EMPLOYMENT TRIBUNALS

Claimant: Mrs T Kostakopoulou

Respondents: (1) University of Warwick
(2) Rebecca Probert
(3) Stuart Croft
(4) Gillian McGrattan

PRELIMINARY HEARING

Heard at: Birmingham (in public) **On:** 8 August 2018

Before: Employment Judge Camp

Appearances
For the claimant: Dr E Dochery, lay representative (claimant's husband)
For the respondents: Ms A Reindorf, counsel

RESERVED JUDGMENT

(1) All complaints of detriment for making protected disclosures under the Employment Rights Act 1996 are struck out pursuant to rule 37 on the grounds that they have no reasonable prospects of success.

(2) Apart from the complaints listed in paragraph (3) below, all complaints of victimisation under the Equality Act 2010 are struck out pursuant to rule 37 on the grounds that they have no reasonable prospects of success.

(3) The following complaints of victimisation are the only complaints that are not struck out:

a. those relying on the alleged protected act referred to as protected act 6 (an email of 19 December 2015);

b. those relying on the alleged protected acts referred to as protected act 10 (the claimant's appeal document submitted on or around 19 December 2016, the contents of her appeal presentation, and what she allegedly said during the appeal hearing on 15 February 2017).

(4) **STRIKE OUT WARNING:** For reasons explained below, Employment Judge Camp is proposing to strike out pursuant to rule 37, in addition, on the grounds that, in light of paragraphs (1) and (2) above, they appear to him to have no reasonable prospects of success:

a. all complaints against respondents (2), (3), and (4);

b. all complaints against respondent (1) apart from the three complaints listed in paragraph (5) below.

(5) The three complaints referred to in paragraph (4) b. above are complaints of victimisation relying on the following as the alleged detriments:

a. the fact that there was a relatively long period of time between the claimant appealing a final written warning imposed on her in November 2016 and the appeal hearing taking place;

b. the fact that that appeal, including what she calls her "*complaints about procedural irregularities and victimisation*", was dismissed and the final written warning confirmed;

c. the fact that (in her view) her appeal hearing was unfair and biased.

(6) If the claimant objects to the above proposal, she must send her objections in writing to the tribunal and the respondents' representatives within 21 days of the date this is sent to the parties.

(7) Some case management orders are made after the Reasons, below.

REASONS

Introduction & background

1. The claimant, who is also known as Professor Dora Kostakopoulou, is and was at all relevant times employed by the University of Warwick ("University"), respondent (1) / the first respondent, as Professor of EU Law, European Integration and Public Policy. Having gone through early conciliation from 13 April to 27 May 2017, she presented her claim form on 27 June 2017.

2. The claim consists of complaints of victimisation under the Equality Act 2010 ("EQA") and of detriment for making protected disclosures – 'whistleblowing' – under the Employment Rights Act 1996 ("ERA"). The earliest complaint relates to something that is said to have happened around June 2014, and the latest, to something that allegedly occurred on or about 24 April 2017. There are, on the face of the claimant's case[1], over 90 complaints in total.

[1] There may well be some duplication and there are some complaints where the alleged detriment appears to be damage, e.g. to health or reputation, that allegedly stems from another detriment; I arrived at my total by counting the detriments identified by

3. Through counsel, the respondents suggested to me [the Employment Judge] at this hearing that in reality the claim was about and only about the imposition of a final written warning on the claimant on 29 November 2016 (and the upholding of that warning on appeal, in February 2017). There is considerable support for that suggestion in what has been put before the tribunal by the parties, the claimant as well as the respondents. However, this doesn't alter the fact that the claim that has been presented is broader than that.

4. According to the respondents, the warning was imposed because of: the claimant's behaviour at a meeting on 15 June 2016; her refusal to engage meaningfully with the University's requests to attend a disciplinary meeting concerning that behaviour; harassment of other University staff, including the circulation of intimidating emails.

5. This was a preliminary hearing to deal with the following preliminary issues, identified by Employment Judge Dimbylow in the written record of a preliminary hearing that took place on 21 and 28 November 2017:

    5.1 whether any part of the claim should be struck out under rule 37 as having no reasonable prospects of success ("strike out issue");

    5.2 whether one or more deposit orders should be made under rule 39 ("deposit issue");

    5.3 whether any part of the claim should be dismissed because the tribunal lacks jurisdiction on the basis of time limits ("time limits issue").

6. The preliminary hearing was originally listed to take place in June 2018. It was then brought forward to March 2018 by the tribunal, on its own initiative. It was then put back to June again, at the claimant's request. At the hearing on 4 June 2018, before Employment Judge Rose QC, neither the claimant nor anyone on her behalf attended. It was adjourned (postponed), which is how it ended up before the tribunal on 8 August 2018. The time estimate was two days, but, for various reasons, it became a one day hearing with a reserved decision.

7. One unfortunate result of the preliminary hearing not taking place until August 2018 was that it has proved necessary, on grounds of practicability, to postpone the final hearing, which had been listed to take place over 17 days in October and November 2018.

8. The claimant did not attend the preliminary hearing; her husband appeared on her behalf. During the course of the day, he made two, and only two, applications. He decided not to pursue either of them after some discussion. The first was an application for specific disclosure. The second was for a reference to be made to the Court of Justice of the European Union. As neither of them was pursued, it is not necessary to mention them further. However, I think it would be helpful for the future of these proceedings for me to discuss within these Reasons the disclosure application, at least, as well as one or two

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Employment Judge Dimbylow and those set out by the claimant in the list she provided following the preliminary hearing in November 2017.

other matters raised directly or indirectly at the hearing and/or in correspondence afterwards.[2] I shall do so after I have dealt with the preliminary issues.

9. The only thing I shall explain later in these Reasons that ought to be noted before dealing with the preliminary issues is that I am dealing with them on the basis of the material that was before me at the preliminary hearing and not additional documents emailed by the claimant to the tribunal afterwards.

10. Also, by way of background, I refer to and adopt the "*Cast List*" prepared on the respondents' behalf.

Respondents' concessions

11. This is effectively the hearing of applications made by the respondents. The respondents have chosen to attack specific parts of the claimant's case, and not others, on specific bases, and not others. No relevant concessions are made that will apply at the final hearing, but the respondents have, expressly or impliedly, made some concessions for the purposes of this preliminary hearing:

    11.1 that the time limits issue does not apply to the whistleblowing detriment complaints identified in paragraphs 6.4.9 to 6.4.29 of the "*Case Management* Summary" section of the written record of the preliminary hearing on 21 and 28 November 2017;

    11.2 that the time limits issue does not apply to any victimisation complaint;

    11.3 that the only bases upon which strike out or deposit orders are sought are the time limits issue and an allegation that the claimant has little or no reasonable prospects of successfully showing that particular alleged protected disclosures and protected acts were indeed protected disclosures and protected acts. This concession was made in correspondence from the respondents' solicitors to the tribunal and the claimant well before the hearing took place – see in particular a letter of 9 January 2018 and an email of 22 June 2018.

12. None of these concessions was forced on the respondents by the tribunal. Quite possibly, other parts of the claim are out of time, and/or there are other reasons why parts of the claim have little or no reasonable prospects of success, and/or there are other parts of the claim that have little or no reasonable prospects of success. However, although in theory the tribunal is not bound by the respondents' concessions, in practice it would not be fair to the claimant for me to consider arguments that have not been put forward on the respondents' behalf, or to go any further than the respondents are asking me to.

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[2] Because I have dealt with a strike out and deposit order application, I am very unlikely to be the Employment Judge chairing the tribunal at the final hearing. However, I shall probably be responsible for case management from now until shortly before the final hearing. It seems sensible for me to take the opportunity to deal with as much as can reasonably be dealt with at this stage.

The law

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

14. I note that striking out a tribunal claim, particularly one such as this one involving whistleblowing and victimisation complaints and disputed allegations of fact, is an exceptional thing to do and that before I will do so the respondents have to cross a very high threshold indeed. Equally, however, the overriding objective is not served by permitting claims that are bound to fail to continue. Doing so benefits no one, least of all the claimant. Although whistleblowing is one of the most important of the jurisdictions the employment tribunals have, this does not make everyone a whistleblower who describes themselves as one in their claim form, nor does it make every whistleblowing claim a weighty and/or meritorious one.

15. As I have struck out all of the complaints in relation to which the deposit issue potentially applied, I need not concern myself with the law as to the meaning of "*little reasonable prospects of success*" in rule 39.

16. An allegation may have no reasonable prospects because of vagueness or opacity. Particularly where, as here, the claimant has been given a number of opportunities to clarify her case, the claimant can't avoid the striking out of a particular complaint by failing to make clear, specific, detailed allegations that it is practicable to assess the merits of. If the position were otherwise, it would provide an incentive to be vague; a claimant should not, for example, be able to avoid having her victimisation claim struck out by saying, in effect, "I won't tell you what I wrote or said that constituted a protected act until trial; for now you'll just have to accept my word that it was a protected act". Providing clarity and detail potentially highlights the weaknesses of a claim as much as its strengths.

