EMPLOYMENT TRIBUNALS

Claimants: Mr Neeraj Handa

Respondent: The Station Hotel (Newcastle) Limited (R1)
Mr Aran Handa (R2)
Mr Paul Williamson (R3)
Mr Steven Duncan (R4)
Ms Helen McDougall (R5)

OPEN PRELIMINARY HEARING

HELD AT: Newcastle **ON:** 6/7December 2023

BEFORE: Employment Judge Moss

REPRESENTATION:

Claimant: Mr R O'Dair (Counsel)
Respondents 1,2,3: Mr T Cordrey (Counsel)
Respondent 4: Ms C Millns (Counsel)
Respondent 5: Mr C Kelly (Counsel)

JUDGMENT

1. The claims of whistleblowing detriment under Section 47B of the Employment Rights Act 1996 against Mr Steven Duncan (the fourth respondent) are struck out as having no reasonable prospect of success.

2. The claims of whistleblowing detriment under Section 47B of the Employment Rights Act 1996 against Ms Helen McDougall (the fifth respondent) are struck out as having no reasonable prospect of success.

REASONS

Introduction

1. Judgment having been delivered orally at the hearing on 7 December 2023, the claimant's representative requested written reasons at the conclusion of the hearing.

2. This public preliminary hearing was listed by order of Judge Morris, dated 15 October 2023, to determine whether the claims against the fourth and/or fifth respondent should be struck out as having no reasonable prospect of success or, in the alternative, whether deposit orders ought to be made on the basis of the claims having little reasonable prospect of success.

3. At the outset, I had regard to the witness statements of the claimant, Paul Williamson, Steven Duncan and Helen McDougall, as well as to the skeleton arguments/outline written submissions of Counsel on behalf of all parties and, as directed, to the relevant pages of the preliminary hearing bundle that was comprised of 863 pages. The claimant and the respondents' witnesses were sworn at the start of the hearing, confirming that the contents of their statements were true to the best of their knowledge and belief, save for one minor amendment to Ms McDougall's statement. No further evidence was heard.

The relevant claims and issues

4. Against all five respondents the claimant is making a complaint of having been subjected to detriment on the ground that he made a protected disclosure. The complaints against Mr Duncan (R4) and Ms McDougall (R5) are brought pursuant to Section 47B(1A)(b) of the Employment Rights Act 1996 on the basis that they were acting as 'agents' of the first respondent. Protection is provided under that section against workers being subjected to any detriment by any act, or any deliberate failure to act, done by an agent of the worker's employer with the employer's authority, on the ground that the worker has made a protected disclosure. The claimant's representative confirmed that any argument R4 and/or R5 could alternatively be classed as 'workers' within s47B(1A)(a) ERA was not being pursued.

5. The claimant's case is that he made a number of protected disclosures and was subjected to the following detriments as a result:

    - being suspended by the First Respondent on 6 April 2023;

    - being removed as a director of the First Respondent by way of notice to Companies House on 13 April 2023;

    - being dismissed on 17 April 2023.

6. The issues pertaining to the strike out/deposit order applications concern primarily whether Mr Duncan and/or Ms McDougall could be said to be acting as agents of SHNL (R1). A secondary issue relates to whether they could be said to have subjected the claimant to any of the detriments relied upon.

Undisputed facts

7. The hearing proceeded on the basis of submissions, but it may be helpful at this stage for key elements of the undisputed facts to be set out as background information for context.

8. The Station Hotel (Newcastle) Limited (SHNL) is a family run business owned by Handa family members. The claimant was an employee of the company (the start date of which is in dispute) until his dismissal on 17 April 2023 for gross misconduct. He had been appointed as a Director of the company in May 2022.

9. Following his appointment as a Director, the claimant made repeated allegations of financial impropriety regarding the business arrangements of the company which culminated in formal grievances being submitted against him by several members of staff, relating to allegations of bullying and harassment.

10. SHNL employed Square One Law to manage the process relating to the grievances. Mr Duncan (R4), a Human Resources Consultant who operates his own business, was appointed by the first respondent to carry out an investigation into the grievances. There was no letter of engagement or written contract between R4 and R1, with a meeting taking place at an SHNL hotel at Newcastle Airport on 17 January 2023, at which Mr Duncan discussed the scope of his instruction with Mr Williamson (R3).

