EMPLOYMENT TRIBUNALS

Claimant: **Miss J Dove**

Respondent: **HSBC Bank PLC**

Heard at: **Sheffield** **On: 2 November 2018**

Before: **Employment Judge Brain**

Representation:
Claimant: Mr S Mallett, Counsel
Respondent: Miss A Reindorf, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's claim was presented out of time in circumstances in which it was not reasonably practicable to have presented it in time. It was presented within a reasonable time and the Employment Tribunal has jurisdiction to hear it.
2. The respondent's application for an order that the claimant's claim be struck out upon the basis that it has no reasonable prospect of success fails in so far as the claimant pursues a complaint of post-employment detriment upon the grounds of having made the first disclosure (as defined in paragraph 5 of the reasons for this reserved judgment). It cannot be said that the claim has no reasonable prospect of success.
3. The respondent's application for an order that the claimant's claim be struck out upon the basis that it has no reasonable prospect of success succeeds in so far as the claimant pursues a complaint of post-employment detriment upon the grounds of having made the second and third disclosures (as defined in paragraphs 6 and 7 of the reasons for this reserved judgment).

4. The respondent's application for an order that the claimant should be required to pay a deposit as a condition of continuing with that part of her

claim of post-employment detriment upon the grounds of having made the first disclosure upon the basis that it has little reasonable prospect of success is refused. It cannot be said that the claim has little reasonable prospect of success.

REASONS

1. This reserved judgment follows a public preliminary hearing which was held to decide the following issues:

   (i) Whether the proceedings were presented within the limitation period.
   (ii) Whether the claimant's claim (or any part of it) has no reasonable prospect of success and should be struck out.
   (iii) Whether the claimant's claim (or any part of it) has little reasonable prospect of success and the claimant should be ordered to pay a deposit as a condition of continuing with it.

2. I heard evidence from the claimant. Cross examination was limited of course to the issue of whether her complaint was presented within the limitation period. I then heard helpful submissions from counsel for each party.

3. The background to this matter is that the claimant brought earlier proceedings against the respondent. This was allocated case number 3200579/2016. Following an 8 days' hearing in May 2017, followed by a day in chambers on 17 May 2017, the Tribunal promulgated a reserved judgment on 5 July 2017. I shall refer to this as 'the Judgment'. Being a reserved judgment it was accompanied by reasons. For ease, I shall refer to the relevant paragraph numbers of the reasons for the Judgment simply as *'paragraph xx.'* That expression is to be taken as a reference back to the reasons for the Judgment.

4. In the Judgment the Tribunal held that the claimant had been unfairly dismissed by the respondent. The complaints of detriment for having made protected disclosures and of dismissal for having done so were dismissed. However, the Tribunal found that the claimant had made three protected disclosures: I refer to paragraphs 293.2, 293.3 and 293.4

5. The Tribunal determined (at paragraphs 293.2) that the claimant made a protected disclosure to Sheldon Rowles of the respondent on 2 December 2014. (I shall refer to this as *'the first disclosure'*). This concerned two issues: that of the claimant being asked by Richard Barker of the respondent to falsify customer records; and information provided by the

claimant about the probity of an examination process (referred to in particular at paragraph 57).

6. The second protected disclosure *('the second disclosure'*) was the claimant's written complaint to the respondent's compliance investigation team made by the claimant at the end of December 2014 (paragraph 277.3). This concerned both the falsification of records issue and the examination issue (as they became known). The Tribunal held that the claimant did not have a reasonable belief as at the end of December 2014 upon the falsification issue. She continued to have a reasonable belief after that date upon the examination issue. The latter was thus the second disclosure for the purposes of the Part IVA of the Employment Rights Act 1996.

7. The third protected disclosure *('the third disclosure')* was information provided by the claimant to Alison Clarke of the respondent in January 2015 (paragraph 277.4). This was about the falsification of records and examination issues. Again, the Tribunal held that because of the absence of reasonable belief the claimant did not make a protected disclosure at the interview with Alison Clarke about the falsification issue but did so upon the examination issue. Again, the latter was thus the third disclosure for the purposes of the Part IVA of the Employment Rights Act 1996.

