EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105238/2017

Held in Glasgow on 17 July 2018

Employment Judge: F J Garvie

Ms K Niven	**Claimant** **In Person**
Tesco Personal Finance PLC	**Respondent** **Represented by:** **Mr P Grant-Hutchison** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is to strike out the claim in terms of Rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the claimant having been afforded a reasonable opportunity to make representations both in writing and at the Preliminary Hearing in terms of Rule 37(2) of the said Regulations, on the basis that the claim has no reasonable prospect of success.

REASONS

Background

1. In this case, there was a Preliminary Hearing by way of case management on 22 December 2017. Various directions were made. A Note was issued on 27 December 2017. In it, reference was made to claimant's allegations about protected disclosures and detriments as referred to by the respondent in the Paper Apart to their response, (the ET3).

2. The Note also made reference to a judgment of the Employment Appeal Tribunal to which Mr Grant-Hutchison referred, **Blackbay Ventures Limited trading as Chemistree v Gahir** [2014] IRLR 416.

3. The claimant was given until 31 January 2018 to provide replies to the points on which Further Particulars were being sought by Mr Grant-Hutchison during the Preliminary Hearing.

4. By email dated 25 January 2018, the claimant replied, indicating that she was in the process of instructing a solicitor but, in the meantime, she had "received some preliminary advice on a "pro bono" basis." She went on to state that she understood that the main purpose of a further Preliminary Hearing would be to consider the respondent's request that the claim be struck out because it is out of time. Whether that would still be an issue will depend on the opinion of the respondent after receiving her further particulars. Her email continued:

> "I believe that the matters which led to my resignation were all a part of an ongoing series of events and that my time for claiming/commencing compulsory early conciliation ran from the effective date of termination of my employment and therefore my claim was in time."

5. By email dated 9 February 2018, the respondent's representative indicated that they wanted to receive the claimant's Further and Better Particulars prior to confirming the purpose of the Preliminary Hearing. This was not received

by them until 31 January 2017 (this is a typographical error and should refer to 2018).

6. The respondent sought a Preliminary Hearing as to whether the claimant had raised a protected disclosure within the meaning of section 43 of the Employment Right Act 1996, (referred to as 1996 Act).

7. The respondent's position was that the claimant failed to raise a protected disclosure during her employment and, if she did not raise such a disclosure, then the entire claim falls away and there would be no need for a substantive hearing. The respondent continued that the "protected disclosure" that the claimant alleges she raised in 16 May 2017 post-dated her resignation and therefore should a tribunal find that it does constitute a protected disclosure (which was not admitted) she could not have suffered any detriment caused by the respondent following those disclosure(s) as the employment relationship had concluded.

8. An application was made for the claim to be struck out as having no reasonable prospect of success pursuant to Rule 37 of Schedule 1 of the Employment Tribunal (Constitution Rules of Procedure) Regulations 2013, (the Rules).

9. Where there is reference to employees of the respondent their names have been changed to show only their initials as their full names are not relevant fo the purpose of this Tribunal reaching a determination on the issue before it which is as set out in the immediately preceding paragraph.

10. There was then a further email from the respondent's representative dated 12 February 2018 in relation to the detriments where the claimant had provided in the Further and Better Particulars. They referred to paragraphs 13 (a) and (e) of the respondents Grounds of Resistance and responded as follows:

> "13(a) The Claimant did not raise the allegation that she had been excluded from a meeting prior to the ET1, including within her grievance. It is accepted that the Claimant did not attend the meeting

in question, as she was on annual leave when it took place. The Respondent submits that it is not clear how this caused the Claimant a "detriment".

13(e) the Claimant attended a performance review meeting with JR on 25 April 2017 at which some negative feedback was shared with the Claimant, however, overall she achieved a "met" expectations rating. A number of colleagues were interviewed as part of the grievance investigation who confirmed that JR defended the Claimant's position and performance and recognised that her role could be challenging at times. Two colleagues respectively described JR as "supportive" and "respectful" of the Claimant. It is denied that this allegation constitutes a detriment.

The Respondent maintains, as per our correspondence dated 9 February 2017 that the Claimant failed to raise a protected disclosure within the meaning of s43 of the Employment Rights Act 1996 during her employment with the Respondent.

Further, the "protected disclosures" that she alleges that she raised on 16 May 2017 post-dated her resignation from the company and therefore, should the Tribunal find that they do constitute a protected disclosure (this is not admitted), she could not have suffered any detriment caused by the Respondent following those disclosures as the employment relationship had concluded."

11. By letter dated 20 February 2018, the parties were informed that Employment Judge Mary Kearns had directed that there should be a one day Preliminary Hearing on the following issue:

"The Respondent's application for strike out on the grounds that the claim has no reasonable prospect of success."

12. Notices were then issued. They were dated 13 March 2018 for the Preliminary Hearing to be held on 27 March 2018.

13. By email dated 15 March 2018, the respondent's representative sought a postponement as their counsel, Mr Grant-Hutchison, was not available. By letter dated 19 March 2018, they were directed to clarify if they had copied the application to the claimant. They then attached an email of 19 March 2018, addressed to the claimant, indicating that if there was any objection to the application, she should confirm this in writing to the tribunal within seven days. No such application appears to have been received and, by a letter of 21 March 2018, Employment Judge Kearns directed that the postponement had been granted as counsel was not available. Date listing letters were issues for the period May to July 2018.

14. Formal Notices were then issued on 9 April 2018 directing that a Preliminary Hearing was to be held on 9 May 2018. Again, the reason for the Preliminary Hearing, was reiterated in those Notices.

15. By email dated 4 May 2018, the claimant referred to the earlier Note from the Preliminary Hearing on 20 December 2017. She explained that she had not received a joint bundle and that an email to her dated 27 April 2018 from the respondent was the first intimation she had of the Preliminary Hearing. The claimant's position was that she had not had "very much notice of the hearing and time to prepare for it." Her position was that she felt she was being prejudiced and that the Preliminary Hearing should be postponed. She copied her email to the Tribunal office to the respondent's representative. They then emailed a reply on the same date, indicating that they considered the claimant's email was "misleading in its description of our communications." They went on to say that a proposed bundle had been sent to the claimant on 27 April 2018, asking if it could be agreed and then be paginated. They indicated that they wished to add two additional pages as they had not heard back from the claimant. It was their position that if the claimant was not

already aware of the Preliminary Hearing, she had been since 27 April 2018 and in the meantime, the respondent had incurred counsel's brief fee.

16. By letter dated 8 May 2018 and sent under over of an email of that date, it was explained that I had directed that the claimant must explain why she maintained that the Notice of the Preliminary Hearing was only received on 27 April 2018 when it was dated 9 April 2018. The claimant was to reply later that day i.e. on 8 May 2018 which she duly did. In relation to why did not receive the letter of 9 April 2018 the claimant had been at home and received other mail so she could only conclude that the letter (i.e. the Notice) was "lost in the post." She indicated that she had requested her preferred method of contact was email and no letter/confirmation had been sent by that method.

17. The file was then referred back to me again on 8 May 2018. I directed that since the postponement request was only received on the morning of 8 May 2018 rather than being referred on 4 May 2018 and while noting all that was said in opposition to the postponement then had it been put before an employment judge on 4 May 2018 it may be that the postponement request would have been refused. However, as it was only referred to an employment judge on 8 May 2018 after the intervening holiday weekend, I directed that the Preliminary Hearing should be postponed and relisted.

18. By 8 May 2018, the claimant confirmed to the respondent that she had 30 documents that she wished to be added to the bundle.

19. Arrangements were made for a further Preliminary Hearing again on the same issue. The parties were informed that there was no need to copy correspondence between the parties to the tribunal.

20. The Notices for this Preliminary Hearing were then issued on 12 June 2018, confirming it would be held on 17 July 2018. Once again, the same issue for determination was referred to, namely the respondent's application to strike out the claim on the grounds it has no reasonable prospect of success.

21. The above sets out the background to this Preliminary Hearing.

The Preliminary Hearing on 17 July 2018

22. At the start of the Preliminary Hearing, the claimant explained that she had received by email a joint bundle of documents on 12 July 2018 but this included copies of documents which she had not sent to the respondent.

