. The email also sets out a request for an unconditional apology, two days of salary and compensation for injury to feelings.
59. At the hearing, the claimant submitted that in relation to the allegation of leaving her CV lying around, this would be a breach of data protection law and as such a matter in the public interest. The claimant does not refer to data protection law in the email of 22 May 2023 or set out how any legal obligation arising under data protection law is said to have been breached.

The tribunal does not have jurisdiction to determine alleged breaches of data protection law. In principle a disclosure of information which in the reasonable belief of the person making the disclosure tends to show that there is a failure to comply with a legal obligation arising in relation to data protection law could amount to a qualifying protected disclosure.

60. The respondent acknowledges that the email of 22 May 2023 could be construed as either a protected act and/or the making of a protected disclosure. I agree that there are reasonable prospects of the email of 22 May 2023 being construed as either a protected act and/or the making of a protected disclosure.
61. On 11 May 2023, the claimant sent a message to Michelle Graham (HB 91-92). The message sets out 'Marina was rude and disrespectful towards me in front of patients and also kissing her teeth...I explained this to you yesterday. I felt humiliated and degraded of her behaviour towards me. I am very upset and stressed by the way I was treated, therefore, I have decided not to come to work. I am sorry.'
62. The respondent submits that this communication at its highest complains of bullying and cannot be taken as a 'protected act' as defined in the Equality Act 2010. The communication on 11 May 2023 does not refer to the alleged treatment being discriminatory or related in any way to any protected characteristic such as race or age and complains about rude and disrespectful behaviour without any detail as to what the behaviour was. There is clearly no express allegation about contravention of the Equality Act 2010 contained in the communication of 11 May 2023 and it is difficult to discern a basis on which there is impliedly an allegation about contravention of the Equality Act or conduct which is discriminatory towards the claimant.
63. The claimant submitted that the communication on 11 May 2023 followed a conversation between the claimant and Michelle Graham on 10 May 2023 when she had explicitly referred to race. The 11 May 2023 communication refers 'explained this to you yesterday'. The claimant does not set out any oral communication on 10 May 2023 as a 'protected act' for the purpose of her victimisation claim. It is the case that she refers at paragraph 20 of her particulars of claim 'I reported her to Michelle, and she replied that she is like that only, don't worry about her. And on the second day, I informed her again she said she would speak to her.' Paragraph 20 thus does not record any details of the alleged reporting of Marina to Michelle when it could readily have done so particularly if this was reporting of alleged race discrimination. The particulars of claim do not set out that as a protected act. The amendment at the case management hearing on 25 October 2023 was to include the oral communication on 10 May 2023 as a 'protected disclosure'. The claimant has not set out anywhere the details of that oral communication and the information disclosed beyond complaining about Marina's conduct although at the hearing before me submits that 'race' was mentioned even though it is not mentioned in the 11 May 2023 written communication or anywhere in her particulars of claim in relation to the conversation on 10 May.

64. As set out by the claimant in her particulars of claim the oral communication on 10 May 2023 and the written communication on 11 May 2023 cannot be construed as a 'protected act'. I have further concluded that there is no reasonable prospect of these communications being construed as 'protected disclosures'.
65. In circumstances where the detriments alleged due to the making of protected acts occurred prior to the protected acts relied upon, I have concluded that there can be no reasonable prospect of the victimisation claim succeeding.
66. In circumstances where the detriments alleged due to the making of protected disclosures occurred before the disclosures said to amount to qualifying protected disclosures were made and where the oral communications on 21 March 2023 and 10 May 2023 cannot conceivably be construed as amounting to qualifying protected disclosures, I have concluded that there can be no reasonable prospect of the protected disclosure claim succeeding.
67. Regulation 3 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides that the regulations apply to a worker who was a full-time worker and following a termination or variation of contract worked for lower weekly hours than they worked immediately before the termination or variation. The claimant is bank staff and cannot fall within scope of the 2000 Regulations. I have therefore concluded that there can be no reasonable prospect of the less favourable treatment on the ground of part-time worker status succeeding.
68. I have taken full account of the fact that the claimant is a litigant in person, the overriding objective and approached matters flexibly and I have taken full account of the draconian nature of strike out and all the circumstances.
69. In all the circumstances, I have concluded that the allegations identified as having no reasonable prospects of success be struck out on that basis.