11. Mr Duncan conducted grievance investigation meetings with each of the complainants and held a grievance hearing with the claimant. Mr Duncan declined to consider any evidence relating to allegations by the claimant of fraudulent activity by the company, explaining to the claimant by email on 30 January 2023 that his remit was to look only at claims of bullying against him and not matters concerning financial activities of the company. Mr Duncan found two of the grievances to be substantiated and recommended the matter proceed to a disciplinary setting to determine if a disciplinary sanction was appropriate. The report made it clear that they were recommendations only and Mr Williamson was at liberty to follow them or not as he saw fit.

12. Ms McDougall (R5) is a Human Resources Consultant who operates her own business. The contractual terms and conditions for the supply of HR consultancy and training services by Ms McDougall (a copy of which is at pages 438-9 of the bundle) include within the interpretation section, “the

Proposal" means the quotation for the supply of Services as provided to the Client, and "the Services" means the provision of consultancy and/or training Services by Helen McDougall HR Consultancy and Training in order the complete the objectives as set out in the Proposal.

13. Ms McDougall was appointed by the first respondent to undertake a disciplinary hearing involving the claimant, and drew up a proposal on 16 March 2023 relating to the scope of work as follows:

    "To conduct a disciplinary hearing:

    - Review of investigation evidence
    - Hold a formal disciplinary meeting
    - Provide notes of disciplinary meeting
    - Complete any further investigations or enquiries as necessary
    - Evaluate employee submissions against allegations and evidence
    - Make a disciplinary determination or recommendations"

14. The following day on 17 March 2023, the claimant was sent a letter by email inviting him to a disciplinary hearing to be held by Ms McDougall. He was notified that she was an independent HR Consultant, and was advised that following any recommendations by her, 'we' (inference being the company, the letter being signed by R3 on behalf of SHNL) may decide to issue a disciplinary sanction. The disciplinary hearing took place on 3 April 2023. Ms McDougall sent her draft report to Jean Pierre Van Zyl, a partner at Square One Law, on 11 April 2023, subsequently adding that the company would be justified in a decision to terminate employment on the grounds of gross misconduct, and thereafter sending the final version to Mr Van Zyl that same day.

15. On 6 April 2023 the claimant was suspended by the first respondent. On 13 April 2023 he was removed as a Director of the first respondent by way of notice to Companies House. On 17 April 2023, the claimant's employment was terminated with immediate effect for gross misconduct. The claimant appealed the decision to dismiss him on 21 April 2023. On 31 May 2023 Warren Wayne, employment lawyer at Abbiss Cadres LLP, was appointed to hear the appeal. Mr Wayne met with the claimant on 16 June 2023 stating that the scope of his role was to review Ms McDougall's report and the disciplinary sanction. The claimant received a letter rejecting his appeal on 20 July 2023.

The Legal Framework

16. Rule 37(1)(a) of the 2013 Employment Tribunals Rules of Procedure provides that the Tribunal may strike out all or part of a claim on the ground that it lacks reasonable prospect of success.

17. Rule 39 of the 2013 Rules provides that the Tribunal may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of

continuing to advance an allegation or argument in a claim or response where it considers such allegation or argument to have little reasonable prospect of success.

18. The purpose of a deposit order is: *"To identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs, ultimately, if the claim fails"* - **Hemdan v Ishmail and anor** [2017] ICR 486 at [10] per Simler J.

19. I was referred to and had regard to a range of cases that offer guidance as to how the power under Rule 37(1)(a) should be exercised, including **Anyanwu v South Bank Students' Union** [2001] IRLR 305; **Mechkarov v Citibank NA** [2016] ICR 1121; **Ahir v British Airways plc** [2017] EWCA Civ 1392; **Kaur v Leeds Teaching Hospital** 2018 IRLR 833; **Chandhok v Tirkey** 2015 ICR 527; **Hawkins v Atex Group** 2012 IRLR 807.

20. Key principles regarding use of the power were summarised by Mitting J in **Mechkarow** as follows:

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

21. The caution which tribunals should exercise before striking out discrimination claims was explained by Lord Steyn in **Anyanwu**:

"Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

22. However, there is a countervailing public interest, identified by Lord Hope in **Anyanwu**, which is that the time and resources of the Employment Tribunal (and for that matter of the parties) should not be taken up with having to hear evidence in claims which have no reasonable prospect of success. In **Ahir**, Underhill LJ said:

"Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where

the full evidence has not been heard and explored, perhaps particularly in a discrimination context".

23. A similar approach to that taken to strike out in discrimination claims is to be taken in protected disclosure claims – **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126.