23. In relation to the joint bundle provided for this Preliminary Hearing, the claimant had only received this in hard copy on the morning of 17 July 2018 when it was handed to her by Mr Grant-Hutchison.

24. The claimant explained that she had been on holiday on 12 July 2018 and so she had not had the opportunity to consider an email from the respondent's representatives to her of that date.

25. Mr Grant-Hutchison explained that the joint bundle contains three sections.

26. The first is marked "A. Pleadings and Tribunal Correspondence". The next is marked "B. Interparty Correspondence." The third section is marked "C. Claimant's Documents."

27. Mr Grant-Hutchison's position was that those instructing him did not consider that the claimant's documents which are found in Section C are relevant. He had advised that they should be included since they are the documents which the claimant wanted to be included in that bundle. However, in in his submission, they are not relevant for the issue to be determined by this Tribunal.

28. Mr Grant-Hutchison referred the Tribunal to page 20, (this being the respondent's Grounds of Resistance at pages 20 to 22) and then to the Further Particulars provided at pages 64 to page 66. These are set out in an email from the claimant dated 31 January 2018 which was the deadline set by me for her to do so at the earlier case management discussion in December 2017.

29. Mr Grant-Hutchison's position is that the claimant had failed to identify what was the alleged protected disclosure. In summary, he considered there was insufficient information to constitute a disclosure.

30. The claimant explained that she had documents which she wished to be added to the bundle and which she had sent to the respondent's agents.

31. There was then further discussion as to what had happened regarding this bundle of documents and when it was prepared. It is important to point out that in directing that there should be a joint bundle and that this should be exchanged at least fourteen days in advance of the start of any hearing, whether this be a Preliminary Hearing or a Final Hearing, what was intended was that this would be a hard copy of the documents. I had not understood as it turns out that the documents were only emailed to the claimant so that she, in turn, then had to download and print out the documents herself.

32. Mr Grant-Hutchison reminded the Tribunal and the claimant that there had been reference by him at the Preliminary Hearing in December to *Blackbay,* (see above).

33. The claimant directed my attention to an email from the respondent's representative to her of 12 February 2018, (page 71) where it is stated:

> "The Claimant's further and better particulars clarify the details, such as the date of the alleged protected disclosures, which have already been addressed in the Respondents Grounds of Resistance. We do not consider that a further response to those allegations is required."

34. As I understood it, the claimant appeared to suggest that because she had received this reply from the respondent's representative, she did not understand that there would be a Preliminary Hearing on the issue of reasonable prospects of success in terms of Rule 37.

35. I reminded the claimant that Notices had been sent to her in relation to the Preliminary Hearing which state what was the issue for determination.

36. Mr Grant-Hutchison referred me to the List of Authorities, copies of which he provided to the claimant and to the Tribunal. Specifically, he referred me to the Judgment of the Employment Appeal Tribunal (Lady Wise) in Mr N Hasan v Tesco Stores Limited which considers the issue of fair notice.

37. The claimant's position remained that she had misunderstood what was to happen on 17 July 2018. It was her submission that she thought that the detriments which she had alleged had been accepted by the respondent.

38. I again asked the claimant what she thought the reference to "No reasonable prospect of success" meant under reference to the Notices for the Preliminary Hearing. I did not understand the claimant to give any reply to this enquiry.

39. The claimant said she had taken advice. Her position remained that she had not been given enough time and so she now needed time to consider matters further.

40. After discussion with the parties, I confirmed that the claimant should be given time to consider her position further in the sense of having the opportunity to consider the draft written skeleton argument provided by Mr Grant-Hutchison. I explained that given there was opposition from him to any postponement of this Preliminary Hearing and since I was satisfied that the claimant was put on notice as the purpose of this Preliminary Hearing I was not prepared to postpone it. In doing so I had to keep in mind the competing interests of the parties and that there had already been a postponement of the previous date for a Preliminary Hearing following the claimant's application to postpone it.

41. After further discussion, the claimant indicated that she was willing to return at 2 pm which would give her almost two hours to read Mr Grant-Hutchison's submission as it was by now approaching 12.15 pm. The claimant could also use this adjournment to consider what points she then wished to make in opposition to his application regarding the issue for determination.

42. The Preliminary Hearing reconvened at about 14.08 pm. The claimant explained that she did not have time to provide any written further details about her case. However, the claimant was able to provide a document entitled, "Submission for Preliminary Hearing – 9 May 2018". A copy was available for Mr Grant-Hutchison.

Claimant's Written Submission

43. In her Submission, the claimant indicated that she did not consider the Tribunal could come to a decision without hearing evidence from the parties and therefore she thought a full evidential hearing, (i.e. a Final Hearing) should be fixed.

44. Her submission referred to the email of 12 February 2018 from the respondent. It continued as follows:

> "In that email, they seem to accept that I have provided further and better particulars which clarify details of the alleged protected disclosures. They say they do not consider a further response to those allegations are required. They do however make two points in relation to detriment. The first relates to paragraph 13(a) where they say I did not raise the allegation that I had been excluded form (sic) a meeting prior to submitting my ET1. They accept I was on annual leave when the meeting took place. They say that this is not clear how this caused a detriment. I consider this to be a petty and trivial point. My position is that this was part of a sequence of events aimed at excluding me. My evidence will be that this meeting was arranged around the diaries of everyone taking part in the meeting except me.
>
> In the second point made in relation to paragraph 13 (e), the respondents deny the allegations made constitutes a detriment. Again, my position is that the tribunal cannot properly determine this issue one way or the other without hearing evidence about what happened at that meeting and who said what.

> The final point the respondents make is that the protected disclosures on 16 May 2017 post-dated my resignation from the company. The ET1 says that the date of termination of my contract was 17 May 2017, one day later, and in the ET3 the respondents admit and agree that was the correct date of termination. Consequently, the suggestion by the respondent in that email of 12 February 2018, that I could not have suffered any detriment because the employment relationship had concluded, is clearly wrong as I was still an employee on 16 May 2017. Again, this should be a matter of evidence."

45. As indicated, Mr Grant-Hutchison had provided a skeleton submission in the morning. He wished to supplement that by an oral submission to the Tribunal. The skeleton submission is set out below. In the Respondent's Written Submission the names of individual employees have again been shortened to initials since their full names are not relevant to the issue for determination at this Preliminary Hearing on strike out.

Respondent's Written Submission

Background

46. The claim was lodged on 18th October 2017. Said claim is made on the basis of detriment following 2 alleged public interest disclosures or to a series of alleged public interest disclosures (see pages 13, 64, 65 and 66). The Response denies many if not all of the factual allegations but more importantly contends that (a) there has not been a disclosure of information or a sufficiency of disclosure in relation to anything that is habile to be a protected disclosure and (b) that any alleged disclosure was not sufficiently, if at all, in the public interest to qualify as a protected disclosure. Calls for Further and Better Particulars in these regards were included in the Response.

47. By way of an Agenda for a preliminary hearing the Claimant has intimated that she wishes to call some 13 witnesses. The Respondent at page 40 of the Bundle being part of its agenda requests a preliminary strikeout hearing. At a preliminary hearing on 22nd December 2017 it was agreed that the

Claimant would produce Further and Better particulars (she was supplied with a copy of Blackbay Ventures Ltd t/a Chemistree v Gahir [2014] IRLR p416 by way of guidance as to what should be contained in the particulars and she was referred to the calls in the Response. Further and Better Particulars were duly produced. By way of an email of 9 February 2018 the Respondent requested a preliminary strikeout hearing based on submissions alone (see page 67). A hearing on strikeout was set down for 9 May 2018. This was postponed at the Claimant's request on 8 May 2018. On 12 June 2018 today's hearing was set down. If this hearing does not strike out all the claim then the question as to which, if any, of the allegations are time barred.

Factual Context

48. The Claimant was employed by the Respondent from 31 October 2016 to 17 May 2017 as a People Advisory Manager. She had written on 3 May 2017 stating that she wished to resign and her employment terminated on 17 May 2017.