17. The fact that the claimant is a highly intelligent woman and a legal academic at a very reputable UK institution (albeit English is not her mother tongue and she is not an expert in the law of England and Wales or in employment law and employment tribunal practice and procedure) is relevant in relation to this. I think I am entitled to assume that: she understands the importance of precision in the words that she uses in connection with her tribunal claim and is more than capable of expressing herself in writing clearly; she is significantly better placed than most litigants in person to research employment law and

employment tribunal practice and procedure and to understand and apply the products of any research she has carried out. If she chooses not to provide adequate details of a part of her claim that she knows the respondents are attacking, I am afraid I can see no good reason to give her the benefit of the doubt, as I might do a litigant in person without her advantages.

18. The time limits issue is potentially an issue in its own right, but I prefer mainly to consider it as part of the strike out issue in relation to the whistleblowing complaints. In other words, one of the factors I am considering is the claimant's prospects of successfully persuading the tribunal at trial that it has jurisdiction pursuant to ERA section 48.

19. From the decision in Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 onwards, tribunals have been directed to be wary of deciding time limits issues at preliminary hearings. There is, however, no bar to doing so. It may, for example, be abundantly clear that there is no relevant "*act* [that] *extends over a period*" [ERA section 48(4)(a)] or "*series of similar acts or failures*" [ERA section 48(3)(a)]. As to whether there was "*a series of similar acts or failures*" or any "*act extending over a period*" under ERA section 48, I note, in particular, Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358.

20. The time limit under ERA sections 48(3) & (4) includes a requirement for the claimant to show, if a complaint was presented outside of the primary 3 month[3] time limit, that it was "*not reasonably practicable for the complaint to be presented before the end of that period of 3 months*". In relation to the "*not reasonably practicable*" test, I note Wall's Meat Co Ltd v Khan [1979] ICR 52, CA, Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945, Schultz v Esso Petroleum Ltd [1999] 3 All ER 338. However, in practice in this case, I have not had to think very much about that test, except to remind myself that it is for the claimant to show that she 'passes' it. The reason I have not had to think very much about it is that the claimant has put forward no evidence whatsoever in relation to it, or even made any coherent submissions about it. What this means is that if I am satisfied that a particular whistleblowing complaint was not presented within the primary time limit (or, which effectively amounts to the same thing, that she has no reasonable prospects of successfully arguing at trial that it was presented within the primary time limit), there is no proper basis for extending time and the complaint is liable to be dismissed.

21. It is no part of my decision that any particular complaint was presented in time and/or was "*an act* [that] *extends over a period*" [ERA section 48(4)(a)] and/or was "*part of a series of similar acts or failures*" [ERA section 48(3)(a)]. The only final and binding decisions I am making are to the effect that particular complaints should be struck out because they have no reasonable prospects of success – and one of the reasons why a particular complaint may have no or little reasonable prospects of success may be my assessment of the chances of the tribunal at trial deciding that it was presented within the relevant time limits.

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[3] Extended, if appropriate, to take early conciliation into account.

22. That brings me to a further point: in relation to some parts of the whistleblowing case that I am striking out, my decision that they have no reasonable prospects of success is based on more than one factor. In other words, some of the complaints face at least two hurdles – for example, time limits and satisfying the tribunal that the claimant reasonably believed the disclosure was made in the public interest – and the claimant would have to get over all of them in order to win at trial. It may be that, arguably, it would not be difficult enough for the claimant to get over one of those hurdles for the complaint being considered to have no reasonable prospects of success; but that to get over all of them is so unlikely that the complaint plainly crosses the *"no reasonable prospects"* threshold.

23. Assessing prospects of success pursuant to rule 37 cannot, of course, be done scientifically and should not be approached as if it were a matter of calculating probabilities on a mathematical basis. This doesn't, though, mean I should not think about logic and probability at all. The percentage chance of the claimant succeeding on two separate and independent points is to be found by multiplying the chance on her succeeding on one point by the chance of her succeeding on the other. For example (this is purely illustrative), if the probability of her succeeding on point one were 20 percent and on point two were 20 percent, the probability on her succeeding on both together would (assuming the points were entirely separate from and independent of each other) be 20 percent of 20 percent, which is just 4 percent.

24. Rule 37 does not oblige me to strike out a claim or part of a claim that I decide has no reasonable prospects of success; I have a discretion as to whether or not to do so come what may. However, I think I would have to have some very particular reason for permitting a complaint I thought was bound to fail to continue. My decision in the present case is that it is appropriate for me to exercise my discretion to strike out whenever a particular complaint or part of a complaint has no reasonable prospects of success. This is because there is no discernible special or particular reason to do otherwise.

25. Finally in relation to the law, I note and adopt paragraphs 4 to 12 and 38 to 40 of respondents' counsel's skeleton argument dated 24 May 2018.

Protected acts

26. The many opportunities the claimant has had to provide clarification of her claim include having the option to give witness evidence at this hearing. Paragraph 4.1 of the case management orders Employment Judge Dimbylow made at the hearing in November 2017, which concerned witness statements for this hearing, included: "*We discussed whether or not oral evidence would be received from witnesses. … It is likely the claimant will give oral evidence, possibly limited to the time points, but … the decision is hers.*" She chose not to put in a witness statement and not to attend to give oral evidence.

27. During the hearing, we – and I include the claimant's representative, Dr Dochery, in this – carefully went through the respondents' "*Amended Response and Further Information*" document ("Amended Response"), cross-referencing it with a table that the claimant emailed to the tribunal during the

hearing, and with the claimant's further particulars. We established that, with three exceptions, the respondent had identified the ten alleged protected acts with reasonable accuracy, sufficient to enable me to decide whether or not to order a strike out or a deposit.

28. The thing I am referring to as the "further particulars" is a version of some further information she submitted in August 2017. She provided the further particulars to the tribunal on or about 25 November 2017, further to a direction given by Employment Judge Dimbylow at the hearing on 21 November 2017. She has not suggested that the further particulars are inaccurate in any way.

29. The claimant's further particulars is the key document, as the claimant herself confirmed in an email to the tribunal of 9 August 2018, in which she stated that, "*My ET1 and the consolidated ET1 and FBP submitted on 19 August* [the further information] *are the **only** documents that contain the true and accurate depiction of my claims and facts*" [original emphasis].

30. The table submitted by email by the claimant during this hearing had some inaccuracies in it. For example, it suggested that alleged protected act ("PA") 5 consisted of complaints of November 2017, December 2017 and a letter dated 28 January 2018, whereas in fact – according to the further particulars – it is an alleged complaint to Professor Probert (the second respondent) of 28 January 2016.

31. The three PAs in relation to which one needs to look outside the Amended Response are PAs 6, 8 and 10.

32. Before this hearing, the respondents' case in relation to PA 6 was that a copy of the alleged email of 19 December 2015 the claimant was relying on could not be located. However, the respondents' legal team found what they thought was probably the document the claimant is relying on amongst the many pages of documents sent to them by the claimant in the run up to the hearing. Dr Dochery confirmed to me that that document is indeed a copy of the relevant part of alleged PA 6. The respondents make no admissions as to the document's authenticity, nor as to whether it was sent to or received and read by Professor Pam Thomas, to whom it is addressed. However, for the purposes of this preliminary hearing, they are willing for me to assume that it was and to take it at face value.

33. Dr Dochery conceded on the claimant's behalf that, whether or not it was a protected act, PA 8 is not relevant because the claimant is not relying on it for the purposes of her victimisation claim.

34. In relation to PA 10, the respondents made a mistake. The respondents failed to recognise that the claimant is alleging she did protected acts by complaining about discrimination in her appeal document (submitted on or around 19 December 2016), in her appeal presentation, and during the appeal hearing on 15 February 2017. Once this mistake was highlighted, counsel withdrew the application for a strike out or a deposit order in relation to the three complaints that rely on this as a protected act.

35. The other alleged protected acts can be split into two categories: those contained in a document a copy of which is before the tribunal; those in relation to which there is no documentary evidence before the tribunal, where all I have to base my decision on is, at best, a few sentences in the claimant's further information.

PAs 1, 3, 4, 5, & 9

36. I'll start with the second category of PAs. It consists of PAs 1, 3, 4, 5, and 9. What those PAs allegedly are is explained in counsel's skeleton argument, to which I refer. The respondents make essentially the same point about all five: that the claimant has failed to identify anything capable of constituting a protected act.

37. I agree with the respondents that, in relation to this part of the claimant's case, the only thing supporting the allegation that protected acts were made is the claimant's bare assertion that this was so. In relation to each of Pas 1, 3, 4, 5, and 9, she hasn't even made a clear allegation that she complained about a breach of the EQA. The closest she gets to doing so is in relation to PA 1, in an allegation that in the letter of 19 May 2014 relied on (which I haven't seen and which was not put before the tribunal at this hearing – see below) she complained of "*unfair and unequal treatment*". Unequal treatment is not synonymous with unlawful discrimination under the EQA.

38. Given that the claimant allegedly has a copy of the letter relied on as PA 1, if she really did use words in it that amount to a protected act, her failure to tell the tribunal what those words are is inexplicable. The same goes for the other alleged protected acts that are apparently contained in documents that were not put before me at this hearing but that she appears to be asserting she has copies of: PAs 5 and 9.

