EMPLOYMENT TRIBUNALS

Claimant: Mr O Ogunjimi

Respondents:
1. Bolton Hospital NHS Foundation Trust
2. Dr Emma Donaldson
3. Dr Nadia Raza
4. Pennine Acute Hospitals NHS Trust

Proposed additional respondent: Dr T A Syed

HELD AT: Manchester **ON:** 21 February 2018

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Mr Olu Ogunyanwo, representative

1st-3rd Respondents Mrs J Gray, solicitor
4th Respondent Miss A Smith, counsel
Proposed respondent: Ms M Guilding, solicitor

RESERVED JUDGMENT FOLLOWING A PRELIMINARY HEARING

1. The complaint of victimisation contrary to the Equality Act 2010 is dismissed on withdrawal.
2. The tribunal refuses the claimant's application to amend his claim to include a complaint of detriment on the ground of protected disclosures.
3. The tribunal refuses the claimant's application to amend his claim to include a complaint of unlawful deduction from wages.
4. The tribunal refuses the claimant's application to join Dr Syed as a respondent.
5. The tribunal refused the claimant's application to amend his claim to include complaints against Dr Syed.

6. The tribunal refuses the application of Pennine Acute Hospitals NHS Trust to be dismissed from the proceedings.
7. The claim against Pennine Acute Hospitals NHS Trust is not struck out.

The effect of this judgment is that the tribunal will not consider any complaint or allegation unless it appears in the Schedule to the case management order accompanying this judgment.

DEPOSIT ORDER

Employment Judge Horne considers that the allegations of direct discrimination and harassment against Pennine Acute Hospitals NHS Trust have little reasonable prospect of success. As a condition of proceeding with those allegations, the claimant is ordered to pay a deposit of £250.00 by 4pm on 26 March 2018.

REASONS

Preliminary

1. For convenience I use the following abbreviations in these reasons:
   1.1. "Bolton" to mean Bolton Hospital NHS Foundation Trust;
   1.2. "Manchester" to mean Central Manchester NHS Foundation Trust, now Manchester University NHS Foundation Trust;
   1.3. "Pennine" to mean Pennine Acute Hospitals NHS Trust;
   1.4. "EqA" and "ERA" to mean respectively the Equality Act 2010 and the Employment Rights Act 1996; and
   1.5. "the Schedule" to mean the Schedule to the case management order accompanying this judgment.

The disputed decisions

2. By a case management order dated 2 January 2018, Regional Employment Judge Parkin listed the claim for a preliminary hearing to take place today for the following purposes:

   > "As well as further case management of the claims and listing the next hearing, the Tribunal will determine the preliminary issue of whether [Pennine] should be dismissed from the proceedings".

3. During the preliminary hearing there was a discussion of the proper remit of the issues to be determined today. The following points emerged:
   3.1. All parties understood that I should adjudicate on the claimant's application to amend the claim to include complaints of whistleblowing detriment, a complaint of unlawful deduction from wages and various complaints against Dr Syed.

3.2. The solicitor for Bolton and Drs Pennington and Raza asked the tribunal to consider its application for the claim against them to be struck out on the ground that there were no reasonable prospects of success. During final submissions that application was withdrawn.

3.3. Counsel for Pennine confirmed that the application to dismiss Pennine included an application to strike out the claim against Pennine on the ground that it had no reasonable prospect of success. During final submissions, in response to a question from me, she indicated that, if the strike-out application was unsuccessful, she would be seeking a deposit order.

3.4. A large part of the hearing was taken up with Mr Ogunyanwo clarifying the way he put his case. This included explaining the basis of his complaints under EqA against all respondents. With the exception of Dr Syed, all respondents agreed that the claimant would not need to amend his claim in order to pursue his complaints under EqA against them.

Background

4. The claimant is a doctor working within the National Health Service (NHS). At the time with which this claim is concerned, he was employed as a Specialty Trainee ("ST") undergoing training to be a Specialist Registrar.

5. It is impossible to grapple with the issues in this case without a basic understanding of the framework under which the NHS provides training for its staff. As will be seen, some of the details of this framework are in dispute, but unless otherwise indicated, the following summary represents the agreed position between the parties.

6. Training of NHS staff is the responsibility of Health Education England ("HEE"), a public body responsible to the Secretary of State for Health. HEE's functions are divided into separate geographical regions, known as "Deaneries". The North Western Deanery is the responsibility of Health Education England North West ("HEENW").

7. Pennine's case is that HEENW is a department of HEE. It is not clear to me whether or not the claimant accepts this latter point. At one point, his representative contended that the Deaneries, including HEENW, have primary responsibility for training and that the Deaneries delegate their functions to HEE.

8. Every ST within a Deanery is employed by a Lead Employer for that Deanery. In the North Western Deanery the Lead Employer is Pennine.