Parties' submissions

24. Summaries of the parties' combined written and oral submissions are set out below.

Mr Cordrey on behalf of the first, second and third respondents –

25. Mr Cordrey contended the claims against R4 and R5 were oppressive, vexatious and meritless and should be struck out. He stated the argument that they were acting as agents of R1 is misconceived, the claimant's representative having misunderstood the difference between service provision and agency. R4 and R5 are in business on their own account with multiple clients and they provided discrete services to R1 for a period of a few weeks until their assignments were completed. Further, neither R4 nor R5 were responsible for the three detriments alleged against them. For that reason too, the claims are hopeless and should be struck out.

26. Mr Cordrey submitted the fact that an employer (A) contracts with a service provider (B) and provides B with authority to undertake a particular task or service on A's behalf, does not, in fact, make B an agent for A as regards that service or task. The leading authority on the concept of agency in employment legislation is **Ministry of Defence v Kemeh** [2014] ICR 625, CA. The Court of Appeal, Elias LJ, held that the concept of agency must reflect "the essence of the legal concept" of agency at common law. As to that, the leading practitioner text on the topic, Bowstead & Reynolds on Agency (22nd Ed), provides a definition "*Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party*".

27. Applying that definition to the facts of this case, Mr Cordrey asserted -

    a. R1 did not give R4 or R5 authority or power to affect R1's legal relations with anyone;
    b. Even if (which is not accepted) the services which R4 and R5 were engaged to provide included a power to affect R1's legal position as regards the claimant, the claimant was an employee of R1, not a third party for these purposes; and
    c. The relationship between R1, R4 and R5 was not of a fiduciary nature.

28. He went on to say, the services R4 and R5 were contracted to provide were clearly and explicitly based on them making recommendations to R1, with R1 free to take whatever course of action it saw fit in response. The relationship between R4, R5 and R1 was the classical and functional relationship that results from a company outsourcing a service. That kind of relationship is expressly stated in Bowstead and Reynolds not to be an agency relationship – "*the mere fact that one person does something in order to benefit another, and the latter is relying on the former to do so or may have requested or even contracted for performance of the action, does not make the former the agent of the latter".* R4 and R5 were no more agents than any employees would have been if the investigation and disciplinary were handled in house.

29. Mr Cordrey argued that, on the undisputed facts, R4 and R5 were operating in business on their own account, and contracted with R1 as a client, to provide the relevant services. He stated R1 was just one of many clients serviced by R4 and R5, the tasks they were engaged in were for a very limited period of time, they negotiated the commercial terms on which they would provide their services and invoiced R1 for payment. He pointed to the fact the claimant had acknowledged the independence and consultant status of R4 and R5 in his own statement.

30. Mr Cordrey stated an essential component of ERA s47B as regards the claim against R4 and R5 is that the alleged detriments must have been done by an agent of the worker's employer with the employer's authority. R1 provided no authority to R4 or R5 as regards the three acts which the claimant relies upon as detriments and neither R4 nor R5 did in fact do the acts in question. Even if Mr O'Dair were right that R4 and R5 materially contributed to detrimental acts done by others, that did not go to the question of whether they were agents. There is no reasonable prospect of it being established that R4 and R5 were agents of R1 as regards the detriments, or at all, and the claims against R4 and R5 must be struck out.

Ms Millns on behalf of the fourth respondent

31. Ms Millns echoed Mr Cordrey's submissions without seeking to rehearse them in full. She did however, reiterate that R4's role was limited to providing recommendations to R1 as an independent HR advisor, that he had no authority to determine R1's position and there was no reasonable prospect of the claimant being able to establish that he was an agent of R1. On the question of whether R4 could be said to have subjected the claimant to the detriments complained of, Ms Millns stated that Paul Williamson (R3), the Non-Executive Chairman of R1, had accepted without qualification that the decision making in respect of the alleged detriments was by him and others and expressly not Mr Duncan.