39. To an extent, the same goes for PAs 3 and 4 too, which were allegedly protected acts done orally, during conversations. To have any chance of success at trial, she will have to tell the tribunal what she alleges she said that amounted to a protected act. Presumably she knows what she is alleging in this respect and is satisfied of the merits of her own case. If she does know what she is alleging in this respect, one has to ask: why she has not spelt out her allegations to the tribunal at or before this hearing, given she is aware of the basis upon which the respondent is seeking to strike out these parts of her claim?

40. The claimant has had at least the following chances to set out her case clearly:

    40.1 in the original claim form;

    40.2 in additional information she provided in August 2017. I note, in relation to this, that to an extent she appears to have been permitted, generously, to add to the claim set out in the claim form, in effect (arguably) to amend her claim without asking for or being given permission to amend;

    40.3 at the preliminary hearing in November 2017;

40.4 when she provided the further particulars in November 2017;

40.5 in her extensive correspondence with the respondents' solicitors and the tribunal in advance of this preliminary hearing and the June 2018 preliminary hearing. In particular, the part of this correspondence that was about documents was a prime opportunity for the claimant to identify the documents relied on as PAs 1, 5, and 9;

40.6 in a witness statement prepared for this hearing;

40.7 in oral evidence at this hearing;

40.8 in oral and/or written submissions at this hearing, for example in the table she emailed in to the tribunal part way through the hearing;

40.9 in one of the 6 or 7 emails she has sent to the tribunal since the hearing.

41. Further, in her account in the further particulars of the part of a conversation with Professor Croft (the third respondent) relied on as PA 3 (see paragraph 45 of counsel's skeleton argument), the claimant does not even allege that she made a complaint of any kind. Instead, she describes showing Professor Croft a document that she now alleges amounted to targeting on racial grounds. Even in the part of the same paragraph of the further particulars – a part not identified as a protected act – in which she does seem to be alleging she complained about that document to Professor Croft, she does not state that at the time she complained to him about racial targeting, or made any other allegation of a breach of the EQA.

42. The question for me boils down to this: is it enough to avoid the striking out of the parts of her claim that rely on PAs 1, 3, 4, 5, and 9 for the claimant simply, without more, to assert in the further particulars that they are protected acts? My answer is: no, it is not. Given the number of chances she has had, and has squandered, properly to explain her case, I think she must either be unable to do so – in which case she will be similarly unable to do so at trial – or she is wilfully refusing to do so, for some unknown reason, in which case she is in no position to complain if parts of her claim are struck out as a result. I do not, in the particular circumstances of this case, accept ignorance as an excuse. If she genuinely did not appreciate what she needed to do, it could only be because of a refusal to think about and engage with the preliminary issues; again, she would be the author of her own misfortune.

43. I note that if the claimant were still relying on PA 8, what has just been stated about PAs 3 and 4 would apply equally to it. I agree with what is stated about PA 8 in in paragraphs 56 to 58 of counsel's skeleton argument.

PAs 2, 6, & 7

44. PA 2 is an email of 17 May 2014, a copy of which is in the hearing bundle, at page 139. In short, there is nothing in it that any tribunal, properly directing itself in law, could reasonably conclude was a protected act. The part of the email that comes closest is: "*I do not know whether the updating of the School's website falls within your remit … but I was almost certain that*

[particular fellowships] *feature under 'Latest News' and 'Research'. A colleague has pinpointed to me that they are not and expressed concerns relating to matters of equal opportunities*". The claimant did not allege that she had "*concerns relating to matters of equal opportunities*". Even if it is arguably implicit from the email that she shares her colleague's supposed concerns, expressing concerns about unspecified matters of equal opportunities is a very long way from making an allegation that someone has breached the EQA.

45. As explained above, I have been provided with a copy of the relevant parts of the document – said to be an email sent on 19 December 2015 – relied on as PA 6. I am satisfied that the claimant has reasonable prospects of successfully persuading the tribunal at the final hearing that it contains allegations of direct sex discrimination, and probably victimisation too. The relevant parts of it are: "*I write to express my interest in participating in this working group on women in academia as well as my willingness to contribute to promoting change across the University … I was one of the two female academics that reached the Professorial level through internal promotion since the establishment of Manchester Law School … I was … exposed to a culture of respect for female voices, their initiatives and for their contributions. As soon as I arrived at Warwick Law School, I experienced the following: marginalisation; being set up and being set up to fail;* [other forms of mistreatment] … *I pinpointed the unprofessionalism and disrespect surrounding such practices and fought for change. As a consequence, I have been victimised and re-victimised*". The claimant does not have to say "*I was less favourably treated because I am a woman*" in terms in order to have complained of sex discrimination; for me the implication that that is what she was complaining about is clear.

46. PA 7 is made up of the contents of three emails of 27 and 28 June and 1 July 2016, that appear at pages 181, 186, and 189 of the hearing bundle. In summary, I agree entirely with counsel's submissions about this, set out in paragraphs 54 and 55 of her skeleton argument: although the word "*victimisation*" is used in all three emails, it is clearly being used in its colloquial sense, i.e. to mean 'picking on' someone, rather than in its strict legal sense. There is not the slightest hint in any of the emails that the claimant thinks she has complained about discrimination and is being persecuted for doing so.

Conclusions on victimisation

47. In conclusion, the claimant has no reasonable prospects of successfully showing at the final hearing that PAs 1, 2, 3, 4, 5, 7, 8 and 9 were protected acts in accordance with EQA section 27. (The claimant is no longer relying on PA 8 anyway). Because of this, I am exercising my discretion to strike out all of the victimisation complaints that rely on those alleged protected acts. This leaves only the complaints that rely on PA 6 (principally those labelled A3.D4, A5.D1, A5.D2, A5.D3, and A5.D4 by the claimant in the list of victimisation complaints that comes at the end of the further particulars ("claimant's list"); I'll call these the "PA 6 detriments") and the three that rely on PA 10 (labelled A.10.D1, A10.D2, and A10.D3 in the list – the "PA 10 detriments").

Protected disclosures & time limits

48. During the hearing, we went through the alleged protected disclosures ("PD"s) in much the same way that we went through the protected acts. Employment Judge Dimbylow, a very experienced Employment Judge, spent what I understand was a full day on 21 November 2017 (at what had been listed as a 2 hour case management preliminary hearing), trying to get to the bottom of the whistleblowing claim, and evidently believed that he had done so. My starting point is therefore his written record of that preliminary hearing, which incorporates his understanding of what the alleged PDs being relied on are. Although the claimant had, in correspondence, accused Employment Judge Dimbylow of incorrectly setting out her claim, when I went through what Judge Dimbylow stated the alleged PDs were with Dr Dochery, Dr Dochery accepted that the Judge had not made any relevant mistakes or omissions in this respect.

49. When discussing the whistleblowing claim, unless otherwise indicated, references to numbered paragraphs are to paragraphs of the case management summary section of the written record of the preliminary hearing before Employment Judge Dimbylow in November 2017. In relation to time limits in particular, I am taking it as read that what he set out in that written record accurately reflects the claimant's case. I appreciate that the claimant has expressed concerns about its accuracy, but: she has done so in an unhelpfully unspecific way; no obvious inaccuracies were identified at this preliminary hearing before me; given the amount of time the Judge devoted to the hearing, I should be very surprised if any significant mistakes were made by him; and the claimant had the opportunity to give evidence at this preliminary hearing and has chosen not to do so.

50. It is convenient to deal with time limits at the same time as the strike out and deposit issues. The relevant 'cut-off date' is 14 January 2017, in that any complaint about a detriment allegedly suffered before then potentially has a time limits problem.

51. Because of the respondents' concessions, I am to assume for the purposes of this preliminary hearing that the complaints about the alleged detriments stemming from the alleged PDs in paragraphs 6.1.3 and 6.1.4 were presented within the relevant time limits. Given that all the other alleged whistleblowing detriments occurred well before 14 January 2017 and given that there is – see above – no basis in the evidence for extending time, the question for me is: is there any reasonable prospect of the tribunal at trial deciding that any of the complaints about those other alleged detriments were part of "*a series of similar acts or failures*" or any "*act extending over a period*" when taken together with the detriments stemming from alleged PDs 6.1.3 and 6.1.4.

52. Employment Judge Dimbylow split the whistleblowing complaints up into six claims, numbered 1 to 6. Within each claim there are a number of complaints and a number of alleged PDs. Except for a small part of claim 4 and of claim 5 (see below), each claim is separate and distinct from the others, in that the claimant's case is that she made the first lot of PDs – "PD 1" – and was subjected to particular detriments because she made it / them and not

because of any other lot of PDs; then made PD 2 and was subjected to particular detriments because she made it and not because of any other lot of PDs; and so on.

53. The last lot of alleged PDs – PD 6 – may be slightly different, in that it appears to be the claimant's case that PDs 6.1.2 and 6.1.3 and 6.1.4 and the detriments stemming from each of them are independent of each other in the same way that each of the other claims, 1 to 5, is. I shall return to this, below.