9. During their training programme, STs rotate around a number of training placements at NHS hospitals. The NHS trusts responsible for those hospitals are known as Host Trusts.

10. Each specialty training programme has a Training Programme Director ("TPD"). There is a dispute about how TPDs come to be appointed. Pennine's case is that they are appointed by HEENW.

11. During placement at a Host Trust, STs are allocated an Educational Supervisor. Again, there is a dispute as to the mechanism by which Educational Supervisors are allocated.

12. It is common ground that the claimant was employed by Pennine. The respondents say that Pennine was his only employer. But it is the claimant's

case that, as well as being employed by Pennine, he was also employed by each Host Trust where he worked.

13. By letter dated 5 September 2014, Pennine offered the claimant employment as an ST, and set out various terms and conditions of employment. The claimant signed his acceptance of those terms on 20 September 2014.

14. Paragraph 4a of the letter read as follows:

> "Your base salary will be £30,002 per annum on the MN37 pay scale… and will progress by annual increments to £47,175 per annum in accordance with the current national salary scale for your grade. (These rates are subject to amendment from time to time by national agreement).

15. The claimant's TPD was Dr Munish Batra, an employee of Lancashire Teaching Hospitals NHS Trust.

16. The claimant then began a series of placements. His fifth placement, from 3 August 2016 to 31 October 2017, was with Manchester. During this time his Educational Supervisor was Dr Syed, whom Manchester employed. His Clinical Supervisor was Dr Marie Hanley, also an employee of Manchester.

17. On completion of his Manchester placement, the claimant's next Host Trust was Bolton. His Educational Supervisor at that time was Dr Raza, an employee of Bolton.

18. This claim contains many allegations, as will be seen in the Schedule. But, in a nutshell, the claimant wants to complain about the way Dr Syed treated him whilst he was at Manchester, and during regional training event on 1 March 2017. His claim also relates to Dr Donaldson's behaviour towards him and Dr Raza's failure to do anything about it. The claimant also reported concerns about Dr Syed, Dr Donaldson and Dr Raza to Dr Batra at Pennine; the claimant's case is that Dr Batra did nothing.

Procedural history

19. On 17 August 2017 the claimant began early conciliation with ACAS, naming Bolton, Dr Donaldson and Dr Raza as prospective respondents. He obtained a certificate on 14 September 2017. On 21 October 2017 the claimant presented his claim, naming Bolton, Dr Pennington, Dr Raza and Pennine as respondents. Because of procedural defects relating to the early conciliation certificate, the claim against Dr Raza and Pennine was initially rejected. The claimant provided the required information in respect of those two respondents on 31 October 2017, with the result that the claim against Dr Raza and Pennine was treated as having been presented on that date.

20. The claim form raised complaints of direct race discrimination and harassment related to race. It set out a reasonably clear narrative of what had happened during the claimant's time at Manchester and Bolton and how it amounted to discrimination and harassment. What was far less clear was how each respondent was said to be liable for that prohibited conduct. Phrases such as "duty of care" and "jointly and severally liable" hinted at possible routes to liability, but there was no analysis of the employment relationship or the relevant causes of action in Parts 5 and 8 of EqA.

21. In the claim form, the claimant described in some detail the way in which Dr Syed had allegedly behaved towards him. He did not, however, name either

Manchester or Dr Syed as respondents, or suggest that Dr Syed should be held liable. Nothing in the claim form indicated a complaint of unlawful deduction from wages.

22. The claim form indicated that the claimant was represented by "Alpha Shindara Legal".

23. A preliminary hearing took place before Regional Employment Judge Parkin on 2 January 2018. At that hearing, Mr Ogunyanwo, representing the claimant, informed the tribunal that the claimant sought to amend his claim to include Dr Syed as a respondent and to raise complaints of victimisation under EqA, and detriment on the ground of protected disclosures. The claimant was ordered to set out the basis of his proposed claim in writing.

24. The claimant e-mailed the tribunal on 20 January 2018. Attached to his e-mail were three documents.

25. The first document, which I will call the "Table of Allegations" set out in table format his claim under EqA against the original four respondents.

26. The second document, headed, "Application to Amend Claim" contained details of his proposed complaint of whistleblowing detriment and unlawful deduction from wages. Significantly, as far as the wages complaint was concerned, the application to amend stated:

> "The claimant believe[s] that he should have been paid according to specialty doctor pay scale MC46 which shows a starting point of £46,000 per annum compared with 34,000 per annum which he was paid. We refer to the Pay and Conditions Circular (M&D) 1/2017 Pay scale".

27. The third document was a further table setting out allegations of discrimination and harassment that the claimant wished to bring against Dr Syed. Although it made one reference to a complaint of victimisation under s27 of EqA, Mr Ogunyanwo confirmed at today's hearing that that allegation was withdrawn.