32. Ms Millns pointed to the fact of Mr Duncan running his own company, Duncan HR Ltd, through which he provides HR advice and assistance to

businesses on employment law issues, regularly conducting grievance and disciplinary hearings. She stated there were indisputable facts in terms of remit and level of instruction given to R4 and that he was in no sense whatsoever an agent of R1. Having been contacted by Square One Law (solicitors for R1) on 13 January 2023 to enquire into his availability to undertake an investigation into grievances raised by several employees against the claimant, further discussions took place on 17 January 2023 during which he agreed to investigate and report his findings. Having completed the investigative process, Mr Duncan produced a report dated 15 February 2023 summarising his conclusions and making recommendations, setting out very clearly it was a matter for R1 whether to follow the recommendations. Ms Millns contended that the scope of the agreement for R4 to provide recommendations only to R1 was directly supported by the contents of R4's witness statement, his grievance report and R3's witness statement, and that the claimant had no reasonable prospect of establishing otherwise. In the circumstances, R4 was not acting with R1's authority to affect R1's legal relations with third parties, he did not have authority to stand in the shoes of R1 but was acting on his own behalf to provide advice to R1 only.

33. In terms of R4's liability for any of the alleged detriments, Ms Millns stated there was no alleged detriment relating to the way R4 conducted the investigation and that he could not find himself 3-4 steps removed yet nonetheless be liable by applying a chain of causation concept to whistleblowing detriment claims. She contended there had to be a link between the protected disclosure and the detriment and there was nothing to suggest R4 was motivated by a protected disclosure to produce a wrongful report.

34. Ms Millns further argued that it would be unjust to put Mr Duncan to great expense and inconvenience in defending such an unmeritorious claim, in that he would have to instruct his own legal representative and would also suffer personal cost being unable to obtain work over the period of the lengthy final hearing.

Mr Kelly on behalf of the fifth respondent

35. Mr Kelly contended the claimant had referred extensively to facts in his skeleton argument that were irrelevant to the question of whether R5 was an agent but that the Tribunal should not be conducting a mini trial in any event. He directed me to the letter of 17 March 2023, signed by R3 on behalf of the Station Hotel (Newcastle) Limited, inviting the claimant to the disciplinary hearing, in which the role of R5 was explained as being to conduct the disciplinary hearing on behalf of SHNL and to provide her conclusion and if appropriate further recommendations. He stated the letter makes clear that, while Ms McDougall had an unfettered discretion to make such recommendation as she deemed fit, if the claimant was found to have committed misconduct 'we may decide to issue a disciplinary sanction', 'we' referring to the first respondent.

36. Mr Kelly highlighted that the 'Overall Conclusions/Recommendations' section of R5's report, included "*on balance of probability/reasonable belief this suggests a pattern of bullying and as such the company would be justified in a decision to terminate employment on the grounds of gross misconduct*". Further, that R5 went on to recommend that, in making a final decision in relation to the disciplinary allegations, to ensure consistency of treatment the company may wish to examine the claimant's claims relating to a grievance he said he'd raised but had not been dealt with. Mr Kelly submitted R5's recommendations/conclusions were limited to addressing the facts of allegations against the claimant, concluding that the facts evidenced bullying by him and acknowledging that R1 would be justified in dismissing the claimant. She did not recommend dismissal and did not take the decision to dismiss. The letter of 17 April 2023 giving the claimant notice of his dismissal referred to Ms McDougall's report and findings having been considered, which evidences a decision being taken by R1 and which is consistent with R3's evidence.

37. Mr Kelly relied upon the case of Kemeh as authority for the proposition that no question of agency arises simply on the basis of a contractor carrying out functions for the benefit of an employer which that employer would otherwise need to do for himself. Mr Kelly also referred to the case of **Hoppe v HMRC & Ors** EA -2020-000093-RN, in which the EAT (HHJ Auerbach) concluded it would be insufficient to establish agency *"that the putative agent is providing services to the putative principal under a contract with it. The putative principal must, in fact, be the source of the authority under which the putative agent acts"*.

38. Mr Kelly also directed me to a summary of the features of the agency relationship from Bowstead and Reynolds on Agency (22nd ed), essentially to the effect that agency may arise where the agent's authority to act constitutes a power to affect the principal's legal relations with third parties or where the agent acts on behalf of the principal without such authority, but in each case a fiduciary relationship is called for. In contrast, the mere fact that one person does something in order to benefit another, and the latter is relying on the former to do so or may have requested or even contracted for performance of the action, does not make the former the agent of the latter. Mr Kelly contended R5 was just such a contractor and not a fiduciary, she was providing services to a client or customer of her business.