54. For the time being, however, I shall treat claim 6 as a single entity and consider how the time limits issue would apply to whistleblowing claims 1 to 5 if I do so.

55. In relation to claims 1 to 5, the first and most obvious factor pointing away from there being any relevant act extending over a period or series of similar acts or failures is, as just mentioned, the fact that alleged PD 6, and the detriments to which the claimant was allegedly subjected as a result, are independent of and separate from from PDs 1 to 5 and the detriments resulting from them.

56. PD 6 is a series of alleged PDs said to have been made between March 2016 and April 2017 concerning supposed breaches of the Data Protection Act 1998 ("DPA") and the presence of allegedly inaccurate information in the claimant's personnel file. The PDs were made to the third and fourth respondents, to a Mrs Kindon (of HR), to a Mrs Mills (also of HR), and to Sir George Cox (the Chair of the University's Council, to whom the claimant wrote in March / April 2017). The connected alleged detriments, inflicted from July 2016 onwards, all concern (directly or indirectly) those alleged DPA breaches, the final written warning, and/or the related investigatory, disciplinary, and appeal process. The claimant's case is that those responsible for the detriments are: the third and fourth respondents; Professors Gilson and Ennew (the disciplinary and appeal officers); Sir George Cox.

57. Contrastingly, on the claimant's case:

    57.1 PD1 was made to someone different from the alleged recipients of the PDs making up PD6, was made in May and June 2014, related to alleged breaches of the EQA, and the detriment was inflicted by the second respondent, in June 2014;

    57.2 PD2 was also made to someone different, was made in November and December 2014, concerned financial irregularities, and the detriment was inflicted by Professor Norrie, the then Head of the School of Law, from 5 January 2015.

58. Pausing there, I have no hesitation at all in finding that whistleblowing claims 1 and 2 have no reasonable prospects of success because of time limits. Objectively assessed, there really is nothing at all linking them with whistleblowing claim 6, apart from the alleged victim being the claimant. There is no significant chance of the tribunal at trial finding there was any relevant series of similar acts or failures or any act extending over a period.

59. I would strike out claims 1 and 2 on this basis even if there were no problems at all with whether PDs 1 and 2 were actually protected disclosures. But there are significant problems of this kind as well.

60. In relation to PD 1, I broadly agree with what is set out in paragraphs 16 to 20 of counsel's skeleton argument. PD 1 is the same email as is relied on as PA 2, dealt with above. That email contains no allegation of a breach of the EQA and in my view such information as is contained in it does not "*tend to show*" any such breach, nor could the claimant reasonably have believed that it did. Even if I am wrong about this, I also agree with the submission that the claimant has no reasonable prospects of showing at trial that she reasonably believed making the disclosure – i.e. sending the email to Ms Gibbs – was "*in the public interest*", in that the email and its contents was purely an internal University matter. The only 'public' aspect of it is the fact that the University is a public institution. Unless one accepts – and I don't, and I don't think anyone could reasonably accept this – that all matters pertaining to public institutions are matters of public interest, that does not mean it was made in the public interest, or that the claimant reasonably believed it was.

61. I note that, under ERA section 43B(1), the relevant thing the claimant has to reasonably believe is "*in the public interest*" is the making of the particular disclosure relied on. One should not be asking oneself – or not be asking oneself only – whether, in the abstract, it would be in the public interest for the information disclosed to be disseminated in some way, shape, or form. Instead, one has to ask whether the claimant reasonably believed a particular disclosure of information, made to a particular person, in particular circumstances, was made in the public interest.

62. In terms of whether it was a protected disclosure, the claimant has a similar problem with PD 2 to the problem she has with whether PAs 1, 3, 4, 5, and 9 were protected acts – see above. PD 2 is alleged to be contained in an email chain that was not put before me by the claimant. She has not identified with any precision what words she used in that email chain that she alleges made up one or more protected disclosures. Given the number of chances she has had to clarify her case, I can only assume she is unable to show anything constituting a protected disclosure. I therefore think she has no reasonable prospects of persuading a tribunal at trial that she made a protected disclosure.

63. The situation in relation to PD 3 is nearly as clear cut in relation to time limits; and it is possibly even clearer in relation to whether it constituted a protected disclosure.

64. The only connection between PD 3 and PD 6 is that PD 3 was, in part, made to the third respondent. However, the subject matter of PD 3 was a one-off event – the disappearance of particular documents in March 2015 – and the alleged detriments consist of something that also happened in March 2015 and the continuation of something that allegedly began in January 2015. None of the people said to have inflicted the detriments making up claim 6 is alleged to be responsible.

65. As to whether there is any reasonable prospect of the claimant showing that any part of PD 3 was a protected disclosure, I again agree with counsel's analysis – see paragraphs 24 to 27 of her skeleton argument. The claimant alleges that she reasonably believed she made a disclosure of information that tended to show that the criminal offence of theft had been committed. The relevant information she disclosed was simply that some documents had gone missing from her pigeon hole. I can just about accept that one of the recipients of her emails might wonder to themselves whether the claimant believed the documents had been taken, but that is something quite different from the claimant believing, let alone believing reasonably, that the information she disclosed tended to show theft. Moreover, any belief that making these disclosures – sending these emails – was in the public interest was unreasonable, and there is no significant chance of a tribunal reaching a different conclusion on this point at a final hearing. As with PD1, the fact that the University is a public institution does not make any and every misdemeanour that happens within it a matter of public interest.

66. Claim 4 also has no reasonable prospects of success because of time limits. The claim consists of two alleged detriments. The first detriment is essentially the same detriment – the claimant's alleged exclusion from administration or administrative life from January to August 2015 by Professor Norrie – as forms claim 2 and part of claim 3. There is no discernible connection between this and claim 6. The other alleged detriment is about (in Employment Judge Dimbylow's words) the second respondent, "*making false allegations in order to facilitate disciplinary proceedings (although this did not happen)*". The "*false allegations*" concerned one or more emails sent in November 2015 and were, I think, allegedly made in November / December 2015. Although claim 6 is partly concerned with individuals allegedly making false accusations against the claimant, the individuals alleged to have made the accusations are different, the accusations themselves are rather different, and claim 6 is mainly all about disciplinary proceedings which <u>did</u> happen. Again, I see no real connection on the claimant's pleaded case, sufficient to establish a "*series*" or any act extending over a period.

67. Further, the claimant also faces insurmountable problems in relation to claim 4 in showing that she made a PD. I again refer to and agree with counsel's submissions in her skeleton argument (paragraphs 28 to 31). PD 4 is about "*unwarranted interventions into my staff webpage*" – see paragraph 4.1.4 [of Employment Judge Dimbylow's *Case Summary*]. The claimant alleges she reasonably believed the information she disclosed tended to show theft, and breach of supposed legal obligations to monitor proper use of the respondent's IT systems and to abide by the respondent's Code of Conduct of IT systems. In short, neither theft nor any breach of any identifiable <u>legal</u> obligation is made out and if the claimant believed it was, there is no significant chance of her persuading the tribunal at trial that it was a reasonable belief. The same – if anything, more so – goes for any belief that any disclosure was made in the public interest.

68. Claim 5 is based on alleged disclosures to Professor Norrie and to the third respondent in 2014 and 2015 about what she believed to be inaccuracies in meeting minutes for which Professor Norrie was responsible.

69. This claim is out of time, in that there is, objectively, no substantial link or connection between the detriments allegedly suffered and those that form the basis of claim 6; there is no reasonable prospect of the claimant establishing that there was a relevant series of acts or any relevant act extending over a period.

70. The claimant also has no reasonable prospect of showing that a relevant PD was made, for reasons I shall now give.

71. I disagree slightly with what is set out in counsel's submission in her skeleton argument, in paragraph 34, about this. She submits there is no reasonable prospect of the claimant showing she reasonably believed that the information disclosed tended to show breach of a legal obligation or commission of a criminal offence. I entirely agree with that submission in relation to two out of the three alleged PDs that make up PD 5: those allegedly made in January 2014 and in the spring term of 2015. If that were the sole problem that claim 5 has, it would mean that only the complaint about the removal of the claimant from the post of Director of Research on 13 June 2014 (see paragraph 5.4.1) was liable to be struck out.

72. The claimant is apparently not relying on breach of a legal obligation, but on a suggestion that her disclosure was about the commission of criminal offences instead. In addition, I agree with counsel that if she believed that any of these disclosures tended to show the commission of criminal offences, her belief was unreasonable. However, the third of the alleged disclosures making up PD 5 (allegedly made orally on 19 August 2015) is said to be about "*tampering with committee minutes*" by Professor Norrie. For present purposes, I am willing not to hold the claimant to what she told Employment Judge Dimbylow about this disclosure being concerned with the commission of a criminal offence. Further, I am also prepared to accept that the claimant may have believed, and believed reasonably, that tampering with committee minutes constituted a breach of a legal obligation.

73. My slight disagreement with counsel's submissions about PD 5 does not, though, materially assist the claimant. I have already decided that the whole of the claim is out of time. And even if I am wrong about this, I agree with counsel that there is no reasonable prospect of the claimant showing that she reasonably believed her alleged disclosures were made in the public interest. Once again, the only discernible basis upon which the public interest is alleged to be engaged is the fact that the University is a public institution.