28. The case then proceeded to today's hearing.

The preliminary hearing

29. I read witness statements from Dr Syed on her own behalf and Ms Kelsey Hudson on behalf of Pennine. Neither of them gave oral evidence. I did not think it appropriate for them to do so. I did not need to make any disputed findings of fact. Some of the facts set out in Ms Hudson's witness statement I did adopt, but only where I was sure that they were undisputed.

30. The claimant relied on a selection of documents, most of which were in a single photocopied bundle. Ms Hudson's statement also made reference to documents in a black file. In keeping with the warning that I gave the parties, I did not read all of these documents; I only read those pages to which the parties specifically drew my attention.

31. The claimant clarified the way in which he puts his case under EqA against the original four respondents. That is set out in the Schedule.

32. During this part of the discussion, the claimant referred to some ways in which he was subjected to further less favourable treatment by Dr Clarke and Dr "Alderton" (whose name may actually be Atherton). There was no reference to these in the Table of Allegations, because the treatment had only occurred since 20 January

2018. I attempted to clarify these new allegations with Mr Ogunyanwo, but he did not have sufficiently clear instructions to continue with the exercise. I indicated therefore that if the claimant wished to include these matters as part of his claim, he would need to make a further application to amend.

33. I then asked Mr Ogunyanwo a series of questions aimed at clarifying the proposed complaint of whistleblowing detriment. On the basis of his answers, I recorded the following:

    33.1. The claimant relies on the following protected disclosures:

        33.1.1. Two incident report (IR) forms relating to patient safety, both submitted on 25 January 2017. These had been clearly referred to in Application to Amend Claim.

        33.1.2. Two earlier alleged disclosures to Dr Chillala about patient safety. The first was in a telephone conversation on 18 October 2016. The second was within a week of that conversation. These alleged disclosures were not mentioned in Application to Amend Claim.

    33.2. The claimant contends that, on the ground that he made these disclosures, Dr Syed and Dr Batra subjected him to detriments. A complete list of the detrimental acts and failures to act was set out in four paragraphs of Application to Amend Claim. Mr Ogunyanwo confirmed that the last detrimental act done by Dr Syed was on 1 March 2017. The detrimental failure of Dr Batra was his failure to investigate concerns raised on 6 and 13 February 2017. In Mr Ogunyanwo's view, a reasonable time for investigating those concerns would have expired within a few days; at the very latest by March 2017.

    33.3. The claimant holds Dr Syed personally liable for her own detrimental acts. This is how he puts his case. It is common ground that Dr Syed was a worker for Manchester within the meaning of section 230 of ERA. The claimant contends that he was also a worker for Manchester within the meaning of section 43K. Despite considerable prompting and explanation, the claimant was unable to point to which of the paragraphs of section 43K(1) made him a worker, but he contends that it must be one of them. Dr Syed therefore owed the claimant a duty under section 48B(1A) and breached it by subjecting him to the alleged detriments.

    33.4. It is the claimant's case that Pennine is liable for the alleged detrimental failures of Dr Batra. Pennine was the claimant's employer. According to the claimant, Dr Batra was Pennine's agent within the meaning of section 47B(1A)(b) and his failure must therefore be treated under section 47B(1B) as having been done by Pennine.

34. The conversation then moved on to the way in which the claimant would like to bring his wages complaint. I did not find Mr Ogunyanwo's explanation easy to follow. He was clear that there had been a series of deductions from the outset of the claimant's employment with Pennine, lasting until July 2017, because his annual salary had been less than it should have been. Beyond this point, Mr Ogunyanwo's position appeared to oscillate between various inconsistent contentions:

    34.1. One of these was that claimant was contractually entitled under collectively agreed pay conditions to be paid on Scale MC46. This was the

case advanced in Application to Amend Claim. He handed up a copy of Pay Circular 1/2017. It was dated 11 August 2017; after the alleged deductions had stopped. According to this document, MC46 applied to a "Specialty Doctor", in the same document that provided specific pay scales for STs.

34.2. Another argument advanced by Mr Ogunyanwo was that, under the same Pay Circular, the claimant should have been paid on scale ST3, ST4 or ST5 at Nodal Point 4, on the basis that the claimant was a Specialty Registrar doing Run-Through Training. This was a departure from Application to Amend Claim and again relied on a collective agreement that post-dated the period of alleged deductions. There was no explanation as to why the claimant should be on ST3 or above, as opposed to ST1 or ST2, which also applied to Specialty Registrars doing Run-Through Training.

34.3. A third argument was based of Pay & Conditions Circular (M&D) 2/2014. This had the advantage of being current at the time that is relevant to the claim. The document set out a number of different pay scales, one of which was MN37 "Specialty Registrar (full)". That was the scale on which the claimant was actually paid. I found it hard to discern which of the other pay scales the claimant was saying applied to him, let alone why those pay scales were more appropriate than MN37. The document did not refer to MC46 at all.