39. Mr Kelly went on to make some observations regarding some of Mr O'Dair's specific lines of argument. He argued it would be an error of law for the criminal concept of joint enterprise to be applied to the Employment Rights Act. He stated that, although there was nothing to support a conspiracy between the respondents, the way the allegation was put in the claimant's skeleton went to the unrelated issue of whether the protected disclosures were the reason for any detriment. Even if R5 was involved in a conspiracy, that would not produce an inference that she was a fiduciary of R1 and make her an agent. Regarding Mr O'Dair's contention that Mr Warren, the appeal officer, had clearly formed the view R5 had taken the

decision to dismiss, Mr Kelly stated that Mr Warren was making observations in his report but that was not evidence of R5's role. In connection with any concern of Mr O'Dair's that R5 had failed to have proper regard to the claimant's whistleblowing claims, those claims were irrelevant to the question of whether the claimant had engaged in misconduct. He had admitted to doing what he was accused of doing and R4's findings of fact established he had engaged in misconduct, whether or not the background was whistleblowing. The focus for R5 was the question of whether the claimant had engaged in misconduct and the whistleblowing had no bearing on that. R5 sent the draft report to Mr Van Zyl at Square One Law for review and was asked an additional question which she answered in the affirmative, namely that dismissal could be justified. She did not recommend dismissal as the claimant suggests.

40. In relation to the alleged detriments, Mr Kelly contended R5 had no involvement with the claimant's suspension, nor with his removal as a Director of R1. Her role in the process leading to the claimant's dismissal was to hear the disciplinary case against him and make recommendations as to whether the particular allegations should be upheld. She did not recommend any particular sanction and did not take the decision to dismiss the claimant, nor did she in fact dismiss him.

Mr O'Dair on behalf of the claimant

41. Mr O'Dair contended that R4 and R5 subjected the claimant to detriment as part of a joint enterprise to which R1-3 were also parties. He stated that the decisions made by R4 and R5 were part of a joint collusive enterprise to dismiss the claimant and that a causal link could be established between their involvement and the detriments suffered by the claimant because they had each produced reports which were material causes of the detriments. In seeking to apply the concept of joint enterprise to the issue of the claimant being subjected to detriment by more than one person, Mr O'Dair states at paragraphs 11-13 of his skeleton argument "there is no reason to think that a Respondent must be the sole person who brings about the detriment: thus, if A and B (both male) join forces to ridicule C (who is female) … on the grounds of her gender, they jointly subject her to a detriment. It would be the same if A demoted C and B, acting jointly with A, ridiculed her as a consequence. There would be a joint enterprise of subjecting her to a detriment. All these examples are not accessory liability – both are liable as principals".

42. He argued that it would be wrong to strike out because of limitation in authority, the real question being whether R4 and R5 wrongfully issued reports which caused the claimant ultimately to be dismissed. Mr O'Dair stated that one of the ways the claimant puts his case is that R4 wrongfully issued a pejorative report and R5 relied upon it, whose report in turn was relied upon by the employer in deciding to dismiss.

43. On the issue of agency, Mr O'Dair contended that the respondents could not succeed with their plea, it being inconsistent with their pleaded case at paragraph 6.2 on page 77 of the bundle. He stated that when it suited their case they were perfectly content to assume responsibility for the investigation. That being said, he proceeded to address the law relating to agency and apply his understanding of it to the circumstances of this case.

44. He stated that Ms Millns in her skeleton argument had acknowledged the issue of whether R4 was an agent of R1 is a fact sensitive question and he relied upon Kemeh to argue fact sensitive cases are not naturally the territory for a strike out application. He referred to Mr Kelly having quoted Elias LJ in his skeleton in terms *'whatever the precise scope of agency'* and argued that showed there were cases going beyond the classic agency case. He submitted that R4 and R5 fell within an extended concept of agency since they were carrying out disciplinary procedures that R1 was obliged to carry out, both as a matter of employment law and pursuant to its own policies. He considered it would be dangerous for an employer to be allowed to circumvent the whistleblowing provisions by appointing HR consultants to give them a way out.

45. Mr O'Dair relied upon the Hoppe case for the principle it is not essential to establish common law agency that the putative agent has power to affect the principal's relationships with third parties. He stated it would be an error of law to strike out an otherwise maintainable case on grounds of the claims being allegedly vexatious and distressing to R4 and R5 or that they could still be maintained against R1-3.