Claim 6

74. The alleged protected disclosure identified by Employment Judge Dimbylow as PD 6.1.1 is irrelevant because no detriments are alleged to stem from it. In any event, PD 6.1.1 is a letter and PD 6.1.2 is the sending of a copy of that letter, with a covering letter, to someone else.

75. I am not prepared to strike out or make a deposit order in relation to any part of whistleblowing claim 6 because of time limits. As is mentioned above, claim 6 has been divided into groups of complaints each of which appears to rely on a different set of alleged PDs. The application to dismiss because of time limits is

only made in relation to the complaints alleged to arise out of PD 6.1.2. Most of those complaints are broadly about the same things that the rest of claim 6 is about. I think the claimant would have at least a reasonable chance of successfully arguing at any final hearing that the complaints arising out of PD 6.1.2 were part of a relevant series of similar acts, and/or of a relevant act extending over a period, when looked at together with the rest of claim 6.

76. It follows that if the respondents are going to defeat any part of claim 6 at this stage of the proceedings, they have to persuade me that the claimant lacks any reasonable prospects of successfully showing that the alleged PDs relied on were in fact protected disclosures.

77. PDs 6.1.2, 6.1.3, and 6.1.4 are all about essentially the same thing: "*False information is being placed on my personnel file*". The claimant alleges she disclosed information in emails sent between March 2016 and April 2017 that she reasonably believed tended to show that an unspecified criminal offence had been committed and/or that there had been breaches of the DPA. The respondent's position is set out in paragraphs 36 and 37 of counsel's skeleton argument and in its Amended Response.

78. The claimant seems to be alleging that some of the relevant emails are not before me. I am afraid that if this is so, and if I have therefore not been made aware of some of the words the claimant used that she alleges were protected disclosures, it is the claimant's own fault. I am proposing to base my decision on the material that is before me. Based on this, the gist of the claimant's relevant complaint was that there was material in her personnel file, such as emails between colleagues, containing statements she believed were untrue.

79. My views are:

    79.1 the claimant has no reasonable prospects of showing that she reasonably believed the information she disclosed tended to show that a criminal offence had been committed. As Employment Judge Dimbylow recorded, she is not even able to say what criminal offence she had in mind or who had committed it;

    79.2 she would, however, have better than little reasonable prospects of showing that she reasonably believed the information she disclosed tended to show one or more breaches of the DPA. The DPA is a relatively complicated piece of legislation that is poorly understood even by lawyers if they do not specialise in it (and I include myself amongst their number). The misconception that it prohibits a data controller from holding any information of any kind on someone that is inaccurate is widespread. I am not saying the claimant would definitely win on this point, but she might well do so;

    79.3 claim 6 nevertheless fails, though, because there is no public interest in any of her disclosures and the chances of a tribunal deciding she reasonably believed any relevant disclosure was made in the public interest are negligible.

80. It is very common for claimants in proceedings against public bodies or well-known companies to think that the subject matter of their litigation must be of great interest and significance to the general public because it is so important to them. But it is rare for this actually to be so. The claimant's suggestion in the present case is that, "*The public at large would be interested because they want all public bodies to comply with Article 8 of the EU Charter of Fundamental Rights and the DPA 1998.*" (Article 8 is concerned with protection of personal data). I think I can safely say that the public at large would have little or no interest whatsoever in this.

81. Even if the claimant's suggestion were right, it would not follow that these alleged disclosures, in internal correspondence, were "*made in the public interest*" in accordance with ERA section 43B, or that she reasonably believed they were. No reasonable person standing in the claimant's shoes would think to themselves that it was in the public interest to, for example, send an email to Mrs McGrattan of HR, the fourth respondent, in March 2016 complaining about allegedly false statements contained in documents in the claimant's personnel file. That complaint may have been a perfectly legitimate and reasonable one for the claimant to make in her own interests, but that has very little to do with whether making it was in the public interest.

Conclusion on preliminary issues

82. The claimant has no reasonable prospects of success in relation to all of her whistleblowing complaints and to all of her victimisation complaints apart from those relying on alleged protected acts 6 and 10.

Other matters – missing documents

83. The respondents explained their position on the alleged protected disclosures and the alleged protected acts, and explained the basis of their strike out application, in the Amended Response of December 2017 and in their solicitors' letter of 9 January 2018. Notwithstanding this, and the case management orders made by Employment Judge Dimbylow (which included the usual order to the effect that there should be disclosure limited to documents relevant to the preliminary issues and that the first respondent should prepare a single joint hearing bundle), the claimant would not engage properly with the respondents' solicitors in relation to disclosure of documents for the preliminary hearing before the June 2018 hearing date.

84. At the ineffective hearing on 4 June 2018, Employment Judge Rose QC did not make any case management orders in relation to this preliminary hearing, no doubt assuming that the matter was ready for hearing (which, from the respondents' point of view, it was). His orders were entirely concerned with the reasons why the claimant had not attended.

85. The written record of that hearing appears to have been typed up using an old template. That template has a "*Notes*" section at the end of it, after the section containing the orders. The Notes section, which does not itself contain any case management order, includes this: "*Only in exceptional circumstances will the tribunal consider … documents which are not included in the single bundle, in accordance with this Order.*" That part of the Notes section was unnecessary

and did not apply to anything, because Employment Judge Rose QC had made no order for a single bundle of documents. His order did not mention anything about documents for this preliminary hearing and did not alter or amend in any way the case management orders relating to documents that had been made by Employment Judge Dimbylow.

86. The claimant then took it upon herself to prepare a bundle for the adjourned preliminary hearing. By this stage, the respondent had, of course, already prepared one – the one that was before the tribunal at the hearing in June. The respondents' solicitors' objected in an email 22 June 2018, pointing out, amongst other things, that they had emailed the claimant in January seeking her disclosure, that she appeared to be proposing to include documents that were not relevant to the preliminary issues, that the first respondent had been ordered to prepare the bundle, and that if the claimant had in her possession documents relevant to the preliminary issues not already in the bundle, she should provide copies of them to the respondents' solicitors by the end of the month.

87. What then happened was that:

87.1 the claimant sent the respondents' solicitors hundreds of pages of documents attached to three emails, of 26 June, 1 July and 3 July 2018. At least two of those emails – those of 26 June and 3 July – and their attachments were copied to the tribunal on 10 August 2018. The claimant has told the tribunal that she also copied the 1 July 2018 email and its attachments to the tribunal on 10 August 2018. That email cannot be found on the tribunal's email server and I have not seen it. The two emails I have seen have between them 396 pages of documents attached to them, split into 12 separate attachments in total. There is no index or pagination and the covering emails to the respondents' solicitors stated nothing more of substance than that the claimant wanted the documents included in the hearing bundle. Although I have not gone through them in detail, I note they include such irrelevancies as a copy of a decision of the EAT in a wholly unrelated case involving the University that had been decided by Employment Judge Dimbylow and Members in 2002;

87.2 on 4 July 2018, the respondents' solicitors emailed the claimant again complaining about the fact – and it is a fact – that the claimant had sent a large amount of material that was irrelevant to the preliminary issues. They again explained what the preliminary issues were and in particular the fact that the focus was not on the claimant's allegations of detriment but was instead on whether protected disclosures had been made and protected acts done, and that documents proving detriment were not relevant. They also specifically asked the claimant to send them copies of documents the claimant was alleging "*<u>of themselves</u> constitute protected acts / disclosures*" [original emphasis]. The penultimate paragraph of the email stated, and reasonably so: "*If you have relevant documents to include <u>for the OPH</u>* [short for "open preliminary hearing", i.e. this preliminary hearing] *please provide me with copies of these <u>only</u>, cross referring them to the listed protected acts/disclosures in the*

attached document [the Amended Response] *so I can be satisfied as to their relevance. To be clear, I am very happy to include any documents you will to rely on provided they are relevant to the matters to be determined.*" [original emphasis];

87.3 the claimant's reply, also of 4 July 2018, did not engage with the substance of what the respondents' solicitors were telling her. In particular, although she alleged she had "*provided all the documents you cannot locate which contain the protected acts and the protected disclosures*", she did not begin to explain where, amongst the many attachments and hundreds of pages, those documents were allegedly to be found. She insisted that all of her documents had to be incorporated into the bundle and that failure to do so would, "*result in a straight forward breach of Article 6(1) ECHR and Article 47 EUCFR*";

87.4 on 6 July 2018, the respondents' solicitors emailed a short reply, which ended with the sensible suggestion that, "*If you are not willing to proceed in the manner requested … you should prepare your own supplemental bundle for the Tribunal and we will use the bundle I prepared as the core bundle for the OPH*";

87.5 in her reply, of the same date, the claimant did not mention the suggestion that she prepare her own supplemental bundle. The relevant part of her reply is, "*Thank you for informing me about your intention to exclude all my documents ….*". I think the respondents' solicitors, reading it, would have assumed that what she meant by her documents being excluded was that they were not going to be in the bundle of documents prepared by the respondents' solicitors; and would think that she would be preparing her own supplemental bundle.