DEPOSIT ORDERS

70. **Deposit orders – procedure, consequences and purpose**
Rule 39(1) of the Tribunal's Rules of Procedure provides that where the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument. Rule 39(2) provides that the Tribunal must make reasonable enquiries into a paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit. Rule 39 (4) provides that if a paying party fails to pay a deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out.

71. Rule 39(5) provides that if at any stage following the making of the deposit order, the tribunal decides the allegation against the paying party for substantially the reasons given in the deposit order, the paying party shall be treated as having acted unreasonably in pursuing that specific allegation for the purpose of rule 76 (When a costs or preparation time order may or shall be made), unless the contrary is shown and the deposit shall be paid to the other party.
72. The purpose of a deposit order is to cause a party to reflect given the tribunal has assessed an allegation as having little reasonable prospects of succeeding but not to prevent the party continuing to pursue their claim and as such the amount of deposit needs to be an amount the party can meet within the time period the deposit must be paid failing which the allegation will be struck out.

Enquiries into claimant's means

73. At the hearing, I made reasonable enquiries into the claimant's means. The claimant told me that she had no income and was using her savings of £500 to meet her expenses which she referred to as including rent, bills, council tax and food expenses. She told me she was responsible for 50% of the household expenses with her husband who earned approximately £2,000 per month. The claimant said it would be difficult for her to pay more than an amount of £50.
74. I considered whether to make deposit orders in relation to the allegation that the claimant had been told 'when you people come here, your DBS should be checked' was an incident of direct race discrimination and an incident of harassment related to race. In her email of 22 May 2023, the claimant alleges that she was told 'When you people come here, your DBS should be checked as you will be working with children and confidential matters.' I had concluded that this allegation of direct race discrimination and harassment related to race did not have no reasonable prospects of success. Clearly DBS checks are required for persons working with children or in an environment where there are children. A comment referring to 'you people' distancing and objectifying or othering a group can be construed on its face as potentially discriminatory on grounds of race. The comment may be assessed further to hearing all the evidence as directed at the claimant's race and the claimant may be able to discharge the burden of proof that the reason why the comment was made or the motivation of Sharron Holder (Outpatients Manager for Children's Services) was race rather than being related to process to ensure that all relevant staff groups had DBS checks.
75. I concluded that the allegation has little reasonable prospects of success. In reaching my conclusion, I have approached matters as I am required at this preliminary stage taking the allegation at its highest in light of the information available to me. In light of my conclusion on the prospects of success, the discretion to make a deposit order under Rule 39 is available. I considered whether to make a deposit order and whether this would be appropriate and proportionate in all the circumstances. I took account of the claimant's means as stated to me at the hearing.

76. I decided to make orders that the claimant pay deposits as a condition of continuing to advance the allegation in relation the claim of direct race discrimination and the claim of harassment related to race on the basis that the allegation has little reasonable prospects of success.
77. Accordingly, the allegation that the claimant was told by Sharron Holder 'when you people come here, your DBS should be checked' and that this was an incident of direct race discrimination can only proceed if the claimant pays a deposit in the amount of £50 within 28 days of the date the deposit order is sent. And the allegation that the claimant was told by Sharron Holder 'when you people come here, your DBS should be checked' and that this was an incident of harassment related to race can only proceed if the claimant pays a deposit in the amount of £50 within 28 days of the date the deposit order is sent. If the claimant fails to pay the deposits ordered, the allegations will be struck out.