8. The Tribunal found (at paragraph 295) that Sheldon Rowles did not communicate the first disclosure to Mr Barker. Therefore, that was not causative of any detriment to the claimant during employment with the respondent nor was it causative of her dismissal. Similarly, the second and third disclosures were not causative of any detrimental treatment of her by Mr Barker or of the claimant's dismissal by the respondent.

9. The instant claim (proceeding with case number 1805095/2018) is a complaint of post-dismissal detriment. It is not of course contested by the respondent that a complainant may bring a claim under section 47B of the Employment Rights Act 1996 in respect of any detrimental action taken by the employer after employment has ended upon the grounds of making a protected disclosure.

10. In the instant case the claimant relies upon the three disclosures as causative of detriment. As I recorded in paragraph 6 of the case management summary dated 15 June 2018 there appeared to be two limbs to the alleged post-termination detriment which she says that she suffered. These were that:

    (i) Mr Barker of the respondent circulated the Judgment to others; and
    (ii) There was the disclosure of information "of a personal and career derogatory nature which given the nature of the financial services industry vastly impacted on re-employment opportunities"

11. It is not in dispute that Mr Barker circulated the Judgment to several individuals within the respondent. I refer to pages 78 and 79, 87 and 88 and 89 to 91 of today's hearing bundle. These were three instances of Mr Barker circulating the Judgment to others.

12. Mr Mallett confirmed that in reality the two limbs of the claimant's complaint (cited at paragraph 10) should be read together. The complaint is not that she was subjected to a detriment by reason of Mr Barker circulating the Judgment in and of itself but rather that he did so accompanied by (alleged) derogatory remarks made by him about the claimant.

13. The term *'detriment'* is not defined in the 1996 Act. Its meaning has been given extensive consideration in case law particularly in the context of the Equality Act 2010 and the anti-discrimination legislation in force prior to the 2010 Act. The word *'detriment'* has been held to mean simply *"putting an individual under a disadvantage"* and exists where a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his or her detriment.

14. Had the claimant been complaining about the circulation by Mr Barker of the Judgment in and of itself then I would unhesitatingly have found that not to be capable of constituting a detriment.

15. As the claimant knew (or at the very least ought to have known) final hearings in the Employment Tribunal are in public. The judgments are now published online (a practice that was adopted before the hearing of the claimant's case: indeed, it appears that the Judgment appeared upon the Tribunal's judgment website although for some reason it seems that it has been taken down). Even before the advent of the judgment website Tribunal judgments could be obtained from the register of judgments maintained at the Bury St Edmunds Employment Tribunal.

16. Thus, I find compelling Miss Reindorf's submission (at paragraph 24.6 of the written submissions that she made today) that, *"the possibility of publicity is a risk in any litigation, and the interests of justice require that it be seen to be done. It would be contrary to public policy, arguably perverse and certainly a worrying precedent if the mere fact of the limited dissemination of a judgment already in the public domain were to be held to be a detriment for the purposes of the whistle blowing legislation."*

17. One is left to speculate as to the reason for there being no precedent which either counsel could find from their researches upon the question of whether the circulation of a publicly available judgment may constitute a detriment. Leaving such surmise to one side it is perhaps unsurprising that Mr Mallett refined the claimant's case to one of detriment caused by the circulation of

the Judgment by Mr Barker accompanied by derogatory remarks about the claimant.

18. I turn now to consider the issue of the limitation period in this case. It is not in dispute that this case is one to which section 18A of the Employment Tribunals Act 1996 applies. Before pursuing this claim, the claimant was required by section 18A of the Employment Tribunals Act 1996 to contact ACAS before issuing proceedings in the Employment Tribunal. The claimant did so on 24 January 2018. ACAS issued the Early Conciliation Certificate on 10 March 2018.

19. The last act complained of by the claimant is the email to which I have already referred in paragraph 11 above at pages 87 and 88. This is dated 10 November 2017.