The Relevant Statutory Law

49. "Strike Out"

Rule 37 Striking Out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Employment Rights Act 1996

Section 43B Disclosures qualifying for production (*sic*)

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following -

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

Consideration of the Claim and the Further and Better Particulars

The Respondent recognises that "Strike Out" is a particularly severe remedy and should be approached with some caution particularly in all claims relating to Discrimination (including whistle blowing): see Hassan v Tesco plc UKEAT/0098/16/BA.

First Allegedly Protected Disclosure For Which Further and Better Particulars Are Sought

However it is an applicable remedy in the circumstances of this case. The Claimant formulates her claim for the first protected disclosure as follows-

"1) On the 22nd of February 2017
2) I made a protected disclosure to JR
3) GG had expressed concern to me at the request made of him to carry out the search on FB's DSAR request based on 4 keywords as they were running out of time and going to miss the 40 day deadline (e.g. one was "performance management") I expressed my concerns about this to JR. I said I thought that this was wrong because it was not normal practice/process.
4) I believed that failure to conduct a full search of the mailboxes etc was a breach of legal obligations under the Data Protection Act.
5) The disclosure was in the public interest because it sought to prevent or remedy the breach of a legal obligation."

The first submission for the Respondent and one which will be repeated in these submissions is that the only informational content contained in this is that "[She] expressed her concerns about" what another individual had told her. The Claimant did not advise the employer of any information and more

importantly she did not advise there was a breach of any legal obligations. What she did say was that [she] thought that this was wrong because it was not normal practice / process. In any event it is not every disclosure of a legal obligation that is in "the public interest" (see page 5 and 10 hereof).

Informational Content

Case law advises us that there must be "disclosed information" see Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR p38 EAT.

Similarly expressing an opinion about the employers conduct is not sufficient to make a protected disclosure see Goode v Marks & Spencer plc UKEAT/0442/09/DM. It is also not sufficient to complain to an employer that an action is immoral, undesirable or in breach of guidance see Eiger Securities LLP v Korshunova [2017] IRLR p115.

Identification of a legal obligation

Given that the Claimant does not seem to have advised the employer at the time that she thought that there was any breach of a legal obligation it matters little that she retrospectively maintains that she believed that there was a breach of a legal obligation, namely a breach of the Data Protection Act. Nonetheless even retrospectively it is not clear as to what legal obligation has been breached. Why should the Claimant have a reasonable belief that the Data Protection Act has been breached?

[see Dawson-Damer & Others v Taylor Wessing LLP Court of Appeal IDA (Employment Law Brief 1070 June 2017); Blackbays v Ventures Ltd t/a Chemistree v Gahir [2014] IRLR p416 advises that save that when an obvious breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference to a statute or regulation". In this case the Claimant is an HR professional. She has specialised

knowledge of the area of endeavour. She can be expected to specify the nature of her reasonable belief. For this part of the claim to proceed the Claimant to comply with the Act and by way of fair notice must specify what breach of the Data Protection Act would be likely to occur.

Sufficient Public Interest

Although it may be said in a very general sense that it is always in the public interest that legislation be obeyed that is not the sense which should be applied in terms of defining a protected disclosure. The case law is clear particularly in relation to alleged breaches of persons individual contract of employment that there must be a substantial "public interest" element.

The Second Alleged Protected Disclosure

1) On the 16th May 2018
2) I made a professional disclosure to JM
3) I raised concerns about the approach taken in the management of Feike Brouwers case. I stated that the search was reduced to a four keyword search, as opposed to a full search. I said I thought this was wrong as it breached Data Protection legislation.
4) I believed that failure to conduct a full search of the mailboxes etc was a breach of legal obligations under the Data Protection Act.
5) The disclosure was in the public interest because it sought to prevent or remedy the breach of a legal obligation.

The foregoing is subject to the same criticism as above although there seems to be a little more informational content.

The Third Alleged Protected Disclosure

Further to comments made in relation to the GM case, the business partner and people partner had both the authority and influence to resolve the matter

at any point as this case progressed, up to the date in May when the matter was finally resolved by me without any need to go through a grievance process.

1) On the 13th of March 2017
2) I made a protected disclosure to NJ
3) I had been asked by JR to hold an outcome letter to GM following an independent investigation into his grievance. This letter was subsequently changed by members of the people leadership team who were not in agreement on the outcome of the investigation. I said I did not believe this to be correct as it is the role of the hearing manager to make recommendations following the hearing.
4) I believed that changing the outcome letter was at risk of a miscarriage of justice.
5) The disclosure was in the public interest because it sought to prevent or remedy a miscarriage of justice.

Criticisms

(1) This alleged protected disclosure fails as there is no information imported which could be characterised as a disclosure - all that has been communicated is an expression of the Claimant's opinion.
(2) Further and in any event it simply is not habile to be characterised as a "miscarriage of justice". "Miscarriage of justice" is not defined within the statute. There has been some speculation that it might be relied upon by police officers complaining about their colleagues. What can be submitted is that (a) logically it should cover matters separate from the other types of protected disclosures and (b) it should not be used to describe a view that something is "just not fair".

The only mention that I can find of a discussion of what may constitute a miscarriage of justice is on "Bellingham v Secession Ltd ET Case No 2201951/04, where the Tribunal rejected the contention that the Claimant had

made a disclosure falling within S43B(1)(c) when she gave evidence in a High Court winding up action brought by one shareholder against another. The Tribunal found it difficult to accept that the act of taking on others in an existing legal dispute could amount to whistleblowing, or that it could constitute a miscarriage of justice. In any event all the Claimant is offering to prove is that there would be a risk of a miscarriage of justice occurring rather than a likelihood.

The Fourth Alleged Protected Disclosure

"1) On the 15th of March 2017

2) I made a protected disclosure to NJ

3) I had been asked by JR to hold an outcome letter to GM following an independent investigation into his grievance. This letter was subsequently changed by members of the people leadership team who were not in a agreement on the outcome of the investigation. I said, I did not believe this to be correct as it is the role of the hearing manager to make recommendations following the hearing.

4) I believed that changing the outcome letter was at risk of a miscarriage of justice.

5) The disclosure was in the public interest because it sought to prevent or remedy a miscarriage of justice."

In relation to this alleged disclosure or it may or may not have sufficient informational content but it faces the same difficulty as the previous alleged disclosure namely that it is not habile to constitute a disclosure of a likely "miscarriage of justice". It is an accusation that a poor practice has been used.

The Fifth Alleged Protected Disclosure

"1) On the 12th of May 2017

2) I made a protected disclosure to JR and SS

3) I raised concerns about the change in stage one outcome letter, concerns about my lack of involvement given my accountability for the case and Debbie Walls concerns about the stage 1 outcome letter. I said that the business had not communicated clearly with G and that we (the people team) had mismanaged the case.
4) I believe the mismanagement of the case was a risk of a miscarriage of justice and a potential breach of the Health and Safety Act (George was highly distressed by the case).
5) The disclosure was made in the public interest because it sought to prevent or remedy a miscarriage of justice and a potential breach of the Health and Safety at Work Act."

Irrespective of any informational content I submit that it is not habile of falling within the category of "miscarriage of justice".

However, there are greater difficulties for the Claimant. It is far from clear if this alleged disclosure is mentioned in the claim and if such is the case the Claimant will firstly require to ask leave to amend to include an allegation which is prima facie time barred.

<u>The Sixth Alleged Protected Disclosure</u>

"1) On the 16th of May
2) I made a protected disclosure to JM
3) I explained that members of the people leadership team persuaded a hearing manager to change the outcome letter for G's stage one grievance.
4) I believe the mismanagement of the case was at risk of a miscarriage of justice and a potential breach of the Health and Safety Act (G was highly distressed by the case).
5) The disclosure was made in the public interest because it sought to prevent or remedy a miscarriage of justice and a potential breach of the Health and Safety at Work Act."

Again this does not appear to be an incident mentioned in the claim and will be subject to amendment/time bar considerations. It is also subject to the same criticism above in relation to the concept of "miscarriage of justice".

The Seventh Alleged Protected Disclosure

"In relation to point 12, I can clarify that the concerns raised were in relation not only to myself but also to the advisory team from members of the people team.