88. The claimant also wrote to the tribunal many times during June and early July 2018. The letters raised a number of matters, including, to an extent, the hearing bundle. A letter from her dated 24 June 2018, but (as best I can tell from the tribunal file) received for the first time on 30 June 2018, included the following, which is the whole of a passage in the letter that she highlighted when she re-sent it to the tribunal as an attachment to one of her 4 or 5 emails of 10 August 2018:

Bundle for the OPH

I wish to refer Employment Judge Rose's Order concerning the submission of a single bundle and the parties obligation to assist the Tribunal to further the overriding objective. As the Tribunal is aware, I had to wait for the Tribunal's decision on my application dated 5 December 2017 and did not hear from it for 48 days. This matter was also referred to the Regional Employment Judge on 28 December 2017. I received the letter from the Regional Employment Judge on 17 January 2018. In the light of these matters which were beyond my control I could not submit my documentation to the Respondents. I subsequently appealed to the EAT. On 6 June 2018, I stated my willingness to save the Respondents' time and resources by undertaking the preparation of an inclusive bundle (my ET1 and the consolidated ET1 and FBR submitted on 19 and 22 August 2017 include a significant number of dates which are documents' dates which strike at the

heart of the issues to be dealt at the OPH). The Respondent's Representative has resisted this.

I would be pleased to forward my documents to him, but in the event that I encounter objections to their inclusion and/or there is no co-operation by the 5th of July 2018, I would like to submit a bundle containing my documents to the Tribunal.

Neither the Overriding Objective nor the right to fair hearing could possibly legitimise the exclusion of important documents on protected disclosures, protected acts and the continuing nature of my victimisation and detrimental treatment.

[sic]

89. There are a number of things potentially of note about this passage, but for present purposes, what is important is first and foremost the fact that the claimant did not actually ask the tribunal to do anything. She did not make any application; she merely told the tribunal that if she did not get her way in relation to documents by 5 July 2018, she would like to submit her own bundle. No relevant application was ever made to the tribunal, let alone refused. And on 6 July 2018, the respondents' solicitors had positively suggested to her that she should submit her own bundle.

90. The claimant complains that in its replies to her letter, which she emailed across a number of times, the tribunal did not specifically address the above-quoted part of it. I can't speak for the Judge who looked at it, but it does not surprise me that that part of it was not addressed. The amount of correspondence from the claimant to the tribunal in this case has been unusually high and the amount of time that has had to be devoted by the tribunal to this case – particularly considering the fact that at that stage there had yet to be an effective, substantive hearing – has been disproportionate. The tribunal's reply, which addressed the main point the claimant seemed to be making in her correspondence (her request for further and better particulars), was, in my respectful view, reasonable and proportionate. Even with perfect hindsight, I don't think it was incumbent on the tribunal to respond to the claimant's statement of her intention to submit her own bundle.

91. I also note that neither in her letter of 24 June 2018, nor anywhere else, and in particular not after the respondents' solicitors' email of 6 July 2018 suggesting she prepare her own bundle, did the claimant write either to the tribunal or to the respondents making clear that (assuming this was what she thought): she thought Employment Judge Rose QC had made an order to the effect that she was not allowed at this preliminary hearing to rely on documents other than those the respondents' solicitors were willing to have included in the hearing bundle. She did not, for example, email the respondents' solicitors stating anything like, "Why are you suggesting I prepare my own bundle? You know I'm not allowed one because of Judge Rose QC's order."

92. Neither the respondents' solicitors, nor the tribunal, could reasonably have been expected to know that this is what she thought and that this was what she was getting at in her correspondence at the time.

93. Another puzzling aspect of all this is that, on the claimant's own case (as I understand it), Employment Judge Rose QC had made an order permitting documents not included in the bundle prepared by the respondents' solicitors to be relied on in "*exceptional circumstances*". Why did she not mention or seek to rely on this at any stage, particularly given she apparently believed she was being denied fundamental rights?

94. The next relevant thing that happened was the hearing before me. One of the many things we discussed before we got on to the preliminary issues was documents. It was established that the claimant allegedly had in her possession documents containing protected acts and protected disclosures that were not in the hearing bundle, but that Dr Dochery had not brought to the hearing even one copy of any of those documents. Counsel explained and later provided copies of the email correspondence between the claimant and the respondents' solicitors that I went through above. I asked Dr Dochery why the claimant hadn't taken up the respondents' solicitors' suggestion and submitted her own bundle. He told me the claimant had been given "explicit instructions" by the tribunal that she would not be permitted to do so. That was the first time I had any inkling that the claimant apparently thought the tribunal had made an order that gave the respondents' solicitors a veto over what documents the tribunal would consider at this preliminary hearing.

95. I asked Dr Dochery to identify the order or instruction for me, or show me a copy of it, or tell me when it had been issued, or in some other way to give me enough information to enable me to find it on the tribunal file. He was not able to do so. I did not work out that what was being referred to was the notes at the end of Employment Judge Rose QC's order until writing this decision.

96. This discussion with Dr Dochery took place in the morning. He did not apply for a postponement. I said something to the effect that I could only make my decision on the basis of the evidence I had before me. During the lunchtime adjournment, the claimant emailed a number of documents to the tribunal under cover of an email referring to (a little mysteriously from my point of view because I didn't know what she meant) "*the query made by Judge Camp*". There had evidently – as one might expect – been some communication between Dr Dochery and the claimant at lunchtime. But the documents emailed did not include any of the documents allegedly containing protected acts and/or protected disclosures said to be missing from the bundle.

97. As already explained, the hearing ended on 9 August 2018. On 10 August 2018, the claimant emailed the tribunal stating, "*Given that quite a lot of documentation on my protected disclosures has been missing from the Respondents' bundle, if E. J. Camp would like to read the documentation on any (- or all) protected disclosure(s), I would be pleased to provide it*." I drafted a relatively lengthy response, emailed to the claimant at 12:14 hrs on 10 August 2018, the most relevant parts of which are:

> *It is entirely a matter for the claimant what she does. … The hearing is over and the documents she wanted the tribunal to take into account should have been provided before or when it started.*

If the claimant does provide further documents, I will have to decide whether or not to take them into account. …

I am not in any way encouraging the claimant to provide further documents, but if she has documents that are relevant to the issues I am dealing with that she wants me to look at, and she wants there to be a real chance of me deciding to take them into account, she will have to: send them as soon as reasonably practicable, in a single batch, with a single covering letter; copy them to the respondent; identify which particular parts of which particular documents are relevant and explain, clearly but succinctly, why they are relevant; explain briefly why they were not provided before or at the start of the hearing. On the last of these points, it was suggested on the claimant's behalf at the hearing that the tribunal had made an order or given a direction to the effect that the claimant was not permitted to rely on any documents that the respondent was unwilling to include in the hearing bundle it was preparing. As discussed at the hearing, there doesn't seem to be any such direction or order on the tribunal file.

It is almost inconceivable that more than a handful of documents I haven't already seen could be relevant to the issues I am deciding. The fact that something may be relevant to the case generally does not necessarily make it relevant to those issues. The only issues I am deciding are: time limits issues; whether protected disclosures were made; whether the claimant did protected acts. What evidence the respondent had against the claimant when it decided to impose the warning on her, for example, is completely irrelevant to those issues.

If the claimant submits dozens or hundreds of pages of documents and/or submits documents under cover of a long and discursive letter that does not clearly direct me to relevant material, it is very unlikely I will consider them. …

98. Regrettably, the claimant seems to have ignored the guidance I gave her in this email almost completely. Later on 10 August 2018 (a Friday), as mentioned above, between 4.45 pm and 5 pm, she simply copied to the tribunal emails she had previously sent to the respondents' solicitors containing hundreds of pages of documents, unindexed, unpaginated, and substantially unexplained. She did not even explicitly state what she wanted me to do. She also, in one of her covering emails, stated, "*Next week, I will compile a table with a detailed account of the documents on the protected disclosures that were missing from the bundle … and will submit those documents in a single file as instructed.*" A response I drafted was sent to her early on Tuesday, 14 August 2018. It included this:

The claimant is asked to please stop sending in to the tribunal multiple emails with multiple attachments running to many pages. … It is not clear what, if anything, she is asking the tribunal to do. If she wishes to make some kind of application she needs to make it clearly and promptly, in a single letter or email … Further, she will need to explain adequately why any application was not made at the proper time: before or during the hearing before me last week.

99. There was one further email from the claimant on this subject, also on 14 August 2018, which took the matter no further. She did not provide a table or submit further documents as she had said she would in her email of 10 August 2018 that I have just referred to.

100. I have gone through all this in such detail so as to put into its full and proper context my decision not to take into account in relation to the preliminary issues any of the material submitted after the hearing. My main reasons for that decision are as follows:

100.1 the claimant had not submitted her documents to the tribunal before the hearing in June 2018, as she should have done. This was, of course, before Employment Judge Rose QC had made any order that allegedly misled or confused her;

100.2 she refused to comply with the respondents' solicitors' reasonable request that she provide only relevant documents and explain the relevance of what she was providing;

100.3 she chose not to take up the respondents' solicitors' suggestion that she provide her own bundle;

100.4 she sent her husband to this hearing without any copies of her documents and she did not (despite sending in other things) email them to the tribunal on the day;

100.5 she essentially ignored the guidance I gave her in emails of 10 and 14 August 2018;

100.6 she has never told me where, amongst the hundreds of pages of documents she has emailed to the tribunal, the relevant ones are to be found.