20. Upon the basis that the last act in the series of acts complained of by the claimant took place on 10 November 2017 and the given dates upon the Early Conciliation Certificate then the relevant limitation period for the claimant to commence this case expired on 10 April 2018. This was the last day for her to present her complaint within the time prescribed for issuing proceedings in section 48 of the 1996 Act.

21. The Employment Tribunal received the claimant's claim on 10 April 2018. However, this was not accompanied, as it should have been, by the Early Conciliation Certificate issued by ACAS. We can see at page 2 of the claim form that the claimant answered *"no"* to the question *"do you have an ACAS Early Conciliation Certificate number?"* she went on to explain the reason why not: *that a person that she was making the claim with has an ACAS Early Conciliation Certificate number.*

22. It appearing to the Regional Employment Judge that such an explanation was incorrect, he directed that the claimant's claim be rejected. He did so pursuant to rule 12(2) of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (when read with rule 12(1)(c). He caused a letter to be sent to the claimant on 25 April 2018 giving her incorrect explanation about another having an early conciliation certificate as the reason for his decision to reject the claimant's claim.

23. On 26 April 2018 the claimant remedied the defect by submitting the Early Conciliation Certificate. Employment Judge Davies therefore directed that the claimant's claim should be accepted as having been properly presented and that it would treated as having been received on 26 April 2018. The difficulty for the claimant is that this means that her claim has been presented out of time.

24. The claimant gave evidence at paragraphs 16 and 17 of her witness statement about the difficulties that she encountered in presenting her claim form. The evidence in her witness statement (which she repeated when called to give evidence before the Tribunal upon this issue) was that she had made around 15 or 16 attempts to present the claim form without success. She sought assistance from a member of staff in the Leeds Employment Tribunal who referred her to a technical helpline number in Leicester. It appears that she could not get the system to accept the form with the correct information and furnished incorrect information in the hope of getting the form through. She said that she was horrified when she received the letter of 25 April 2018 and took steps to correct it immediately.

25. The claimant was cross examined to the effect that she had failed to check the accuracy of the information received by the Employment Tribunal when she sent in her claim form. Had she done so (as was possible) she would have seen that inaccurate information had been given and she could have emailed to correct the inaccuracy straight away.

26. We can see from pages 27(a) and 27(b) of the bundle that the claimant succeeded in submitting something onto the system on 9 April 2018 at 21:01 hours. She received the confirmation of this from an email address no-reply@digital.justice.gov.uk It is plain from this that an attempt by the claimant to email that address would be futile. The acknowledgement of 9 April 2018 said that the claimant had 'started a claim' and informed her that she could return to it in order to complete it.

27. On 10 April 2018 at 13:25 the claimant emailed the Leeds Employment Tribunal. She said *"As discussed with Lucy this ET claim was due to be submitted yesterday and as you can see I was working on it however was unable to progress online. The problem persists today and I have spoken (to) Laura Nye at ACAS who states she has been contacted by others who have similar issues with ACAS. I am extremely concerned as this was a time critical matter. I will also be responding as directed to the matters of the preliminary hearing – deadline close of play tomorrow. There appears to be a technical issue with the system not accepting the claim number although this has been copied and pasted and entered manually. There were also issues with the system accepting the ACAS Early Conciliation number which was my reason for exiting the system."*

28. The respondent fairly and realistically accepted that the claimant had had a torrid time over 9 and 10 April 2018 in trying to submit the claim form electronically. The criticism of the claimant was not that she left matters to the last minute (as she is entitled to do) but rather of failing to check that all of the information necessary to commence the claim had been filed with the Employment Tribunal on or before 10 April 2018.

29. I note that the email of 9 April 2018 gives a claim number (albeit one in different form to that once it has been allocated to an Employment Tribunal Office). It also says *"you have started a claim to an Employment Tribunal. To return to your claim you need your claim number (above) and memorable word."* This corroborates my earlier finding at paragraph 25 that it was possible for the claimant to have checked what was on the claim form prior to 25 April 2018.