1) On the 13th March 2017
2) I made a protected disclosure to NJ
3) I raised concerns about the behaviours of members of the people team in relation to myself and the advisory team. I said that the business conduct rules had been breached and were causing myself and the team undue pressure.
4) I believe that failure to address fully, failure to investigate and failure to implement the bank's performance management process was a potential breach of duty of care within the Health and Safety at Work Act and a potential breach of contract.
5) The disclosure was made in the public interest because it sought to prevent a potential breach of the Health and Safety at Work Act and a potential breach of contract."

The difficulties for the Claimant in this regard are (a) the complaints made are about the terms and conditions of her own employment and accordingly are not of sufficient public interest to qualify as a protected disclosure, (b) the complaints have not been expressed in such a way as to inform the employer that any breach of a putative legal obligation is likely to occur. It would be extremely difficult for an employer to discern from the Claimant's comments whether a protected act or omission had occurred and (c) that there is nothing

in this section of the Further and Better Particulars which would be likely to engage the provisions of the Health and Safety Act.

This whole allegation has the hallmarks of the raising of a personal grievance with little or no disclosure of information (see Smith v London Metropolitan University [2011] IRLR p884 and see Kilraine v London Borough of Wandsworth [2016] IRLR p422) and in the Court of Appeal – [2018] EWCA Civ 1436.

The Claimant seeks to elide from said difficulties by stating that her concerns also related to the advisory team. She does not seek to advise the Tribunal or the Respondent how many individuals she contends were affected by the alleged wrongdoing. The alleged disclosure also does not raise issues which are relevant to the general public interest. This is fatal to her claim, see Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979 and in particular paragraphs 12 and 37 thereof.

<u>The Eighth Alleged Protected Disclosure</u>

"1) On the 15th March 2017

2) I made a protected disclosure to NJ

3) I raised concerns about the behaviours of members of the people team in relation to myself and the advisory team. I said that the business conduct rules had been breached and were causing myself and the team undue pressure.

4) I believe that failure to address fully, failure to investigate, failure to implement the banks performance management process was a potential breach of duty of care within the Health and Safety at Work Act and a potential breach of contract.

5) The disclosure was made in the public interest because it sought to prevent a potential breach of the Health and Safety at Work Act and a potential breach of contract."

The criticism of this alleged protected disclosure is the same as in the foregoing disclosure. It is certainly not obvious what breach of duty is being alleged. It is very difficult if not impossible to envisage how the Health and Safety Act would be engaged. In reality it seems to be a complaint made entirely for the Claimant's self-interest see Parsons v Airplus International Limited IDS 1087 February 2018 p11.

The Ninth Alleged Protected Disclosure

"1) On the 16th May

2) I made a protected disclosure to JM

3) I raised concerns about the behaviours of members of the people team, that no performance management had taken place within the people function and that since I disclosed the incidents on the 13th of March, no action had been taken.

4) I believe that failure to address fully, failure to investigate, failure to implement the banks performance management process was a potential breach of duty of care within the Health and Safety at Work Act.

5) The disclosure was made in the public interest because it sought to prevent a potential breach of the Health and Safety at Work Act."

The same criticisms can be made of this allegation as the three earlier allegations. It should be noted that many of these allegations the Claimant refers to a "potential breach". In so doing she does not apply the correct statutory test. It is submitted that this is not simply an unfortunate use of language. In reality it expresses what the actual situation is.

Respondent's Additional Oral Submission in support of the above Written Submission

50. In providing this, Mr Grant-Hutchison explained that he had narrated and adopted all that was said in the ET3. He accepts that it is a very high standard

where there is to be strike out on no reasonable prospect of success. Further, the claimant seeks to further amend her further and better particulars.

51. However, in Mr Grant-Hutchison's submission, this would be unreasonable. In Hasan (see above) there was a litigant who brought a number of complaints and had sought an interpreter but as there was no interpreter was available the claimant elected to proceed. There, the judge decided to consider whether the entire claim, including a complaint of discrimination and other payments should be struck out and that is what he did. There was an application for reconsideration which was refused.

52. In Hasan, it was pointed out by Lady Wise that in that case there was no notice whatsoever that the striking out of the discrimination and other payments claim was to be considered at the Preliminary Hearing although eleven days' notice was given in relation to the whistleblowing and unfair dismissal claims.

53. Lady Wise concluded that the decision to strike out the discrimination and other payments claim was made in breach of the provisions of rule 37 as rule 37(2) requires that a party to be given a reasonable opportunity to make representations when consideration is being given to striking out. The opportunity must be adequate, and that necessarily includes notice so that oral or written representations can be prepared, (see paragraph 13 of the judgment).

54. Mr Grant Hutchison reminded this Tribunal that in December 2017, he had referred to **Blackbay**, (again see above). He referred to page 10 of Hassan (paragraph 18) where it was held that the employment judge's failure to consider whether to exercise his discretion in favour of not striking out following his finding that the claims had no reasonable prospects of success amounted to a clear error of law. It continued:

> "While it is not for me to speculate as to how that discretion might have been exercised, the factors that might have weighed heavily include the early stage of the proceedings, the ability to direct that Further and

> Better Particulars of each claim be specified and the absence of any application on the part of the respondent for striking out."

55. Accordingly, *Hassan* confirms that it is not mandatory to strike out. In this case, there have been two discharged hearings, the second of which was done at the claimant's request. In this case, the claimant had been directed to provide Further and Better Particulars.

56. Mr Grant-Hutchison referred to the grounds of resistance at 11(a) under the heading, "Protected Disclosures" (see page 21) as follows:

> "In particular, the Respondents avers that there has not been a disclosure of information which falls under Section 41 ERA and even if there has been any such disclosure, it would not be in the public interest."

57. Mr Grant-Hutchison suggested that in the Further and Better Particulars, the claimant referred to having, "expressed concerns about". Mr Grant-Hutchison's position was that the claimant had not advised the respondent of any information and, more importantly, of a breach of any legal obligation. All that she seems to suggest is that what was happening was not "normal practice".

58. He referred to **Chesterton Global Limited and Others v Mohammed Nurmohamed** [2017] EWCA Civ 979. There, it was held that even alleged breaches of the health and safety legislation would not necessarily attract sufficient public interest but he would revert to that separately.

59. Next, he directed attention to **Cavendish Munro Professional Risks Management Limited v Geduld** 2010 IRLR 38 and specifically to paragraphs 24 and 27.

60. At paragraph 27 in Cavendish it states:

> "**Disclosure**
>
> Even if we are wrong in our conclusion that the Employment Tribunal erred in holding that the letter of 4 February 2008 disclosed information within the meaning of the ERA, we consider whether the employment tribunal erred in considering whether the letter of 4 February 2008 amounted to or contained *a disclosure* within the meaning of the section. The natural meaning of the word 'disclose' is to reveal something to someone who does not know it already. However, s.43L(3) provides that 'disclosure' for the purposes of s.43 has effect so that 'bringing information to a person's attention' albeit that he is already aware of it is a disclosure of that information. There would be no need for the extended definition of 'disclosure' if it were intended by the legislature that 'disclosure' should mean no more than 'communication'."

61. There may be a disclosure if the respondent is aware of something. Doing this as a result of making a disclosure which then brings the matter to the attention of the employer would require both the content of information and of a disclosure.

62. Mr Grant-Hutchison then referred to **Goode v Marks & Spencer PLC** UKEAT/0442/09(DM).

63. The proposition was advanced there that voicing an opinion does not amount to a disclosure of information. Put shortly, the employer was using discretionary enhanced redundancy payments and the employee took a very strong view about this. Reference was made to paragraph 16 and 21. Mr Grant- Hutchison then referred to paragraph 38 as follows:

> "In our judgment, the tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the

> conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

64. Mr Grant-Hutchison submitted that, here, in the context of the first alleged disclosure, the claimant was merely expressing that, in her view, something was wrong i.e. that it was not normal practice but that does not, in his submission, make it sufficient to amount to a protected disclosure.