46. Mr O'Dair stated it would be too easy, and capable of undermining the protection intended for whistleblowers, if the employer were able to argue the claimant was not dismissed because of the protected disclosures but because of the manner in which he made them. In that regard, he relied upon **Martin v Devonshires Solicitors** [2011] ICR 352 as authority for the proposition Tribunals ought to approach such arguments with great scrutiny and he stated this argument was at the heart of this case since it formed the reason why R4 and R5 felt able to ignore the claimant's repeated claim to be suffering as a whistleblower. Mr O'Dair stated that the allegations of misconduct against the claimant may have been made to penalise him for the whistleblowing and that the Tribunal should be slow to strike out a case which depended upon disputed inferences and primary facts. He submitted there is a public interest in having the claims heard and that, where there is a dispute about the reason why particular conduct occurred, it would be rare for a strike out application to succeed.

47. Mr O'Dair reminded me that I should not conduct a mini trial, that I should take the claimant's case at its highest and assume the claimant will come up to proof on the factual allegations. He stated that it is rare in whistleblowing cases to find direct evidence of the necessary facts and that such matters often arise in cross examination. He presented a summary of facts/matters that he contended were capable of leading to an inference that the decisions made by R4 and R5 were part of a joint

collusive enterprise to dismiss the claimant. This included the fact of R4 being invited to a meeting at Newcastle Airport following his appointment to investigate the grievances. In Mr O'Dair's view this was extraordinary and a matter of negative inference. Further the refusal by R4 to investigate whether there was any collusion between those submitting grievances against the claimant, despite the clamant pointing out to him that a number reported to either the subjects of the protected disclosures or to Mr Williamson. Mr Williamson had been the subject of criticism by the claimant and was the person providing instructions to Square One Law about the grievance and disciplinary processes. Mr O'Dair highlighted concerns about the way in which R4 handled the investigation, for example by his not thinking to ask why the initial complainant (whose conduct had been the subject of at least one of the claimant's protected disclosures) was raising for the first time, 5 months after the event, that he had previously been suspended by the claimant. Mr O'Dair argued that R4 should have been alerted to the possibility he was dealing with a whistleblowing case but chose to ignore it. Having interviewed all complainants by 18 January 2023, R4 refused to disclose minutes of their interviews to the claimant at the time or in these proceedings, from which an adverse inference could be drawn. By the time of his interview with the claimant on 8 February 2023 it was clear that R4 had failed to investigate the protected disclosures. A subsequent email from the claimant to the company's HR Director, Richard Adams, claiming to be a whistleblower, was forwarded to R4 on 16 February 2023 and R4 responded that he had already submitted his report and could not investigate further, when in fact he had sought comments on the draft report from R3 and R1s solicitor and the final report was not produced until 20 February 2023. Mr O'Dair contended all of this could support an inference of joint enterprise. He contended that an inference could also be drawn from the fact R1's solicitor, Mr Van Zyl, would not be giving evidence.

48. Of further relevance according to Mr O'Dair, was that Mr Warren, the appeal officer, had treated R5's decision as the decision to dismiss, it being obvious to him the effective decision to remove the claimant was taken by R5. Mr O'Dair contended that R1-3 and R5 were therefore estopped from asserting that R5 did not dismiss. In the alternative, Mr O'Dair argued R5 was a party to the collusive common design, illustrated by the fact she never considered whether R4 had investigated the claimant's assertion that the allegations against him were detriments by reason of his protected disclosures. Mr O'Dair stated that R5 recommended the claimant be dismissed, a recommendation not contained in her draft report before it was sent to R1's solicitor for review. He stated that R5 had drawn to the attention of R1's solicitor the whistleblowing claims made by the claimant but was instructed the matter was concerned with the claimant's behaviour not with his disclosures and she remained faithful to the solicitor's instructions in her conclusions.

49. Mr O'Dair asserted R4 and R5 could be found to have subjected the claimant to the dismissal detriment because R5 relied very heavily, if not

solely, on the factual findings of R4 and the claimant was dismissed almost entirely in reliance on R5's report.

Conclusions

50. I reminded myself that striking out a whistleblowing claim is an exceptional course to take and one which should only be taken in the clearest of circumstances. While not conducting a mini trial, I had to undertake a reasonable analysis from the undisputed facts of the claimant's likelihood of success in establishing that the fourth and/or fifth respondents were agents of the first respondent.

51. The claims against R4 and R5 rest on undisputed events, from which the claimant seeks to have inferences drawn that an agency relationship existed between R1 and R4 and between R1 and R5. Any disputed facts relating to the reasons behind the claimant's conduct from which the grievances arose would be wholly irrelevant to their standing in the proceedings. The claimant's criticisms about their competence in handling the grievance investigation and disciplinary hearing may be relevant to the question of procedural unfairness and could potentially strengthen the unfair dismissal claim against the employer, but it could not convert a contract for services into an agency relationship, so as to render R4 and R5 liable for whistleblowing detriment in their own right.