30. It is not of course, in dispute that the claimant has presented this claim out of time. However, there is an escape clause open to her.

31. Where satisfied that it was not reasonably practicable for the claim to be presented before the end of the limitation period then the Tribunal may extend time for such further period as the Tribunal considers reasonable. Miss Reindorf has helpfully cited the relevant test *per* ***Palmer and Saunders -v- Southend-on-Sea Borough Council*** **[1984] ICR 372 CA**. There, it was held by May LJ sitting in the Court of Appeal that:

> "*We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done…. They mean something between these two. Perhaps to read the word "practicable" as the equivalent to "feasible"…. and to ask colloquially and untrammelled by too much legal logic – "was it reasonably feasible to present the complaint to the Employment Tribunal within the relevant 3 months?" – is the best approach to the correct application of the relevant sub section."*

32. There may of course be a number of reasons for late presentation of a claim. The claimant does not advance (nor realistically could she advance) a contention that she was reasonably ignorant of her rights or of the applicable time limit. On the contrary, she was acutely anxious about matters when she encountered the technical problems on 9 April 2018. She knew (and indeed acknowledged in evidence before me her awareness) that presentation of the claim form on or before 10 April 2018 was time critical.

33. The claimant seeks to rely upon technical problems as the reason for late presentation of the claim. Mr Mallett referred me to ***Consignia plc (formerly the Post Office) -v- Sealy*** **[2002] EWCA Civ 878**. This was a case that concerned postal delays. In that cased due to a delay in the post the complaint did not reach the Employment Tribunal until after time limits had expired in circumstances where in the ordinary course of the post it would have arrived in time. It was held that a claimant was entitled to rely on the ordinary course of post and there was no reason to penalise a

complainant who had done so for not having tried to present his complaint at some earlier point in the 3 months' period. It was held that where a claimant has done something that in the normal course of events would have resulted in his or her claim being presented within the relevant time period but owing to some unforeseen circumstance this did not happen it will have been not reasonably practicable for the claimant to have presented the claim in time. If that condition is satisfied it does not matter why the claimant waited until the last moment. The question of whether the condition has been satisfied is a question of fact to be determined by the Tribunal on the evidence before it.

34. The same principles should apply to electronic applications as with postal applications. Therefore, where a claimant has done something that in the normal course of events would have resulted in the claim being presented but owing to some unforeseen circumstance did not happen it will have been not reasonably practicable for the claimant to have presented the claim in time.

35. I am satisfied that in this case the claimant encountered entirely unforeseen technical difficulties. Having to making 15 or 16 attempts to lodge a claim form due to technical difficulties is something which I accept is unforeseen. Upon the authority of ***Consignia*** it is immaterial why the claimant waited until the day before expiry of the limitation period to attempt to present her claim.

36. Therefore, the focus must turn as to whether or not something more is required of the claimant in the circumstances. It seems that the claimant tried without success to submit the claim form by ticking the "yes" box in answer to question 2.3. Realising that time was critical she then decided that she ought to try to get the claim form submitted online by (incorrectly, as she knew) answering that question in the negative and setting out a reason that was inapt (namely that somebody else had obtained an Early Conciliation Certificate about the same matter). I find that none of this was the claimant's fault. One can only imagine the desperation she felt to get the claim form presented.

37. The claimant did not stop there. She emailed the Leeds Employment Tribunal on 10 April 2018 (that being the final day). To repeat, in the final final line of this email she said, "*there were also issues with the system accepting the ACAS Early Conciliation number."* She also said that the system had not accepted the claim number.

38. There is some merit in the respondents' criticism of the claimant for not forwarding the Early Conciliation number in the email of 10 April 2018 and also failing to check what information had been received by the Tribunal between 10 April and 26 April 2018 (when she received the letter of rejection

from the Employment Tribunal). Against that must be weighed the following issues.

39. Firstly, I take into account the fact that the claimant is an inexperienced litigant in person. She has of course been involved in difficult Employment Tribunal proceedings (with case number 3200579/2016) already in connection with events between her and her former employer. However, she was represented by Mr Mallett upon the first claim. This time around she was acting in person.