65. He also submitted that the claimant was not drawing to the employer's attention something that was a breach or a likely breach of a legal obligation. In this context, he referred the Tribunal to **Eiger Securities LLP v Korshunova** [2017] IRLR 115 at paragraph 46 where it states:

> "In my judgment it is not obvious that not informing a client of the identity of the person whom they are dealing if the employee is trading from another person's computer is, as in *Bolton*, plainly a breach of a legal obligation. That being so, in order to fall within ERA s.43 B(1)(b), as explained in *Blackbay*, the ET should have identified the source of the legal obligation to which the claimant believed Mr Ashton or the respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgment, the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

66. In Mr Grant-Hutchison's submission, it was not sufficient for the claimant to say, "This is not fair". The claimant has to go on to say that she had a belief or a reasonable belief in order to say that there was a breach in terms of the Data Protection Act. Unless the breach was painfully obvious then the

claimant has got to do more than this and reasonable belief must be more than that.

67. He submitted that it was not a breach of information tending to show a breach of the Data Protection Act and there is no specification of which section of the Act was being referred to by the claimant.

68. He next referred to the IDS Employment Law Brief Handbook Comment from 2017 on Data Protection and the Court of Appeal in **Dawson-Damer and ors v Taylor Wessing LLP** and the issue of "No 'disproportionate effort' involved". It can be that there is a reasonable belief that something has been done wrong but that would not matter as long as there was a reasonable belief. This was not set out in the claimant's Further and Better Particulars nor was specific attention drawn to a particular section of the Data Protection Act or to any obvious breach.

69. In Mr Grant-Hutchison's submission, this was not sufficient to bring it within the public interest. In his submission, Public Interest Disclosure was not designed for a situation such as this.

70. At page 5 of his written submission, Mr Grant-Hutchison dealt with the issue of "Sufficient Public Interest". Dealing with the second alleged protected disclosure (page 5 of his written submission), he set out what is said by the claimant but, in his submission, this was subject to the same criticism as there seemed to be a little more information or content provided.

71. In relation to the third alleged protected disclosure (page 6 of his submission), again he criticised this. In particular, he noted that the claimant suggested that she believed "that changing the outcome letter was at risk of a miscarriage of justice". In his submission, this raises a very interesting problem specifically about item 4, namely the reference to "risk of a miscarriage of justice". In his submission, it would have to be more than that. There would have to be a likelihood of a miscarriage of justice.

72. If the claimant, as at 13 March 2017, knew what a miscarriage of justice meant then she must have said so. Miscarriage of justice is not defined in statute and it is not sufficient to say that something was "just not fair".

73. As a matter of fair notice, the claimant must tell the respondent what it was that she thought was at the "risk of a miscarriage of justice" so that the respondent could meet that. There must also be a reasonable belief as long ago as 13 March 2017.

74. The only judgment that he could find in relation to "miscarriage of justice" is an unreported case, **Bellingham v Secession Ltd** ET Case No 2201951/04, where "the Tribunal rejected the contention that the Claimant had made a disclosure falling within S43B(1)(c) when she gave evidence in a High Court winding up action brought by one shareholder against another. The Tribunal found it difficult to accept that the act of taking on others in an existing legal dispute could amount to whistleblowing, or that it could constitute a miscarriage of justice. In any event, here all the claimant is offering to prove is that there would be a risk of a miscarriage of justice occurring rather than a likelihood", (page 7 of his written submission).

75. Other than that, he was unable to find any reference to what constitutes a "miscarriage of justice". He did not have a copy of that judgment.

76. Mr Grant-Hutchison said that, "with the greatest respect" to the claimant he was not sure that she did know of this at the time but that she now seems to know it.

77. Turning to the fourth alleged protected disclosure, (Page 7 of his written submission) this is set out as follows:

> "1) On the 15th of March 2017
> 2) I made a protected disclosure to NJ
> 3) I had been asked by JR to hold an outcome letter to GM following an independent investigation into his grievance. This letter was subsequently changed by members of the people

leadership team who were not in a agreement on the outcome of the investigation. I said, I did not believe this to be correct as it is the role of the hearing manager to make recommendations following the hearing.

4) I believed that changing the outcome letter was at risk of a miscarriage of justice.

5) The disclosure was in the public interest because it sought to prevent or remedy a miscarriage of justice."

78. In relation to this alleged disclosure or it may or may not have sufficient informational content but it faces the same difficulty as the previous alleged disclosure namely that it is not habile to constitute a disclosure of a likely "miscarriage of justice". It is an accusation that a poor practice has been used."

79. Again, in Mr Grant-Hutchison's submission, there was insufficient informational content and also the same problem that arose in relation to the reference to a "miscarriage of justice". Again, in his submission, what the claimant is saying is that there was a risk rather than a likelihood. In his submission, all that the claimant was saying is that it was poor practice but that is not sufficient to make it into a protected disclosure.

80. Turning to the fifth alleged protected disclosure, (Page 8 of the submission):

"1) On the 16th of May

2) I made a protected disclosure to JM

3) I explained that members of the people leadership team persuaded a hearing manager to change the outcome letter for George's stage one grievance.

4) I believe the mismanagement of the case was at risk of a miscarriage of justice and a potential breach of the Health and Safety Act (G was highly distressed by the case).

5) The disclosure was made in the public interest because it sought to prevent or remedy a miscarriage of justice and a potential breach of the Health and Safety at Work Act."

81. Again, this does not appear to be an incident mentioned in the claim and will be subject to amendment/time bar considerations. It is also subject to the same criticism above in relation to the concept of "miscarriage of justice".

82. The claimant sets out her concerns and that was a criticism made but that was not habile or sufficient to constitute a protected disclosure. The only information the claimant passed on is that the business was not communicating clearly with an individual and in the claimant's opinion, that was mismanagement of the case.

83. Again, the difficulty was that there is no reference to miscarriage of justice and what this meant. Also, there was reference to a potential breach of health and safety at work but the only part of the further and better particulars which might engage health and safety was the reference to the individual being "highly distressed". In Mr Grant-Hutchison's submission, if that was "as good as it gets" that is not sufficient to constitute a public interest disclosure.

84. On the sixth point, (again Page 6 of his written submission), this does not appear to be an incident mentioned in the claim and will be subject to amendment/time bar considerations. It is also subject to the same criticism above in relation to the concept of "miscarriage of justice".

85. Mr Grant-Hutchison was "no more confident of what is set out there because the claimant was not properly putting before the respondent something specific." This incident did not appear in the ET1 and so it is subject to time bar considerations.

86. Turning to the seventh alleged protected disclosure, (Page 9 of his written submission, where it is said by the claimant that:

"In relation to point 12, I can clarify that the concerns raised were in relation not only to myself but also to the advisory team from members of the people team.

"1) On the 13th March 2017

2) I made a protected disclosure to NJ

3) I raised concerns about the behaviours of members of the people team in relation to myself and the advisory team. I said that the business conduct rules had been breached and were causing myself and the team undue pressure.

4) I believe that failure to address fully, failure to investigate and failure to implement the bank's performance management process was a potential breach of duty of care within the Health and Safety at Work Act and a potential breach of contract.

5) The disclosure was made in the public interest because it sought to prevent a potential breach of the Health and Safety at Work Act and a potential breach of contract."

87. Mr Grant-Hutchison submitted that the difficulties for the claimant in this regard are (a) the complaints made are about the terms and conditions of her own employment and accordingly are not of sufficient public interest to qualify as a protected disclosure, (b) the complaints have not been expressed in such a way as to inform the employer that any breach of a putative legal obligation is likely to occur. It would be extremely difficult for an employer to discern from the claimant's comments whether a protected act or omission had occurred and (c) there is nothing in this section of the Further and Better Particulars which would be likely to engage the provisions of the Health and Safety Act.

88. In his submission, this whole allegation has the hallmarks of the raising of a personal grievance with little or no disclosure of information, see **Smith v London Metropolitan University** [2011] IRLR p884 and **Kilraine v London**

Borough of Wandsworth [2016] IRLR p422) and again **Kilraine** in the Court of Appeal [2018] EWCA Civ 1436.

89. The claimant seeks to elide from said difficulties by stating that her concerns also related to the advisory team. She does not seek to advise the Tribunal or the respondent how many individuals she contends were affected by the alleged wrongdoing. The alleged disclosure also does not raise issues which are relevant to the general public interest. This is fatal to her claim, **Chesterton** (see above) and, in particular, paragraphs 12 and 37.