101. It would have been a very simple matter for the claimant to have, for example, attached to an email to the tribunal just the missing documents and to have made an application in the email for me to take those documents into account. By the missing documents, I mean those that allegedly make up PAs 1, 5, and 9 and PDs 2, 5, and whatever is said to be absent from the bundle in relation to PD 6. Had she done this, even after the hearing – say, on or before Friday, 17 August 2018 – I might well, notwithstanding everything else, have granted the application. As it is, I couldn't take the missing documents into account even if (which I don't) I thought it would be in accordance with the overriding objective to do so, because I don't know what those documents are.

Specific disclosure

102. One of the two applications made on the claimant's behalf at the hearing before me that was withdrawn was an application for specific disclosure of documents. It was, as best I could tell, a repetition of an application made in (amongst other places) a letter emailed to the tribunal on 5 July 2018. It related to documents about allegations of harassment made against the claimant. The claimant was written to on 31 July 2018 at Employment Judge Findlay's direction and was told that the application would be dealt with at this hearing after the preliminary issues had been addressed, unless the claimant could

explain why it was necessary for it to be dealt with beforehand. She did not do so prior to the hearing.

103. The reason Dr Dochery withdrew the application before me was that, after some discussion, he accepted that although the documents the claimant was seeking disclosure of may well be relevant to the claimant's case generally, they were not relevant to the particular issues I am dealing with.

104. The claimant applied for specific disclosure of different documents in (amongst other places) a letter of 15 September 2017. The application was considered by Employment Judge Dimbylow, who refused it mainly on the basis that it was premature in circumstances where no general disclosure order had yet been made. One part of the EAT's (the President's) rule 3(10) decision of May 2018 was the upholding of Employment Judge Dimbylow's decision not to order specific disclosure for the reasons he gave.

105. The case management orders that will need to be made to take this case forward will include some kind of general disclosure order. The documents then disclosed by the respondent pursuant to that order will either include all the documents the claimant is seeking or they won't. If the claimant thinks those documents have not been disclosed, then – and not before – would be the time for her to make any application for specific disclosure, if she thinks there is a need for further disclosure.

106. I should make clear that the tribunal is unlikely to grant any specific disclosure application before 'ordinary', non-specific disclosure has taken place, particularly not any application that has already been made and refused by an Employment Judge and been the subject of an unsuccessful appeal to the EAT. And I should also make clear that even an application made after ordinary disclosure has taken place has no guarantee of success.

107. I could simply leave specific disclosure applications there. However, given the history of this case, it is almost inevitable that the application relating to documents about alleged harassment will be renewed at some point. I can't comment on the merits of any future application that I haven't seen. Any application will be dealt in accordance with the overriding objective, as applicable when the application is made. But I can anticipate some of the arguments that are likely to be put forward, and I think it would be helpful for me to make some preliminary and provisional observations. My observations are based on my understanding of the case, which is necessarily incomplete and imperfect.

108. The application for disclosure I am discussing concerned documents showing the claimant was guilty of the harassment she was accused of as part of the disciplinary process (the process that culminated in her receiving a final written warning on 29 November 2016). It covered similar ground to the claimant's repeated application for the respondent to provide further and better particulars, which I shall also consider, below.

109. Since well before she presented her claim form, the claimant's case has been that the material she has been provided with to substantiate those accusations

and to support the findings against her that were made during that process are inadequate and insufficient to do so.

110. The respondents' case is that the claimant has already been provided with all of the documents that were relied on in relation to those accusations and findings and that process. The University alleges it provided them both at the time and pursuant to one or more subject access requests made by the claimant. The respondents add that if the specific disclosure order the claimant seeks were made, nothing would or could be disclosed beyond the documents the claimant already has.

111. There are also points about relevance to be taken into account:

111.1 however important particular documents may seem to the claimant, they don't have to be disclosed to her as part of tribunal proceedings unless they are relevant to the real issues in the case and disclosure is reasonably necessary in order for the tribunal reach a fair decision;

111.2 the claim before the tribunal is not and never has been any kind of appeal against the imposition of the final written warning or trial of the allegations that led to its imposition. The respondents are not necessarily accusing the claimant of anything as part of these proceedings; it is the claimant who is making accusations against them. They do not have to prove that the allegations were true, nor that the warning was justified. Equally, the tribunal does not have to decide whether the allegations were true and the warnings were justified. A tribunal's focus in a whistleblowing or victimisation case is not on whether the claimant was treated badly but on why the claimant was treated as she was;

111.3 even before most of the claimant's case was struck out, it was not about whether it was fair and reasonable for the accusations to be made against the claimant and for the University to make the findings against her that led to the imposition of the final written warning. In other words, "was the claimant treated fairly and reasonably?" was not – and is not – one of the real issues in the case. This is because the answer to that question would not help a tribunal decide whether the claimant was subjected to detriments because she did a protected act or blew the whistle. However badly and unfairly she was treated, she will not win her case unless she shows[4] that the reason for any mistreatment she is making her victimisation claim about was that she did a protected act. (If I had not struck out the whistleblowing claim, to win that claim she would, similarly, have had to have shown that the reason for the relevant mistreatment was that she had made a protected disclosure);

111.4 to put things another way, the tribunal could be entirely satisfied that it was completely unfair and unreasonable for the final written warning to be imposed, but still decide that its imposition had nothing to do with any protected acts (or protected disclosures);

[4] Subject to and in accordance with the burden of proof provisions in section 136 of the EQA.

111.5 the documents concerning the harassment allegations that the claimant has been seeking specific disclosure of were, nevertheless, of some relevance to the case as it was before my strike-out decision. They were relevant to this extent only: if the evidence against her was weak, a tribunal *could* decide that the real reason for the accusations, for the disciplinary proceedings, and for the final written warning was not the reason given by the respondent, but was, instead, the protected acts or the alleged protected disclosures;

111.6 none of what remains of the claim relates directly to the accusations and/or the disciplinary proceedings up to the point at which the final written warning was imposed. As explained below, I think the PA 6 detriments appear to relate to things that happened at the end of 2015. The PA 10 detriments relate, directly or indirectly, to the claimant's attempts to get the warning overturned;

111.7 in the circumstances, the documents the claimant apparently wants are of only very limited relevance to what remains of her case.

112. Possibly more important than all of this is whether the claimant herself believes further documents relating to the harassment allegations exist. Is she really alleging the respondents secretly have pages of documents supporting those allegations that they haven't given to her? The claimant may be failing to distinguish between two things: whether the documentary evidence the University relied on was adequate to support the accusations and the findings that were made; what documentary evidence the University relied on. If what she is saying is that the allegations are untrue and that there was and is little or no evidence to support them or to justify the warning, then, surely, the fewer documents the respondents disclose in relation to the allegations, the better, from her point of view?

113. In addition, I note that following a specific disclosure order against a respondent, it is quite common for the respondent to contend it has disclosed everything it should have done and for the claimant to allege that it hasn't. Often, in this situation, it is not practicable for the tribunal to resolve this disclosure dispute before the final hearing. What usually ends up happening is that the tribunal makes a direction along these lines: the question of whether or not the respondent has complied with the specific disclosure order will be dealt with at the final hearing (assuming the tribunal dealing with the final hearing thinks it needs to do so); if the tribunal dealing with the final hearing decides the respondent has not complied with the order, it will make its own decision as to what the consequences of non-compliance should be; the consequences of non-compliance could conceivably include striking out some or all of the response and/or drawing adverse inferences against the respondent (i.e. deciding that it has failed to disclose documents because those documents damage its case).

Further and better particulars

114. The claimant first applied for the respondents to be ordered to provide further information / further and better particulars in or around September 2017. A

similar application has been repeated many times, most recently in a letter emailed to the tribunal on 15 September 2018. It has previously always been refused, mainly because it was deemed premature. The refusal to grant the application has been unsuccessfully appealed to the EAT.

115. One of the things the claimant has been told in relation to her applications is that she could re-apply at this preliminary hearing. In the event, for whatever reason, no application was made; I don't think the previous applications were even mentioned by Dr Dochery on the claimant's behalf.

116. Ideally, the specific disclosure application would be argued before me at a hearing. It would not, though, be a good use of time to hold a further preliminary now. I therefore propose to deal with the application on the basis of what I have in writing before me: principally, the application itself – the version made on 15 September 2018.

117. The application consists of three sets of questions. Questions 1 (a) to (e) concern allegations that the claimant harassed the second respondent and others in June and July 2016. Broadly, the claimant asks for more details of the allegations made. Questions 2 (a) to (g) concern the findings made by Professor Gilson as part of his decision that a final written warning should be imposed on the claimant. Question 3 concerns the definition of harassment used by the respondent in connection with the allegations against the claimant.