40. Secondly (and perhaps more significantly) there was no reply to her email of 10 April 2018 from the Leeds Employment Tribunal. In my judgment therefore the claimant can be forgiven for thinking that she had done enough. I have little doubt that had Leeds Employment Tribunal asked the claimant for the Early Conciliation number on 10 April 2018 or at any time afterwards the claimant would have replied immediately. She dealt with the letter of 25 April 2018 straight away upon receipt of it the next day. That day (26 April 2018) she supplied the Early Conciliation number. The claim was then accepted upon the direction of Employment Judge Davies.

41. By application of the *dicta* in ***Palmer and Saunders*** I find that it was of course physically possible for the claimant to have submitted the Early Conciliation number on 10 April 2018. It was not physically possible for her to do this through the portal administered in Leicester because the email address she was given was *'no-reply'* and there were technical difficulties with the form but it was physically possible for her to have supplied it to Leeds Employment Tribunal Office. However, I find that it was not reasonably feasible for her to have presented the Early Conciliation number as she was not asked for it notwithstanding that she told the Leeds office that she had been unable to put the Early Conciliation number upon the form when sending it electronically to Leicester. True it is that she could have just included it in the email of 10 April 2018 but in my judgment what she did effectively (by dint of her explanation) was to ask if she needed to supply it. She received no reply. In my judgment could reasonably conclude that she had done all that she was required to do.

42. I therefore find that it was not reasonably practicable for the claimant to have presented this claim in time and that she presented it within a reasonable time. The Tribunal therefore has jurisdiction to consider it.

43. I now come on to the question of the respondent's applications made pursuant to schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. The respondent has made an application for an order that the claimant's claim be struck out upon the basis that it has no reasonable prospect of success. This is an application made under rule 37 of schedule 1. In the alternative, the respondent makes an application

for an order that the claimant should be required to pay a deposit as a condition of continuing with her claim (or any part of it) upon the basis that it has little reasonable prospect of success. This is an application made under rule 39 of schedule 1.

44. In any detriment claim (such as this one) brought under Part V of the 1996 Act it is for the employer to show the ground on which any act or deliberate failure to act was done. This does not mean however that once a claimant asserts that he or she has been subjected to a detriment the respondent will have disprove the claim. Rather it means that once all of the necessary elements of the claim have been proved on the balance of probabilities by the claimant (that there was a protected disclosure, there was a detriment and the respondent subjected the claimant to that detriment) the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

45. I find there to be no reasonable prospect of the Tribunal determining that the second and third disclosures played any part in Mr Barker's mental processing or reasoning. He had no involvement in the examination issues. In my judgment therefore Miss Reindorf is correct to submit that there is no reasonable prospect of the claimant succeeding with a public post-dismissal public interest disclosure complaint arising out of them.

46. However, I take a different view about the first disclosure.

47. Miss Reindorf submits that the claimant cannot show that she was subjected to a detriment upon the basis of the email to colleagues at pages 78 and 79, 87 and 88 and 89 to 91. The respondent's submission is that these amount to little more than Mr Barker circulating the Judgment. (I have already determined that in and of itself the circulation by him of the Judgment cannot be a detriment).

48. It is also submitted on behalf of the respondent that the assertion that Mr Barker's action was intended to discredit and damage the claimant's reputation is illogical in circumstances where she won her unfair dismissal claim. Further, the Tribunal did make findings of fact in the Judgment about issues with the claimant's ability in role. Thus, it is submitted on behalf of the respondent that damage to her reputation is not attributable to Mr Barker.

49. Upon the issue of causation, the respondent submits that there is no prospect whatsoever of the Tribunal concluding that Mr Barker disseminated the Judgment because the claimant had made the protected disclosures. The respondent says that the second and third disclosures related to the examination issue in which Mr Barker had no involvement. Miss Reindorf submits (at paragraph 25.3 of her submissions) that "*It is*

inconceivable that the Tribunal could now find that Richard Barker was motivated to maliciously disseminate the judgment in 2017 because of those historical protected disclosures which were nothing to do with him."