90. This appears to be the claimant complaining about her own terms and conditions of employment and she seeks to go a little further when she refers to "her team" being under "undue pressure". She does not mention the size of her team which could be significant because at least at first blush, it could be her own contract but that would not be sufficient to engage public interest.

91. Mr Grant-Hutchison submitted that what is provided by way of explanation does not tell the respondent what is said to be the alleged breach of a legal obligation or that it was likely to occur. It was not obvious to him if this was suggested to be a breach of health and safety at work. It may be that the respondent's practice put the claimant under pressure but there is no obvious breach of health and safety.

92. With reference to point five of the seventh protected disclosure, the Tribunal should proceed with caution if, potentially, the disclosure was made in order to prevent a potential breach of the Health and Safety at Work Act and the potential breach of contract.

93. Mr Grant-Hutchison then referred back to page 57 of the bundle. This is an email from the claimant of 13 March 2017 and states:

> "I am now left in a position where I do not know if addressing my concerns with you are appropriate or whether I should be speaking to someone else. The situation has worsened to the point that I feel my only options are to raise a grievance under the whistleblowing policy,

be forced to resign or go off sick due to the increasing emotional and mental distress the situation is causing. None of these options I would take lightly."

94. While that email mentions whistleblowing and seems to refer to specific practices or there may be specific grievances given the reference to potential unfair dismissal but, in Mr Grant-Hutchison's submission, ground seven of the alleged protected disclosure should be considered in light of **Smith v London Metropolitan University** [2011] IRLR 84 in the rubric as follows:

> "Dr Smith raised a grievance that she was being required to teach modules that she was not qualified or contracted to teach. An appeal panel rejected this, as it considered the request made of her to teach subjects other than theatre studies was not in respect of modules outside her qualification, knowledge, skills or contract. Insofar as they may have been outside the claimant's experience, it was suggested that enough time had elapsed since the claimant's transfer to have allowed her to have developed sufficient expertise and to have widened her experience, and where necessary, to have undertaken additional preparation to compensate for that lack of experience."

95. Also, the further paragraph beginning:

> "Dr Smith raised a second grievance asserting that she was "feeling harassed and stressed" by the university. The university began disciplinary action and, following a disciplinary hearing, dismissed her. It stated that she had failed to perform her full contractual duties and accept management direction and that her behaviour had amounted to gross misconduct. Dr Smith's appeal, heard by a panel chaired by the vice-chancellor, was rejected. The letter stated that she had been unmanageable for a considerably long period."

96. In Mr Grant-Hutchison's submission, in this case is that the allegation has "the hallmarks of the raising of a personal grievance".

97. Next, he referred the Tribunal to **Smith** where in the rubric it noted that "The grievance documents had not been protected disclosures within the meaning of s.47B(1) of the Employment Rights Act 1996 in accordance with *Cavendish Munro Professional Risk Management Ltd v Geduld.* At page 893, paragraph 88 in **Smith**, it is stated:

> "***Failing to find that the appellant was dismissed on grounds that she had made a protected disclosure with the meaning of ERAs.43A***
>
> in our judgment the ET did not err in holding that the respondent's reason for dismissing the appellant was for misconduct. The misconduct was refusing to perform duties requested of her. Accordingly, the ET did not err in failing to hold that the reason for a dismissal was that she had complained and raised grievances that she was being required to perform duties outside her contractual obligations. Even if the appellant had been dismissed because she raised a grievance about being required to perform duties she was not contractually obliged to perform and if the grievance was therefore of a failure to comply with a legal obligation, such a dismissal would not in any event have been for making a protected disclosure with the meaning of ERAs.43A for reasons explained in *Cavendish Munro*. The grievances were not a 'disclosure of information'."

98. Next, Mr Grant-Hutchison referred to the Employment Appeal Tribunal's judgment in **Kilraine v London Borough of Wandsworth** [2016] IRLR 422. In the Employment Appeal Tribunal and the rubric at (3) and (4) as follows:

> "(3) in respect of the third alleged protected disclosure, the tribunal had been justified in concluding as it had. Taking the word "inappropriate" away from the relevant sentence, it said nothing specific and was far

too vague. It was difficult to see how what had been said alleged a criminal offence, a failure to comply with the legal obligations or any of the other matters to which s.43B(1) made reference. Employment tribunals had to take care in the application of the principle arising out of *Cavendish Munro* and should not be too easily seduced into asking whether an alleged protected disclosure was information or an allegation when realty and experience suggested that, very often, "information" and "allegation" were intertwined. The question was whether the a given phrase or paragraph was one or the other. That was to be determined in the light of the statute itself. The question was simply whether it was a disclosure of information.

(4) The tribunal had been entitled to reject the fourth alleged protected disclosure as actually coming within the terms of the Act. On the facts, there was no obvious reason why what had been said by way of information, assuming it to be such, could fall foul of any duty under s.11 and s.175, even if they had been in the mind of Ms Kilraine at the relevant time. Further, the tribunal had been entitled to conclude that Ms Kilraine had not shown that she had reasonably believed that there had been such a duty. It followed that the tribunal had been fully entitled to each the eventual conclusions that it had and, on the basis that it had made those findings of fact, it had been bound to do so."

99. He directed attention also to paragraphs 35 and 36.

100. **Kilraine** then came before the Court of Appeal, [2017] EWCA Civ 979. Mr Grant-Hutchison directed attention to paragraph 15:

"The third disclosure was contained in a letter from the appellant to Mr Johnson, the respondent, dated 10 December 2009. The letter set out a complaint that the appellant had not been included in a meeting of the Performance and Standards Monitoring Group to present an annual report. In the EAT, the appellant's claim was refined down to reliance on the following paragraph in that letter and the sentence in it which I have highlighted."

101. Mr Grant-Hutchison then directed his attention to paragraph 17 of the Court of Appeal and then the reasoning as set out at paragraphs 35 and 36 as follows:

> "35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase "which tends to show [etc] (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.
>
> 36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgement by a tribunal in the light of facts of the case. It is a question which is likely to be closely aligned with the other requirements set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in *Chesterton Global* at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and

specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

102. In Mr Grant-Hutchison's submission, what the Court of Appeal is saying is that an allegation can have informational content rather than **Cavendish** where there was a dichotomy between information and allegation but, in his submission, it asks the same question: is there sufficient informational content because without that, it may be difficult for any claimant to show a reasonable belief – see paragraph 36 as set out above.

103. Then, Mr Grant-Hutchison wished to retrace his steps to the sixth alleged protective disclosure. In his submission, this was time barred. This also applied to the seventh protective disclosure. His submission was that the mere fact that the claimant does not say how many were in her staff is potentially fatal. There may have been five or six, there may have been more. It was not for him to set out but for the claimant to do so. Why did he raise this? Because the original intention of protected disclosures seemed to be not to apply to individual contracts of employment but this was changed in **Parkins v Sodexho Limited** [2002] IRLR 109 as discussed in **Chesterton** at paragraph 10 and again at paragraphs 11 and 12 where the history of the public interest disclosure element is considered. The reasoning of the Court of Appeal is set out at paragraphs 37 and 38. In Mr Grant Hutchison's submission, what they were doing, in shorthand, was to link some of the submissions from one counsel and that there were a number of factors which may introduce sufficient public interest disclosure where what essentially is being done is a contract of employment dispute but there senior management were being queried as to matters which affected a large number of individuals, potentially more than one hundred individuals.

104. Here, the claimant has not said how many people were involved whereas there, there were over a hundred individuals involved. It is also important as to whether the breach was deliberate, there in breach of accounting rules.

105. Mr Grant-Hutchison referred to the footnote marked 5 below paragraphs 37 and 38. This footnote reads:

> "Although disclosures tending to show breaches of the worker's own contract are the paradigm of disclosures of a "private" or "personal" character, they need not be the only kind: see the Minister's reference to disclosures "of minor breaches of health and safety legislation… of no interest to the wider public".

106. There, the Court of Appeal was referring back to Parliament and what was said regarding health and safety and sufficient public interest.