34.4. Finally it was argued on the claimant's behalf that Pennine was under a legal obligation to pay the claimant and his colleagues equally. Despite a number of open questions, Mr Ogunyanwo was unable to provide any more detail about the nature of that obligation.

35. The next proposed amendment to be clarified was the EqA complaint against Dr Syed. In fact, the claimant confirmed that these included discrete allegations against Pennine arising out of Dr Batra's and Dr Hanley's alleged failure to investigate complaints about Dr Syed's conduct. These are incorporated into the Schedule. Importantly in my view, it was not suggested by the claimant that Pennine, or any other Trust, was vicariously liable for Dr Syed's actions: Pennine's liability only arose from failure to deal with the claimant's complaints

36. So far as Dr Syed's proposed liability was concerned, Mr Ogunyanwo argued that the claimant was an employee of Manchester within the meaning of section 86 of EqA. (The claimant's basis for contending that he was Manchester's employee is that he "worked" for Manchester at Manchester's premises.) Manchester therefore had a duty under sections 39 and 40 of EqA not to discriminate against him or harass him. Anything done by Dr Syed had to be treated as being done by Manchester. Since Manchester's prohibited conduct would be a contravention of Part 5, Dr Syed would contravene section 110(1) EqA and be personally liable.

37. The claimant gave unchallenged oral evidence about his means. He told me he is currently in his academic year and is not carrying out any clinical work. He has a basic salary of £46,000, from which his take-home pay is about £2,200 per month. He has three children. His wife works "far away" and he pays for both his and her accommodation. He owns a house, but there is insufficient equity in it to enable him to draw further money down against the mortgage. After he has paid his bills and expenses for his children, he has very little money left.

38. I did not make precise findings of fact about the claimant's take-home pay. It appeared to be on the low side if his gross pay was £46,000 a year. But for today's purposes I took the claimant's evidence at face value.

Relevant law

Overriding objective

39. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective as follows:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Whether amendment is required

40. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

41. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...

> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

42. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

43. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

<u>Whether amendment should be granted</u>

44. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

44.1. A careful balancing exercise is required.

44.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

44.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

44.4. The tribunal should have regard to the manner and timing of the amendment.

44.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

45. Allowing an amendment to introduce a new claim does not necessarily deprive a respondent of the opportunity to argue at a later stage that the new claim is out of time: *Galilee v. Commissioner of Police for the Metropolis* UKEAT/0207/16. I prefer to follow this authority than the earlier cases of *Rawson v. Doncaster NHS Primary Care Trust* UKEAT/0022/08 and *Amey Services v. Aldridge* UKEATS/0007/16. Nevertheless there are still cases where it will be important to consider the question of time limits at the amendment stage: see *Galilee* at para 109.

46. Where an amendment introduces a claim against a new respondent, the tribunal should also have regard to the principles enunciated in *Cocking v. Sandhurst (Stationers) Ltd* [1974] ICR 650. Of these, the following appear to be relevant:

> "6. In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to claim or, as the case may be, to be claimed against.
>
> 7. In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

Liability for discrimination and harassment

47. Section 39(2) of EqA provides that an employer (A) must not discriminate against an employee of A's (B) by subjecting B to any detriment.

48. Section 40 of EqA similarly prohibits an employer from harassing its employee.

49. Section 55 of EqA applies to employment services providers. Section 56(2) brings providers of vocational training into the definition of an employment service provider. "Vocational training" means training for employment or work experience (section 56(6)). By section 55(2), an employment service provider (A) must not discriminate against a person (B) in the way A provides services to B or by subjecting B to any other detriment. Subsection (3) contains a similar prohibition in relation to harassment.

50. By section 109(1) of EqA, anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

51. Section 109(2) provides that anything done by an agent for a principal, with the authority of the principal, must be treated as also having been done by the principal.

52. Where an employer makes arrangements with another body for the provision of training, the other body may be the employer's agent. If the agent discriminates against the trainee in the provision of training, the fact that the agent had no

authority to discriminate does not mean that the discrimination was outside the scope of the employer's authority: *Lana v. Positive Action Training in Housing (London) Ltd* [2001] IRLR 501.

53. Section 110 of EqA provides:

> (1) A person (A) contravenes this section if—
>
> (*a*) A is an employee or agent,
>
> (*b*) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
>
> (*c*) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

Time limits under EqA

54. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination] may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

55. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts,

for which time would be given to run from the date when each specific act was committed"

56. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

57. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA*

58. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298.

59. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

59.1. the length of and reasons for the delay;

59.2. the effect of the delay on the cogency of the evidence;

59.3. the steps which the claimant took to obtain legal advice;

59.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

59.5. the extent to which the respondent has complied with requests for further information.