52. There being no statutory definition of agency, recourse must be had to the common law approach to the legal concept of agency, as evolved through caselaw. In the case of Ministry of Defence v Kemeh, a distinction was drawn between the situation of somebody contracted to provide a service and an agent authorised to act on behalf of the principal, with the Court of Appeal stating that it would be inappropriate for someone employed by a contractor to perform work for the benefit of a third party employer to be described as an agent. In applying the concept of agency, there needed to be a recognition of the need for the agent to be authorised to act on behalf of the principal as opposed to simply working for its benefit.

53. In the subsequent case of Hoppe v HMRC, the approach taken in Kemeh was applied to the protected disclosure detriment provisions. It was stated in that case by the Employment Appeal Tribunal that it is not essential for the putative agent to have the power to affect the putative principal's relationships with third parties, but nor is it sufficient for the putative agent to be providing services to the putative principal under a contract with it and that the principal must be the source of the authority under which the agent acts.

54. Taken together, the caselaw, at times drawing on guidance from Bowstead and Reynolds on Agency, establishes that the concept of agency requires there to be a fiduciary relationship in existence between the parties, whether that includes the ability of the agent to bind the principal in relation to third parties or consists of the agent acting under the authority of the principal without necessarily having such ability. A merely functional relationship is insufficient, whereby something that is necessary to be done

for the putative principal, and that could otherwise be done by itself, is done by the putative agent under some arrangement. A consistent feature throughout is that something over and above the mere provision of services under a contract would be required.

55. That being the case, if R4 and/or R5 were found to be contractors carrying out functions for the benefit of R1 under a contract for services, being functions which R1 would otherwise need to do for itself, that would not amount to an agency relationship. Conversely, if they were found to be exercising their functions by virtue of authority conferred on them by R1, an agency relationship would have been created.

56. There is incontrovertible evidence within the bundle that R5 was operating under a contract for services. She drew up a proposal for the supply of services to R1, establishing the boundaries pertaining to her role. Although there were no written terms of engagement as far as R4 was concerned, he was engaged by R1 in a similar manner, for a similar purpose of undertaking a specific HR function in accordance with the services he regularly provided through his business. This was consistent with him acting for the benefit of R1 rather than on behalf of it or under its authority. The fact R4 failed to uphold a number of grievances is supportive of his independence and the freedom with which he exercised his functions. This could only go against the claimant in terms of having any inference of collusion drawn. There isn't any evidence to suggest R5 deviated from the proposal she made at the outset about the scope of her role. I would point out here that Mr O'Dair misrepresented the facts when he said Ms McDougall recommended the claimant be dismissed. It is clear from her report that she provided an opinion such action would be justified but she did not recommend it as a sanction. Both R4 and R5 made recommendations at the conclusion of their investigations that the first respondent was at liberty to accept or reject.

57. I considered Mr O'Dair's arguments on behalf of the claimant to be irrational or erroneous at times. In his skeleton argument he purported to cover the law on joint enterprise. Joint enterprise is widely recognised as being a doctrine of criminal law whereby participants may be held liable for the acts of the principal offender, as well as for their own direct actions. It has no place in employment law to my knowledge. He does not suggest that R4 or R5 could be rendered liable for the actions of R1 but uses the 'joint enterprise' argument to advance the claimant's case that more than one person can be liable as principals. Parliament has legislated for the prospect of both a worker's employer and the employer's agent to each be liable for whistleblowing detriments. Liability is not dependent on them having acted in concert and I considered Mr O'Dair's 'joint enterprise' argument somewhat otiose in the circumstances.

58. Mr O'Dair argued that this case could be one falling outside the classic agency case because R4 and R5 had been used to fulfil the employer's obligations under employment law as opposed to carrying out an HR service. He expressed concern that an employer could otherwise simply

outsource its HR functions and deprive an employee or worker from bringing a claim before the Employment Tribunal. Regarding the prospect of R4 and R5 falling within an extended concept of agency, although acknowledged by the Court of Appeal in Kemeh that the concept at common law is not one which can be readily encapsulated in a simple definition, consistent throughout the caselaw is an acceptance that something more than a mere contract for services is required. Mr O'Dair's argument that those offering the type of service provided by R4 and R5 should essentially be deemed to be agents while they deliver those services would be bound to fail. It is the fiduciary nature of the relationship that creates agency as opposed to the category of work involved. As for the suggestion that, absent an agency relationship having been created, outsourcing HR functions would leave a worker or employee without redress, such fear is unfounded given there will always be the prospect of bringing a claim against the employer, although the appropriate claim in the case of an employee would be one under Section 103A of the Employment Rights Act 1996.