50. About the first disclosure, the respondent submits that the flaw in the claimant's case is that this was not communicated to Mr Barker but rather to Mr Rowles and was not the cause any detriment to her. Furthermore, it was of short-lived duration as it ceased to be a protected disclosure within hours of the disclosure being made (paragraph 291).

51. As Miss Reindorf puts it, it is submitted that there are no prospects of the Tribunal finding that Richard Barker disseminated the Judgment in 2017 because of this one fleeting and inconsequential protected disclosure in late 2014 and *"which had not been communicated to him contemporaneously. The Judgment runs to 82 pages and contains a wealth of findings on other matters relevant to Richard Barker. The claimant makes no suggestion as to why the Tribunal might find that his dissemination of the judgment to a few colleagues who had supported him during the litigation was done because of this particular protected disclosure."*

52. When considering an application under rule 37, a Tribunal should only strike out a protected disclosure claim in exceptional circumstances. By analogy with discrimination cases strike out is appropriate for cases where the claimant seeks to establish facts that are totally and inexplicably inconsistent with the undisputed contemporaneous documentation. It is not in dispute that a whistleblowing case such as this had much in common with discrimination cases in that they involve an investigation in to why an employer (or in this case a fellow worker for whom the former employer may have a vicarious liability) took a particular step. Such cases are generally fact sensitive and any issues should usually only be decided after all the evidence has been heard.

53. On behalf of the claimant Mr Mallet submitted that Mr Barker has on the claimant's case got an agenda against the claimant. Mr Mallett said that it was implausible that Mr Barker circulated the Judgment to others without further comment. He referred in particular to the email that he sent to Emma Senior (a former employee of the respondent) and which we see at pages 89 to 91 of the bundle.

54. A message was sent by Mr Barker to Emma Senior on Thursday 26 October 2017. This contained an attachment to the Judgment. He said, *"Presuming you've read through this….."* The following day Emma Senior messaged Mr Barker and said, *"no I hadn't before you sent it last night!"* Mr Barker then replied, *"you're mentioned (but not in a good way)."* The next entry at (page 91) reads, *"sorry – what are you on about?"* (I presume that this is from Emma Senior). Mr Barker's replies, *"no lies from me Emma."*

55. At paragraph 5 of her witness statement the claimant says that Emma Senior sent to her a *"mock-up of the Tribunal hearing where he pretended he had told the Judge I was to complete c**t."* (The claimant was not of course cross examined about this today because upon the question of summary disposal of a matter under rules 37 and 39 one generally takes the claimant's case at its height).

56. Although I must take the claimant's case at its highest on an application under these provisions I make the observation that the claimant has referred to this conduct of Mr Barker's before now.

57. In an email to the Employment Tribunal of 29 November 2017 (in connection with case number 3200579/2016) the claimant copied the Tribunal into a complaint that she had sent to the respondent in which she included the comment at paragraph 55 (which message she said had been circulated by Mr Barker in November 2015). The claimant had circulated a copy of the complaint to some within the respondent and the respondent's solicitor on 24 November 2017 (at 15:44).

58. The same complaint to the respondent contains not only the message to which she refers at paragraph 5 of her witness statement but in addition a reference to the 'mock up' of the Tribunal. Mr Barker allegedly said to others that he was going to say before the Tribunal (after taking the oath):

*"Do you swear to tell the truth the whole truth and nothing but the truth?" "I do My Lord." "Mr Barker in your own words please describe Mrs Dove"… "well she's a massive c**t My Lord…." "Fair enough Mr Barker, thank you for your testimony."* The claimant says that this was sent from Mr Barker's telephone number which is 07453 287093.

59. The information in the email of 29 November 2017 led to me sending a letter to the parties on 28 December 2017 and ultimately to the private preliminary hearing heard on 14 March 2018. Details of Mr Barker's telephone number and what he had allegedly said were also sent by the claimant to Daniel Harris of the respondent on 11 January 2018.