Time limits in whistleblowing detriment cases

60. By section 48(3) of ERA, a tribunal must not consider a complaint of protected disclosure detriment unless the complaint was presented:

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b))within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

61. Section 48(4) provides, for the purposes of subsection (3),

"(*a*) where an act extends over a period, the 'date of the act' means the last day of that period, and

(*b*) a deliberate failure to act shall be treated as done when it was decided on;

> and, in the absence of evidence establishing the contrary, an employer… shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

62. Whether a detrimental act was part of a "series of similar acts" is a fact-sensitive question. It is not the same as the test in discrimination cases of whether an act extended over a period. The tribunal must ask whether there is a link between the different acts and omissions that makes it just and reasonable to be considered as part of the same series. It is generally preferable for that question to determined at a final hearing after having heard the evidence. A tribunal may err in law by deciding the point on submissions alone. *Arthur v. London Eastern Railway* [2006] EWCA Civ 1358.

Striking out

63. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 gives a tribunal the power to strike out all or part of a claim on the ground that it has no reasonable prospect of success.

64. It is well established that it is inappropriate to strike out claims – and discrimination claims in particular – where there are central disputes of fact: *Anyanwu & another v South Bank Students Union* [2001] ICR 391. Complaints of whistleblowing detriment are to be treated in much the same way. It will only be in an exceptional case that such a claim will be struck out as having no reasonable prospect of success where the central facts are in dispute: *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126, CA.

Deposit orders

65. Rule 39 enables tribunals to make deposit orders. So far as is relevant, it says:

> "(1) Where at a preliminary hearing … the Tribunal considers that any specific allegation or argument in a claim … has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

66. The amount of a deposit order should, in my view, be sufficient to make the claimant think seriously about whether to pursue a weak allegation or argument. It should not, however, be so hard to pay as to stifle altogether the claimant's ability to pursue the allegation or argument.

67. In *Wright v. Nipponkoa Insurance (Europe) Ltd* UKEAT 0113/14, HHJ Eady QC gave the following guidance to tribunals considering whether to make deposit orders:

> 33. The test for the ordering of a deposit is that the party has *little* reasonable prospect of success; as opposed to the test under Rule 37 for a strike-out (*no* reasonable prospect of success). Although that is a less rigorous test, the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts

> essential to the claim. There is little guidance in the authorities as to what is meant by little reasonable prospect of success, although it was considered by Bean J (as he then was) in *Community Law Clinic Solicitors & Ors v Methuen* UKEAT/0024/11/LA, who doubted whether there was any real difference between little reasonable prospect of success and little prospect of success. In that case the ET had made a deposit order but had refused to strike out the claims. There was no appeal against the deposit orders. The EAT was concerned only with the strike-out issue and ruled that the Employment Judge should indeed have struck out the claims of sex and race discrimination.
>
> 34. When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case. Given that it is an exercise of judicial discretion, an appeal against such an order will need to demonstrate that the order made was one which no reasonable Employment Judge could make or that it failed to take into account relevant matters or took into account irrelevant matters.

68. An employment judge may not have a proper basis for doubting the likelihood of the claimant proving essential facts if, in order to arrive at that conclusion, the employment judge takes the claim and response at "face value", or has to conduct a "trial on the papers" to evaluate the respondent's explanation: see *Javed v. Blackpool Teaching Hospitals NHS Foundation Trust* UKEAT 0135/17 at paras 66 to 68.

69. The amount of a deposit

Removal of a respondent

70. Rule 34 gives the tribunal the power to remove a respondent who has been wrongly included.

71. Counsel for Pennine submits that the test for removal of a respondent is wider than that for striking out on the grounds of prospects of success. I could remove a wrongly-included respondent if I thought it were in the interests of justice to do so, even if I thought that the claim against that respondent had some reasonable prospect of success. Up to a point I agree. I could envisage circumstances in which the respondent to a meritorious claim might be removed, for example, because the claimant has no interest in pursuing that respondent, or there could be no conceivable advantage to the claimant in obtaining a judgment against that respondent. An example might be where the employer of an individual respondent accepts vicarious liability for the individual respondent's actions, would inevitably indemnify the individual respondent, and is obviously good for the money. What I do not accept, however, is that a tribunal could use its powers under rule 34 against the claimant's wishes in order to remove the only respondent to a complaint of an alleged contravention of EqA. To do so would mean that no-one could be held liable for that contravention. Still less do I think that rule 34 could be used in this way where the respondent's grounds for wanting to be removed are that the claim against them has poor prospects of success. To remove a respondent in this way would be to ignore the public interest in discrimination claims being heard on their merits. It would also drive

what is quaintly referred to as a "coach and horses" through the well-established restrictions on striking out discrimination cases on the ground of their prospects.