107. Turning to the eighth alleged protected disclosure, (Mr Grant-Hutchison's page 10 of his written submission) he made these comments because it was not obvious here what duties were alleged to have been breached. How was health and safety engaged? It seemed more like a complaint by the claimant about failures in relation to her self-interest rather than the public interest and that is not permissible.

108. In this case, the claimant's complaint appears to be in relation to her self-interest – see **Parsons v Airplus International Limited** IDS 2018 page 1.

109. Turning to the ninth disclosure, Mr Grant-Hutchison's pages 10 and 11 of his written submission):

> "1) On the 16th May
> 2) I made a protected disclosure to JM
> 3) I raised concerns about the behaviours of members of the people team, that no performance management had taken place within the people function and that since I disclosed the incidents on the 13th of March, no action had been taken.
> 4) I believe that failure to address fully, failure to investigate, failure to implement the banks performance management process was

a potential breach of duty of care within the Health and Safety at Work Act.

5) The disclosure was made in the public interest because it sought to prevent a potential breach of the Health and Safety at Work Act."

110. It seemed to him that this did not to appear in the ET1 and the claim would have to be amended to deal with this and that would give difficulties given the passage of time. He repeated what he had already said about alleged disclosures.

111. Turning to the claim form at page 13 of the bundle, the first paragraph is very specific and the second part seems to categorise a series of expressions of dissatisfaction of the claimant's work. It was very specific regarding an individual, Rahul Roghati, but all these appear potentially to be time-barred and that is very different to a case being set out as a public interest disclosure. The respondent could only rely on the position as set out in their response.

112. At page 21 of the bundle, the respondent refers to 11(a) and have not called for Further and Better Particulars but hey deny that this amounts to a Public Interest Disclosure despite this being alleged by the claimant. They further deny that there has been a disclosure of information which falls within section 43 of the Employment Rights Act 1996.

113. Mr Grant-Hutchison said he was entitled to make the criticisms that he had of what was set out and to go further and submit that the Further and Better Particulars did not meet the criticism.

114. Accordingly, he concluded that there was a scenario where there was lack of detail and it was not sufficient for the claimant to say that she could provide the information by way of evidence at a Hearing at which witnesses would give evidence.

115. He reminded the Tribunal that the first Preliminary Hearing had been discharged and then the second one had been discharged at the claimant's request.

116. In response, the claimant again said that she could provide evidence to the Tribunal by way of calling witnesses to give evidence at a Hearing but she did not provide any further specific information about her opposition to the strike out application.

117. It was pointed out to Mr Grant-Hutchison that a strike out application is discretionary, it is not mandatory. There are other potential remedies such as an unless order or consideration being given to a deposit order if a Tribunal was satisfied that a claim has "little reasonable prospect of success".

118. Mr Grant-Hutchison's position was while these are other remedies they would not assist and there was also the potential problem of time bar.

119. Accordingly, his submission was that the claim should be struck out in terms of Rule 37.

The Law

120. The relevant law is set out above under the respondent's written submission and so it is not repeated here.

Deliberation and Determination

121. First of all, the Tribunal was grateful to the claimant and Mr Grant-Hutchison for their submissions to the Tribunal.

122. It is explained above that the names of the various employees referred to by the claimant in her claim and the Further and Better Particulars have been shortened so as to show only their initials. This is because the full names are not relevant to the Tribunal's determination of this application for a strike out of the claim made in terms of Rule 37 of the 2013 Regulations.

123. Mr Grant-Hutchison is correct that the issue of a strike out of this claim is particularly stark given it is the only complaint brought by the claimant. If it is struck out then the case cannot proceed further as there are no separate standalone claims to determine in the absence of the complaint brought as a Public Interest Disclosure in terms of section 43 of the 1996 Act.

124. In reaching its decision the Tribunal gave careful consideration to all that is said by Mr Grant-Hutchison in support of his application for strike out and also to all that is said by the claimant in opposing any such strike out of her claim.

125. It is appropriate to note that at the Preliminary Hearing on 22 December 2017 the claimant agreed to provide Further and Better Particulars of her claim and to do so by 31 January 2018. She was given a lengthy period to do so as the festive period was fast approaching. The Tribunal was also aware that the claimant might want to seek independent advice and this is referred to in the Note dated 27 December 2017 at paragraph 10 on page 5 of that Note.

126. Having complied with the direction to provide Further and Better Particulars the respondent's agents then sought a Preliminary Hearing on the issue of a strike out application under Rule 37. The claimant suggests that she did not think she required to provide any more information. In doing so she founded on the respondent's email to her dated 12 February 2018, (page 71 of the bundle) where they write, "The Claimant's further and better particulars clarify the details, such as the dates, of the alleged protected disclosures, which had already been addressed in the Respondent's Grounds of Resistance. We do not consider that a further response to these allegations is required."

127. As the Tribunal understood it, the claimant appeared to take the view that this meant the respondent was satisfied with what she had set out in the email of 31 January 2018 regarding the Further and Better Particulars that she provided.

128. While the respondent in that email then goes on to set out their position in relation to alleged detriments (which they deny) their email also indicates that

they continued to maintain their position that the claimant had failed to raise a protected disclosure within the meaning of s43 of the Employment Rights Act 1996 during her employment with them.

129. In an email dated 12 February 2018, (pages 69-70) to the Tribunal office and to the respondent's agent the claimant wrote, "I write further to your correspondence on the 5th of February. I can confirm that I am in discussions with a Solicitor. He has reviewed all the case documents and we are currently discussing funding. If we reach an agreement, I will confirm as soon as possible. I will be proceeding regardless, even if I am representing myself."

130. As explained above, a Preliminary Hearing on strike out was arranged for 27 March 2018. Notices were issued dated 13 March 2018. That Preliminary Hearing was discharged following the respondent's request as their counsel was not available. Further Notices were then issued for the Preliminary Hearing to take place on 9 May 2018, (pages 55 and 56). That Preliminary Hearing was then discharged following the claimant's request and this Preliminary Hearing was then notified to the parties by Notices dated 12 June 2018. All three Notices for the Preliminary Hearing, (the one of 13 March for the Preliminary Hearing on 27 March, the next of 9 April for the Preliminary Hearing on 9 May and the one of 12 June for this Preliminary Hearing are very clear as to the purpose of this Preliminary Hearing, namely for the Tribunal to consider "The Respondent's application to strike out the claim on the grounds that is has no reasonable prospect of success.."

131. As indicated above, while the Tribunal noted the claimant was seeking more time to prepare although her view appeared quite clearly to be that there required to be a full evidential hearing as she did not think that "the tribunal can properly come to a decision on the preliminary points made by the respondent without hearing evidence from the witnesses involved in the matter. I therefore believe that a full evidential hearing should be fixed", (the claimant's written submission provided on 17 July, albeit the heading has the date of the postponed Preliminary Hearing of 9 May 2018.

132. The above matters are set out as they have a bearing on the Tribunal's decision as to whether or not to grant the application for strike out made by the respondent.

133. It is also relevant to explain that, as indicated above, towards the end of this Preliminary Hearing the Tribunal asked whether instead of striking out the claim in terms of rule 37, consideration might be given to fixing a Preliminary Hearing on whether the claim has little reasonable prospect of success and, if so, whether to order a deposit to be paid, (rule 39).

134. Mr Grant-Hutchison opposed this possible route as a way of proceeding. One further avenue canvassed was whether an unless order should be issued in terms of rule 38. Again, Mr Grant-Hutchison was opposed to an unless order being issued.

135. In any event were the Tribunal to direct that there should be an unless order issued then an obvious difficulty which may well arise is that even if the claimant were ordered to provide more information subject to an unless order if she did provide further information then it may well be that a further Preliminary Hearing might have to be arranged to consider what to do in the event the claimant did provide further information and the respondent continued to maintain its fundamental objection that the claimant has failed to make a protected disclosure(s) in terms of s43 of the 1996 Act.

136. From the claimant it was made very clear that what she seeks is the opportunity to proceed to a Final Hearing at which evidence will be given by the claimant and other witnesses as well as witnesses for the respondent.

137. Having noted the parties' respective views on proceeding either under rule 38 or 39 the Tribunal concluded that it was unrealistic in the circumstances to arrange a further hearing or to issue an unless order.