118. In her letter of 15 September 2018 containing the application, and in previous similar letters, the claimant seems to be suggesting: that she has rights under the Human Rights Act 1998, the European Convention on Human Rights, and EU Law to be provided with the information she is seeking; that she has these rights because she has never known or understood the detail of the allegations made against her by the University and that this is a breach of natural justice. She writes: "*The damage from the Birmingham Tribunal's (in)action thus far has been physical … reputational and professional as well as material (-economic disadvantage and financial loss resulting from my inability to apply for and/or to accept professional opportunities due to a suspension of four months and unjust imposition of a disciplinary sanction…)*". I am afraid the claimant appears fundamentally to misunderstand the claim that is before the tribunal, what an employment tribunal is for, and how the tribunal process works.

119. I repeat everything set out above in relation to the specific disclosure application about what the claimant's case is and about what the complaints and issues are, and as to the relevance and importance to the remaining claim of the allegations and findings made against the claimant in 2016.

120. This case is about whether the claimant was subjected to particular alleged detriments because she did particular alleged protected acts. The liability issues at trial will be: did the claimant do one or more protected acts, as alleged; did the respondent subject her to the alleged detriments; if so, did the respondent do this because the claimant did the relevant alleged protected act(s). No matter how much she may want it to be, the case is not really about the allegations that were made against her, nor is the tribunal process a

vehicle for clearing her name. The tribunal at the final hearing could decide all of her remaining complaints in her favour without this meaning that the allegations against her are untrue, and/or that it was wrong to give her a final written warning. True allegations can be made by people with the worst of motives; and the right decision can be made at a disciplinary hearing for completely the wrong reasons.

121. The tribunal's decision not to order the respondent to provide further and better particulars has not been the cause of any damage the claimant has suffered as a result of the allegations and findings made against her. An order for further and better particulars that was complied with fully by the respondents would not change the fact that she was suspended and has been given a final written warning. The only thing that might help in this respect would be for the tribunal to make findings at a final hearing as to the truth of the allegations and as to whether the final written warning should have been imposed. Given the claim that is before the tribunal, this is unlikely to happen even if the claimant wins. She has, moreover, not been conducting these proceedings as if getting to a final hearing is her priority.

122. Even if this case were entirely about the allegations and findings made against the claimant in 2016, and even if the tribunal were going to decide definitively at the final hearing whether the allegations were true, I would be unlikely to grant the application made.

122.1 Most of the questions do not read like genuine requests for information the claimant would like the respondents to provide. They seem, instead, to be rhetorical and/or tactical devices to highlight what she plainly sees as deficiencies in the University's case against her in the disciplinary proceedings. For example, with reference to her question 2 (c), I suspect that she already knows roughly how many emails she sent Mrs Wilson and Mr Doran in June and July 2016, and that the point of her question about this is that she didn't send very many and that she therefore can't, in her view, have been guilty of harassing them by sending them emails.

122.2 Similarly, a number of the questions are argumentative and invite the respondents to justify now, with the benefit of hindsight, what was done rather than to explain what was going through their minds at the time and/or the questions presuppose something the respondents almost certainly won't accept. For example: question 2(b) asks for an explanation of why particular sentences and/or words come within a particular part of one of the University's policies; part of question 2(f) asks why the fourth respondent [allegedly] misapplied a particular policy.

122.3 As with her request for specific disclosure of documents about the harassment allegations, she was given, at the time, all of the information the University was willing and able to give about the allegations against her and as to why the warning was being imposed. If she deems that information inadequate, a better approach than encouraging the University retrospectively to address these inadequacies by providing further information might be to persuade the tribunal at the final hearing to agree with her, and to invite it to draw adverse inferences.

122.4 Question 3 is not really a question at all. It is essentially an assertion that the claimant was not guilty of harassment in accordance with accepted definitions of that word.

122.5 The claimant would not need any of the information requested in order to be able fully to advance her essential case, to the effect that untrue and unsubstantiated allegations were made and upheld against her.

123. Given that the claim before the tribunal is not directly about the allegations and findings made against the claimant in 2016, and given that the tribunal is in all probability not going to decide definitively at the final hearing whether the allegations were true, the argument for ordering the respondent to provide further information along the lines of that requested by the claimant is even weaker than it would otherwise be.

124. In conclusion, my main reason for rejecting the claimant's application for an order for further and better particulars is this: I am not remotely satisfied that the claimant's ability to deal with the issues arising in her claim, and to take her case to trial, is in any significant way handicapped by not having the information she is seeking.

The strike out warning

125. In order for me to make the decision I made above to strike out parts of the claim, it was unnecessary for me to engage to any great extent with the claimant's case as to what detriments she suffered as a result of doing protected acts. But the case can't go to trial without all parties and the tribunal being clear as to precisely what, in factual terms, the remaining detriment complaints are all about.

126. The three PA 10 detriments appear straightforward enough. In the further particulars, they are:

126.1 the fact that there was a relatively long period of time – 8 weeks according to the claimant – between her appealing the final written warning and the appeal hearing taking place;

126.2 the fact that the appeal, including what she calls her "*complaints about procedural irregularities and victimisation*", was dismissed and the final written warning confirmed;

126.3 the fact that (in her view) the appeal hearing was unfair and biased.

127. The PA 6 detriments are less easy to pin down. A3.D4 is, "*Being set up in order to be referred to HR; disruption and impact on my work, well-being and performance*". The second part of this is not, I think, a separate detriment but is, if it is anything relevant, damage allegedly caused to the claimant by the detriment(s) to which she alleges she was subjected. The same goes for A5.D3 ("*Erosion of standing in the department*") and A5.D4 ("*Disruption of work, impact on health*") and something set out under the heading *"Protected Act 6 (as above)*" in the claimant's list: "*Cumulative impact of linked A1, A2, A3, A4, A5, A6 and protected disclosures*".

128. Other alleged PA 6 detriments also seem not to be detriments in their own right but to be another way of describing the same alleged detrimental treatment and/or to be an attempt to suggest that that treatment is part of a continuing course of conduct: A5.D2 ("*Subject to conspiracy to injure*"); the two things set out, under the heading *"Protected Act 6 (as above)*" and the sub-heading "*DETRIMENTS*" in claimant's list ("*A continuing disadvantage in the conditions of my work and unequal treatment – I was increasingly disrespected and marginalised*" and "*A continuing failure to apply university procedures and the law of the land and to stop my revi*[c]*timisation*").

129. That leaves just two complaints connected with the A6 detriments: half of A3.D4 – "*Being set up in order to be referred to HR*"; A5.D1, which is, "*Subject to false and fabricated allegations designed to cause harm*".

130. Looking at the body of the further particulars, A3.D4 appears to be about an alleged decision of the second respondent on 23 November 2015 to "*refer*" the claimant "*upwards*" (see page 86 of the bundle). As the email relied on as PA 6 was, according to the claimant herself, sent on 19 December 2015, it seems to me that this complaint is, in light of my decision to strike out other victimisation complaints, unsustainable on the basis of logic and chronology.

131. There is, I think, similar confusion in relation to A5.D1. The claimant's case, as set out in the further particulars (again page 86 of the bundle), seems not to be that she was subjected to detriments because she sent the email relied on as PA 6, but that that email was about those detriments. The only detriments mentioned in the part of the further particulars that – according to what the claimant has written – relate to PA 6 are to do with the second respondent's alleged dealing with HR in relation to the claimant in November 2015, in particular an email of 23 November 2015. In other words, nothing relied on as a detriment in relation to PA 6 happened after the email relied on as PA 6 was sent.

132. If all that is correct – and, provisionally, I think it is – then the only complaints the claimant has left are those about the PA 10 detriments. So far as I am aware, the claimant does not allege in her further particulars that any of the second to fourth respondents is responsible for subjecting her to those detriments.

133. For these reasons, I am proposing to strike out:

    133.1 all complaints against the second to fourth respondents;

    133.2 all complaints against the University apart from the three PA 10 detriments complaints, set out above.

Adjournment of June 2018 hearing – costs

134. One of the things it was anticipated would or might be dealt with at this hearing was whether the claimant should be ordered to be pay any part of the respondents' costs that were wasted when she failed to attend the hearing in June 2018 and it was adjourned. At the hearing before me, the respondents, through counsel, reserved their position. I don't think it is appropriate for this

issue to be put off until after trial; I think the respondents have to make a decision now as to whether or not to pursue any application for those costs, hence my order, below.

CASE MANAGEMENT ORDERS

(8) The claimant's application for the respondent to be ordered to provide further and better particulars is, for the reasons given above, refused.

(9) If the respondents wish to pursue any application for costs connected with the adjournment of the hearing on 4 June 2018, or with the hearing on 8 August 2018, they must make an application in writing within 21 days of the date this is sent to them.

(10) Within 21 days of them being sent the tribunal's decision as to whether to strike out the complaints to which the strike out warning given in the above Judgment relates, the parties must submit their proposals, agreed if possible, for case management orders for the future conduct of this matter, including a new time estimate for the final hearing and any relevant dates of unavailability.

Employment Judge Camp
05 October 2018