Conclusions – amendment to include Dr Syed

72. My starting point is to assess the extent to which allowing this amendment would expand the scope of the claim. In my view, it would change the claim in three important respects.

    72.1. First, it would expose Dr Syed to the risk of personal liability.

    72.2. Second, it would open up a new area factual enquiry about what Dr Syed did and why. It is true that the original claim form made allegations about Dr Syed's conduct. But on a reasonable understanding of the claim form, those allegations are largely irrelevant. The claim in its unamended form does not require the tribunal to make any finding of fact about what Dr Syed actually did, or her reasons for doing it. Assuming, for the moment, that Dr Syed did harass or discriminate against the claimant, nobody would be liable for it. The only relevance of Dr Syed's behaviour was that the claimant complained about it to Dr Batra and Dr Hanley. It was only their actions (or inactions) and not those of Dr Syed, that could result in someone being held liable. Allowing the amendment would bring Dr Syed's actions and motivation under the spotlight for the first time.

    72.3. Third, the whistleblowing element of the claim against Dr Syed would also require further fact-finding. The content of the IR forms is unlikely to be disputed, but there would have to be an enquiry into the claimant's belief about what the IR forms tended to show. The conversations with Dr Chilala (during which the earlier disclosures were allegedly made) may well be the subject of differing recollections. It will also be necessary for the tribunal to examine an aspect of Dr Syed's motivation that would not be covered by the EqA complaints. Was her treatment of the claimant materially influenced by the IR forms and the conversations with Dr Chilala?

73. Because of the considerable expansion of the claim caused by the amendment, it is important to consider the statutory time limits.

74. I start with the time limit for the whistleblowing detriments. The claimant accepts that the last detrimental act done by Dr Syed was on 1 March 2017. It may be possible to see Dr Syed's detrimental acts as part of a series of acts that were similar to Dr Batra's failure to act. That failure must also be treated as having been "done" on the expiry of a reasonable period, which, the claimant says, must have expired by March 2017. The last day for presenting the claim was therefore 31 May 2017. The claim form was not presented until 21 October 2017. It is nearly 5 months out of time. The application to bring the claim against Dr Syed was over 7 months out of time.

75. In my view it was reasonably practicable for the claimant to have presented his claim before 31 May 2017. The claimant only put forward one argument to the contrary. He relies on an e-mail exhibited to Dr Syed's witness statement. The statement is dated 9 February 2018 and the e-mail was sent on 6 February 2017. His argument is that the e-mail makes damaging and unjustified assertions about the claimant's mental health. He did not know about the e-mail until after he received the witness statement. Until then, he says, it was not reasonably practicable for him to bring a complaint of whistleblowing detriment against Dr Syed. The difficulty with this argument is that, even before he saw the e-mail, the

claimant had already formulated his whistleblowing complaint against Dr Syed and included it in Application to Amend Claim. There was nothing to stop him formulating it in the same way before 31 May 2017. If I am wrong in that conclusion, I would not think it reasonable to extend the time limit from 31 May 2017 to 21 October 2017, let alone 2 January 2018. The claimant's allegations relate to behaviour and things said in conversation. The events about which the claimant complains are now over a year old. By now, memories about these events will inevitably have faded. I draw this conclusion not from the contents of Dr Syed's witness statement – which have not been tested – but from the nature of the allegations themselves. Since 21 October 2017, or possibly earlier, the claimant has had the assistance one or more people holding themselves out as legal representatives.

76. I turn to the time limits under EqA. No act of discrimination or harassment is said to have been done by Dr Syed after 6 February 2017. I have considered whether it is reasonably arguable that the alleged discrimination and harassment by Dr Syed was part of the same ongoing state of affairs as the discrimination and harassment that was alleged to have occurred at Bolton, or the alleged discriminatory failure on Pennine's part to investigate it. In my view, that proposition is not reasonably arguable. The later incidents involved different perpetrators and took place at a different hospital. Failure by alleged agents of Pennine to investigate Dr Syed's conduct is a different kind of discrimination to Dr Syed's conduct itself. The last day for presenting a complaint against Dr Syed under EqA was therefore 5 May 2017. Even had Dr Syed been named as a respondent in the original claim form, the complaint would have been over 5 months out of time.

77. In my opinion it is not just and equitable to extend the time limit. There has been no good reason for the delay. It is bound to have adversely affected the parties' recollections of the conversations in which discrimination and harassment are said to have taken place.

78. The claimant's difficulty with time limits plays into the *Selkent* balancing exercise in two ways. First, the overall delay up to 2 January 2018 is an important factor in its own right. Second, the specific delay to 21 October 2017 neutralises any disadvantage that the claimant would suffer if the amendment were to be refused. Even if the amendment were to be allowed, and the claim were to proceed to a final hearing, he would still face the obstacle that his claim would have been out of time even if it had been included in the original claim form.