138. Accordingly, the Tribunal has to reach a determination on whether or not to grant the application for strike out of the claim in terms of rule 37.

139. The authorities to which Mr Grant-Hutchison referred are with the exception of **Bellingham** (see above) decisions of the Employment Appeal Tribunal or the Court of Appeal. As such they are binding on this Tribunal unless they can be distinguished on a material point.

140. The Tribunal noted from **Hasan** that the decision to strike out the discrimination and other payments claim was made in breach of rule 37 as it requires a party to have a reasonable opportunity to make representations where consideration was a being given to striking out, (see paragraph 13 of that judgment). Here, in contrast, very considerable notice was given to the claimant standing the terms of the three Notices of Hearing for the original date in March which was then postponed followed by the Notice for the May date which was also postponed and then the third Notice for this Preliminary Hearing. All three are in identical terms and the claimant could not be in any doubt as to the purpose of the Preliminary Hearing. This is supported by the claimant's written Submission referred to above which has a date of 9 May although that Preliminary Hearing was postponed following the claimant's request to do so. The Tribunal concluded that the claimant was afforded a reasonable opportunity to make representations to it on 17 July 2018.

141. Mr Grant-Hutchison had at the Preliminary Hearing on case management on 22 December 2017 referred to the judgment in **Blackbay**, (again see above) and so the claimant was on notice as to what her Further and Better Particulars required to set out. He has taken issue with their contents and has set out why in very considerable detail.

142. The Tribunal was alert to the fact that this is a Preliminary Hearing and no evidence was heard. The issue for determination is whether this claim has no reasonable prospect of success. It does not require a final determination on whether the alleged protected disclosures are indeed protected disclosures.

143. Instead, what this Tribunal has to consider is whether the claim (which, at the risk of repetition, is a single complaint of alleged protected disclosures and alleged detriments arising therefrom) has no reasonable prospect of success.

144. The guidance set out **in Blackbay** to which the Tribunal was referred at paragraph 88 is very helpful in reminding tribunals that it is disclosure of information as opposed to the making of allegations that are capable of being protected.

145. The Tribunal reminded itself of what is submitted for the respondent and, in doing so, has concluded that there is very limited information content provided by the claimant. It is clear that the claimant has expressed her views which may well be valid but she does not set out specific information nor did she state that there was an actual breach or breaches of any legal obligations. The Tribunal concluded that Mr Grant-Hutchison's submission is well made on this point.

146. In reaching this conclusion, the Tribunal also noted the guidance from **Cavendish**, (again see above) regarding "disclosed information" and from **Goode** (see above) that the expressing of an opinion about an employer is not enough.

147. The Tribunal then noted all that is said regarding identification of a legal obligation and that the claimant is said to have failed to identify what legal obligation had been breached. The Tribunal noted that the claimant has not specified what breach of the Data Protection Act is alleged to have occurred. The Tribunal also noted that it is not clear what substantial public interest arises from the claim as set out in the ET1 and the Further and Better Particulars.

148. Dealing with the second alleged protected disclosure the Tribunal noted that the same criticism is made by the respondent as for the first alleged protected disclosure.

149. Dealing with the third alleged protected disclosure, this makes reference to there being a risk of a "miscarriage of justice" as well as to the disclosure being in the public interest but no more is specified. However, there is a lack of information provided and it therefore unclear what it is that the claimant asserts was at risk of a miscarriage of justice or indeed a likelihood of this arising.

150. Turning to the fourth alleged protected disclosure, the Tribunal concluded that Mr Grant-Hutchison is correct in suggesting that fails to set out on what basis the claimant asserts there was a risk of a miscarriage of justice.

151. The Tribunal notes the suggestion that what is being stated is that there was a poor practice being used by the respondent. That may well be correct but it does not seem sufficient to amount to a protected disclosure.

152. Next, the fifth alleged protected disclosure refers again to a "risk of a miscarriage of justice" and a potential breach of the "Health and Safety at Work Act" but no information is set out in support of this allegation.

153. Mr Grant-Hutchison also suggested that this alleged disclosure does not seem to be set out in the claim, (the ET1) and so he suggests that it may require the claimant to apply to amend the ET1 and he goes on to indicate that there would then be an issue of time-bar to be considered.

154. The sixth alleged protected disclosure, which refers again to a "risk of a miscarriage of justice" and a potential breach of the Health and Safety at Work Act. Mr Granat-Hutchison points out that this is not foreshadowed in the ET1 and so amendment/time-bar would have to be considered.

155. On the seventh alleged protected disclosure, it is suggested that this is in effect a complaint by the claimant about her own terms and conditions of employment and so is not sufficient to qualify as a public interest disclosure. He also indicates, correctly in the Tribunal's view, that the necessary

information to the employer that there is any breach of a legal obligation is not provided.

156. He suggests this has the "hallmarks of raising a personal grievance with little or no disclosure of information." The Tribunal noted the reference to the guidance in **Smith** and **Kilraine**. It concluded that this criticism is valid as there is a lack of information of the sort required in **Smith** and *Kilraine*.

157. It is not clear to the Tribunal how the alleged disclosure can amount to raising issues that are relevant to the general public interest. Mr Grant-Hutchison points out that there is a lack of information about the team and he refers the Tribunal to **Chesterton** at paragraphs 12 and 37.

158. On the eighth alleged protected disclosure, the Tribunal noted that there is again a criticism made of the failure to set out what breach of duty is being alleged nor is it clear how the Health and Safety at Work Act is engaged. It is suggested that instead what is being said is a complaint about the claimant's self-interest.

159. Finally, turning to the ninth alleged protected disclosure, the criticism here is that while there is reference to a "potential breach" there is lack of refence to the statutory test. What is it that the claimant is asserting here? The Tribunal concluded that Mr Grant-Hutchison is correct in his criticism of this alleged protected disclosure.

160. In reaching its decision as to whether it should grant the application for strike out, the Tribunal has considered each of the allegations in turn. It was necessary to look at them individually as it might be that some of them are set out in such a way as to amount, on the face of it, to qualifying disclosures in terms of s43 of the 1996 Act and so in doing so the claimant has shown that there is or has been or likely to be a failure by the respondent to comply with a legal obligation to which it is subject.

161. Section 43C sets out the requirement of there being a reasonable belief and that the worker reasonably believes that the information which is disclosed and any allegation contained in it are substantially true.

162. Having looked in detail at each of the alleged protected disclosures, the Tribunal was not satisfied that, viewed objectively, all or any of these are set out in such a way as to persuade the Tribunal that this claim has a reasonable prospect of success. Again, the Tribunal has to reiterate that it is not for it to reach a final determination on the alleged protected disclosures but to ask the question whether the claim has no reasonable prospect of success.

163. The Tribunal has already explained that it concluded that holding a further Preliminary Hearing at which a deposit order might be issued if the tribunal concluded that the claim has "little reasonable prospect of success, (rule 39 of the 2013 Regulations) would not be appropriate in the circumstances.

164. Had the Tribunal concluded that some or indeed any single allegation has some reasonable prospect of success, then it would have refused the application for strike out, either of all of the alleged protected disclosures or of some of them.

165. However, the Tribunal has given careful consideration to each and every alleged protected disclosure both in the ET1 and the Further and Better Particulars and having done so and having regard to the trenchant criticisms made by the respondent and also the authorities to which it has been referred, it has concluded that this claim has no reasonable prospect of success.

166. Accordingly, since that it the determination that it has reached it follows that this hat the claim must be struck out in accordance with rule 37 of the 2013 Regulations.

167. In reaching this determination, the Tribunal appreciates that the claimant has attempted to set out in full how it is that she asserts she made protected interest disclosures but, as already explained, the issue for the Tribunal was to reach a view on the issue of whether the claim has no reasonable prospect

of success. Its conclusion after careful consideration is that the claim has no reasonable prospect of success.

168. It therefore follows that the claim must be struck out since the Tribunal has concluded that is has no reasonable prospect of success.

Employment Judge: FJ Garvie
Date of Judgment: 06 August 2018
Entered in register: 08 August 2018
and copied to parties