59. I was specifically asked by Mr O'Dair to cover in the written reasons what he described as one of his central arguments against the respondents being able to succeed on the issue of agency. He contended that their position was inconsistent with the pleaded case at paragraph 6.2 of the grounds of response. Paragraph 6.2 concerns the respondents' pleadings relating to the unfair dismissal claim, in respect of which agency has no relevance, but Mr O'Dair in his oral submissions relied upon it to suggest the respondents were perfectly content to assume responsibility for the investigation when it suited their case.

Paragraph 6.2 reads as follows:

By reason of the above the SHNL Respondents will contend that Neeraj was dismissed for a fair reason, namely conduct, and that, in all the circumstances, including the investigation which it followed, SHNL acted reasonably in treating this reason as sufficient to dismiss Neeraj summarily. Prior to effecting Neeraj's dismissal, it followed a full and fair procedure, complying in all material respects with the ACAS Code of Practice on Disciplinary and Grievances."

For context, the preceding paragraph reads:

SHNL had a genuine and honest belief that Neeraj was guilty of the misconduct alleged and this amounted to gross misconduct. This was a conclusion which was fair and reasonable in the circumstances and reached following a full and fair investigation with support from independent third parties".

I am at a loss to understand how the contents of paragraph 6.2 might be incompatible with the respondents' position on agency. The respondents' assertion that it acted reasonably in all the circumstances, including the investigation which it followed, does nothing to undermine the argument that R4 and R5 were acting under a contract for services rather than as the

employer's agents. Nor is the reference in the paragraph to the employer following a full and fair procedure inconsistent with the respondents' position on agency. A link is made at the start with the preceding paragraph and para 6.1 makes it clear that support was obtained from independent third parties.

60. Taking the claimant's case at its highest, I find this to be a hopeless case. The factual basis for concluding that R4 and/or R5 were agents of R1 is so weak that an arguable case could not be established. The claimant has no reasonable prospect of establishing that a fiduciary relationship existed with R4 or R5 acting on behalf of R1, putting R1's interests above their own, as opposed to them acting on their own behalf providing a service to R1 for its benefit. R4 and R5 were chosen for a particular task and necessarily had to receive some instruction as to what that entailed, but thereafter they performed their roles in accordance with the services they were contracted to provide, rather than exercising their functions by virtue of any authority conferred on them by R1. It is pure speculation to suggest otherwise and a theory that is unsupported by the evidence. Cases ought not to be allowed to proceed to final hearing to enable a fishing expedition to take place in the vain hope something favourable to the claimant may be unearthed by cross examination.

61. Mindful that I retain a discretion to allow a case to proceed despite a finding that it has no reasonable prospect of success, I considered the overriding objective and my duty to deal with cases fairly and justly. I attached considerable weight to the fact R4 and R5 would be put to cost and inconvenience in having to defend what I consider to be a hopeless case. Aside from any legal costs they might incur, their businesses would inevitably suffer by their absence for a lengthy period. The claimant is not denied the opportunity of presenting his case and seeking redress given he is proceeding with his claims against R1-3 in any event. Having taken a step back and reflected on the just exercise of my discretion, I have concluded the balance lies in favour of striking out the claims against R4 and R5.

62. Although academic, had I reached a different conclusion on the agency point, I would not have moved to strike out the claims on the basis of there being no reasonable prospect of success on the subsidiary point of whether R4 and/or R5 could be said to have subjected the claimant to detriment. Nor would I have made deposit orders. If there was a genuine issue to be resolved at trial about the true nature of their roles, the procedure leading up to dismissal is so interwoven with the act of dismissal itself, that it would have been only proper to leave that for the Tribunal Panel to unpick at the final hearing. I say this for completeness given it was raised as a separate issue, though I am conscious it is somewhat artificial to isolate the issues in the circumstances of this case, given any potential liability on the part of R4 and R5 for dismissal as a detriment would be contingent on them having been found to have acted as agents of R1.

Employment Judge Moss

Date____17/01/2024_____