79. By contrast, allowing the amendment would put Dr Syed at a disadvantage in having to cast her mind back to the incidents concerned.

80. For good measure, I also take into account that there is no evidence of the claimant having made a genuine mistake as to the identity of the respondent. He carefully chose four respondents to the claim, including individual alleged perpetrators. I infer from that fact that, had the claimant originally wished to include Dr Syed as a respondent, he would have done so.

81. I have an additional reason for refusing the amendment in respect of the EqA complaints. It seems to me that, if the amendment were allowed, the claimant would struggle to show that he was employed by Manchester. Whilst he may have carried out work at a Manchester hospital, he has not at any time suggested

that his work there was under a contract with Manchester. That is what the section 83 definition of an employee requires.

82. I therefore refuse the proposed amendment and decline to add Dr Syed as a respondent.

Conclusions – amendment to add protected disclosure detriment complaint

83. Aside from Dr Syed, the only respondent to the proposed whistleblowing detriment complaint is Pennine. That complaint would raise new areas of factual enquiry in relation to the alleged protected disclosures (see above) and also in relation to the motivation of Dr Batra. Time limits are therefore important, especially in relation to the period before presentation of the original claim form, although they are not in my view quite as weighty as in the case of Dr Syed.

84. As I have previously indicated, Dr Batra's detrimental failure to act has to be treated as having been "done", at the latest, by the beginning of March 2017. Adopting the same analysis as in Dr Syed's case, the complaint would have been presented nearly 5 months too late, even if it had been included in the original claim form. It was actually raised over 7 months after the time limit expired.

85. I must therefore consider whether it was reasonably practicable to have brought the whistleblowing complaint against Pennine within the statutory time limit. The claimant did not put forward any argument to suggest that he could not have presented his complaint within that time.

86. I also think that, if the amendment were allowed, the claimant would have real difficulties in showing that Dr Batra was Pennine's agent. I have not yet considered all the evidence about the interrelationship between the various NHS bodies. For the reasons I give in relation to the deposit order, however, I think it is inherently unlikely that the relationship of agency existed in the way the claimant describes.

87. Refusing the amendment is doing little more than depriving the claimant of the opportunity to pursue a hopeless claim. It would have failed if it had been included in the original claim form, because the claimant would not be able to obtain an extension of time. It would also probably have failed due to the difficulty in showing that Dr Batra was Pennine's agent.

88. If the amendment were allowed, the disadvantage to Pennine would not quite as stark as it would be to Dr Syed. Dr Batra already has to cast his mind back many months to deal with the complaint under EqA. But he would have to answer questions about what he knew of the IR forms, what contact he had with Dr Chillala. The delay will inevitably have made recollections of these thought processes more difficult. Pennine may also have to call Dr Chillala to try and recall conversations that took place in 2016. Disadvantages such as these outweigh the disadvantage to the claimant caused by refusal of the amendment. Accordingly the amendment is refused.

Conclusions – amendment to add wages complaint

89. This is a wholly new complaint which would raise a new set of issues for the tribunal to determine. Because of the shifting way in which the claim is advanced, it is hard to identify precisely what those issues would be. There may have to be some enquiry into the meaning and effect of the Pay Circulars. Could they have the effect of placing an employee on one contractual pay scale into a different pay scale? Potentially, if I understand the claimant's case correctly,

there may need to be a factual enquiry as to whether the work done by the claimant, or the responsibilities given to him, meant that he met a description in one of the Pay Circulars that matched one of his desired pay scales such as MC46, or ST3. There will certainly need to be some evidence about which Pay Circulars applied to which kind of doctors' contract. Time limits therefore have some relevance here.

90. Had this complaint been included in the original claim form, it may or may not have been presented within the time limit. The last in the alleged series of deductions was the last occasion on which the claimant was paid under pay scale MN37. It appears to be common ground that this happened in July 2017, but I am unsure of the precise date. There may well be some technical arguments as to whether the claim form should be treated as having been presented as against Pennine on 21 or 31 October 2017. Be that as it may, I will assume in the claimant's favour that the claim would have been treated as being in time had the wages complaint been included in the original claim form. I must, however, also consider the time that passed between presentation of the claim and the application to amend. That was a further two months. No reason has been put forward as to why the claimant did not include the wages complaint in the original claim form or waited until January 2018 to raise it.

91. One relevant factor here is the manner and timing of the amendment. It comes a long time before the final hearing, so Pennine would be able to prepare once it understood what case it had to meet. But the basis of the claim is still far from clear. Various arguments are being advanced that seem different from and inconsistent with the version in Application to Amend Claim.

92. Because the basis of the claim is so uncertain it is hard to measure any disadvantage to the respondent if the amendment is allowed. There is some potential for oral evidence about matters (such as the claimant's work and responsibilities) about which memories would fade.