CLAIMANT'S APPLICATION TO AMEND HER CLAIM

78. The claimant has now applied to amend her claim to include allegations that not looking into and/or concluding her complaint of 22 May 2023 and 6 July 2023 is direct race and age discrimination and victimisation. Paragraph 21 of the Record of Preliminary Hearing on 25 October 2023 sets out that the claimant did not seek at that stage to amend her claim to include complaints related to delay in dealing with the investigation of her complaints although these had been included on the draft list of issues.
79. On 26 February 2024, the claimant applied to amend her claim to include an allegation that she was told on 23 March 2023 that she was more suited to back office work and not a face to face job as this job was very fast-paced and you need to be able to multi-task as direct age discrimination.
80. The claimant also applied to include as detriments for making a protected disclosure on 22 May 2023 and as detriments for doing a protected act on 22 May 2023 the allegation that the respondent did not follow the grievance procedure and did not uphold the majority of issues raised in her complaint. The claimant also applied to include issuing her tribunal claim on 22 August 2023 as a protected act.
81. The written application to amend does not explain the reasons for seeking the amendments sought at this time. The outcome letter dated 15 February 2024 records the complaint about the conduct on 23 March 2023 as partially upheld. Implicitly, the claimant complains about the grievance and outcome at this stage given the outcome does not uphold her complaints although I acknowledge that the claimant's position is that there are procedural flaws and unfairness in the handling of the grievance.
82. In relation to the allegation of age discrimination in relation to an incident on 23 March 2023, there is no explanation as to why this was not detailed in the original particulars of claim which are relatively detailed and in particular at paragraph 13 (HB 16) include factual allegations as to what Sharron Holder is said to have said and done on 23 March 2023 without any mention

of the factual allegation now raised. Although the claimant is a litigant in person, her originating claim form and particulars of claim are reasonably detailed and comprehensive. The claimant had an opportunity to clarify and/or amend her claims at the preliminary hearing on 25 October 2023 and at that preliminary hearing there was both clarification confirmed and an amendment permitted. At that hearing, the claimant did not wish to amend to include factual allegations as to the handling and/or delay in handling the grievance. The claimant has also had the opportunity at any point after that preliminary hearing and had the process explained at that hearing to seek to amend her claim and did not take any steps until 26 February 2024. Adding the new factual allegation in relation to conduct on 23 March 2023 at this stage, is introducing a new factual allegation which is out of time having regard to the ordinary three month time limit and that the written application is dated 26 February 2024. The claimant does not set out any reason as to why it would be just and equitable to extend time to permit this amendment.

83. The timing and manner of the application to amend is as set out above unexplained occurring on the eve of the preliminary hearing. There is some prejudice to the respondent as, if the amendments are permitted, the respondent will need to amend its grounds of response to respond to the further amended claim.
84. I have struck out the claimant's existing claim of detriment due to making protected disclosures and her claim of victimisation. The effect of permitting the amendments would be to maintain claims for victimisation and making protected disclosures in these proceedings. The allegations of detriment linked to the 22 May 2023 which the respondent acknowledged could be construed as protected disclosure/protected act do occur after the protected disclosure/act relied upon given the outcome on 16 February 2024. The claimant would potentially be in time to present new claims based on those alleged detriments and in those circumstances, it can sometimes be practical having regard to the overriding objective to permit amendments to an existing claim given where there is a related factual matrix any new claim would feasibly be joined to the existing claim. That approach of itself can of course have impacts on the progress of existing proceedings and it is important to be mindful of the impact of delay on the fairness of any hearing including on the quality of any witness evidence as events recede in time.
85. If the amendment is refused there is limited prejudice to the claimant as she can bring a new claim including those allegations if she wishes to advance them. The claimant is also not precluded from raising the points she wishes to raise as to the alleged unfairness and lack of integrity of the investigation and outcome in evidence and/or submissions at any final hearing if she chooses to continue to advance her allegation of direct race discrimination and harassment related to race – allegation (iii).
86. As the respondent has recently completed its internal investigation and produced an outcome letter, amending to include allegations addressing the investigation and outcome would not require the respondent to engage in any new lines of enquiry but equally the respondent could readily respond if

these allegations were brought as new in time claims. There is injustice and hardship for the respondent if it is now required to defend new allegations not least as the respondent will likely have to file further amended response to address the new allegations raised. There will likely be some delay that would not otherwise have occurred to the progress of the existing proceedings. I take account of the factor that where the claim keeps evolving, the respondent is put to revisiting its position and the proceedings overall do not progress to hearing and disposal.

87. I considered the principles in ***Selkent Bus Co Ltd v Moore*** 1996 ICR 836, EAT. I have considered all the circumstances of the case including the nature of the amendment sought, the timing and manner of the amendment and time limits and the balance of injustice and hardship.
88. Having considered all the circumstances, I decided not to exercise discretion to permit the application to amend.

Tribunal Judge Peer acting as an Employment Judge

11 March 2024

Sent to the parties on:

26 March 2024

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For the Tribunals Office

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