60. Mr Mallett says that it is a question of fact whether there was a causal link between the first disclosure on the one hand and Mr Barker's subsequent actions upon the other. He also submits that given the surrounding circumstances it is unlikely that he would restrain himself from simply circulating the Judgment.

61. In my judgment, there is much force in these submissions. The document at page 91 evidences that Mr Barker did not content himself simply with copying Emma Senior into the Judgment. His remarks that *"you're*

mentioned (but not in a good way)" and *"no lies from me Emma"* are inconsistent with an individual simply circulating the Judgment to others for information. Further, the respondent pleads (at paragraph 9 of the amended grounds of resistance dated 27 July 2018) that Mr Barker had no recollection of sending those messages. That appears to be a less than convincing position given what is on the face of the document at pages 88 to 91.

62. Taking the claimant's case at paragraph 5 of her witness statement at its height (as I must do when considering summary disposal of her case as urged upon me by the respondent) there is, in addition to the messages to Emma Senior post-Judgment, also evidence of Mr Barker making derogatory remarks prior to the Employment Tribunal hearing that commenced in March 2017.

63. In these circumstances it cannot be said that the claimant's case has no reasonable prospect of succeeding. Her case is not inconsistent with agreed contemporaneous documentation. On the contrary, there are consistencies between her case and the fact of Mr Barker's remarks to Emma Senior at the end of October 2017 and before the hearing of case number 32000579/2016. Those remarks are consistent with the claimant's evidence (which I have to accept at face value at this stage) of a propensity on Mr Barker's part to make adverse comment about the claimant.

64. In my judgment therefore it cannot be said that the claimant has no reasonable prospect of demonstrating that she was subjected to a detriment by reason of adverse or derogatory remarks made about her by Mr Barker in conjunction with him circulating the Judgment. It is of course for the claimant to show a causal link between one of the protected disclosure or some of the disclosures on the one hand and these detriments on the other.

65. Given the operation of the burden of proof upon detriment claims brought within Part V of the 1996 Act I find there to be no reasonable prospect of the Tribunal determining that the second and third disclosures played any part in Mr Barker's mental processing or reasoning. In my judgment therefore Miss Reindorf is correct to submit that there is no reasonable prospect of the claimant succeeding with a public post-dismissal public interest disclosure complaint arising out of them. There is no reasonable prospect of her establishing a causal link between his alleged derogatory remarks on the one hand and the first and second disclosures on the other. He had no involvement in them. They concerned an examination issue in which he had no involvement. It is highly improbable that he would be motivated to act as he did by reason of them.

66. However, I take a different view about the first disclosure. Even though its status as a qualifying disclosure was very short in time I agree with Mr Mallett that it is a question of fact as to whether Mr Barker was motivated by that disclosure to circulate the Judgment accompanied by (on the claimant's case) derogatory remarks. A Tribunal must be satisfied (the claimant having established that there was a qualifying disclosure, a detriment and that the detriment was caused by one of the respondent's workers for whom it has a vicarious liability) that in no sense whatsoever was it an operative cause of the claimant's treatment.

67. Given that the burden is upon the respondent to show that in no sense whatsoever was the claimant subjected to detriment because of the first disclosure in my judgment it cannot be said that the claimant's case has no reasonable prospect or little reasonable prospect of success. At summary stage I am satisfied that she has made out those elements of the claim upon which she bears the burden (that is to say that there was a protected disclosure, there was a detriment (by way of derogatory remarks for which there is some evidence) and it was the respondent (through its employee Mr Barker) that subjected her to detriment).

68. I therefore need not be concerned with the issue of a deposit. I did receive evidence from the claimant as to her means but am satisfied that it cannot be said that there is little reasonable prospect of success of her complaint. This is a case which will turn upon the facts as they emerge from the evidence.

69. Therefore, I hold that the Tribunal has jurisdiction to entertain the claimant's claim and it will proceed but only upon the basis of the first disclosure.

70. I now invite the parties to write to the Tribunal within 21 days of the date upon which this judgment is sent for further directions.

Employment Judge Brain
Dated: 28 November 2018