93. I have weighed these disadvantages against the disadvantage to the claimant if the amendment were to be granted. Here, the merits of the claim are relevant. There is no point in allowing an amendment if the claim would ultimately fail. The starting point is that the claimant expressly agreed to be paid at MN37. The contract provided for national agreements to change the *rates* for each pay scale, but did not provide for national agreements to move him onto a different pay scale altogether. The onus is very much on the claimant to show that wages became properly payable on a different pay scale. With this in mind, I have looked at the four different, and contradictory, ways in which I understood the claimant to be putting his case as to how he came to be entitled to be paid at a higher rate. For the reasons I have already given, each strand of his claim has real problems getting off the ground.

94. Taking all the factors into account, my view is that the amendment should be refused.

Conclusions – whether to strike out claim against Pennine

95. Miss Smith, counsel for Pennine, asked me to note that Pennine strongly disputes the claimant's version of the facts. Their evidence would tend to show that no discrimination or harassment took place. Quite sensibly, however, she acknowledged that points such as these are arguments for another day. They would not justify striking out complaints such as these at a preliminary hearing.

96. Instead, Miss Smith concentrated her fire on the claimant's prospects of showing that Pennine could be held responsible under EqA for acts of discrimination and harassment, on the assumption that they occurred. The individual alleged perpetrators were Drs Chowdhry, Hanley, Raza, Batra, Clarke and Atherton. None of them was employed by Pennine. It was simply wrong to cast them as Pennine's agents. TPDs (such as Dr Batra) are appointed by HEENW and not Lead Employers. Educational Supervisors (such as Dr Raza) are appointed by the Host Trust, not the Lead Employer.

97. I saw the force in these arguments, but did not think that they were sufficiently strong to enable me to strike out the claim against Pennine altogether. *Lana* makes clear that it is possible in principal for an employer to create a relationship of agency with another body for the provision of training. I have not yet heard evidence about the interrelationship between the different NHS bodies. The claimant does not accept the respondents' contentions about which bodies appointed certain individuals to carry out their functions. This is a matter for evidence. I would only strike out the claim if the assertion of an agency relationship were inherently so absurd, or so inconsistent with the agreed facts, that no evidence could credibly be given in support of it. That hurdle has not in my view been reached.

Conclusions – whether to dismiss Pennine as a respondent

98. There are many alleged contraventions of EqA for which the only respondent that could be held liable is Pennine. For the reasons I have given, I do not think it would be appropriate to remove Pennine as a respondent unless those allegations meet the criteria for being struck out. The allegations do not meet the strict strike-out test. Pennine should therefore remain a respondent.

Conclusions – deposit order in respect of claim against Pennine

99. Although the claim against Pennine is not struck out, I am persuaded that it has little reasonable prospect of success. For these purposes I assume that the claimant was harassed and discriminated against in the way in which he alleges. His difficulty will be in establishing that Pennine was liable for that prohibited conduct.

100. Whilst recognising that it is possible for an agency relationship to be created for the provision of training (*Lana*), I do not think that such a relationship arose here, at any rate not in the way that the claimant contends.

101. I do not think it likely that there was a direct relationship of agency between the Lead Employer and Educational Supervisor (such as Dr Raza and Dr Syed). It is common ground that Educational Supervisors were employed by the Host Trust. Although it is a matter for evidence, common sense would suggest that Host Trust is the most likely body to appoint its own employees to be Educational Supervisors for STs placed at the Host Trust.

102. There is a possibility that the Host Trusts themselves were the agents of the Lead Employer. With one exception, that is not how the claimant puts his case. The exception relates to Dr Hanley (see Allegations 2 and 3 of the Table of Allegations and paragraph 17 of the Schedule). But Dr Hanley was a Clinical Supervisor. Without hearing evidence, I would imagine Dr Hanley's role to be essentially overseeing clinical work carried out by the claimant at Manchester. If Pennine did appoint Manchester as its agent for the delivery of training, I think

the claimant will struggle to show that clinical supervision (as opposed to educational supervision) fell within the scope of its authority.

103. It is improbable in my view that TPDs (such as Dr Batra) were the agents of the Lead Employer. I have to be careful here not to take at face value Pennine's evidence that they are appointed by HEE. When fully tested, the evidence might conceivably show that they were appointed by some different route. But it seems inherently likely that HEE or HEENW did appoint them. That is their function. The Lead Employer's role is essentially to carry out line management functions and to ensure compliance with policies and procedures.

104. I do not think it likely that employees of HEE (such as Drs Clarke and Atherton) acted as Pennine's direct agents. It is more likely that HEE would appoint its own employees to carry out its own functions. An indirect relationship of agency is still harder to imagine. HEE cannot sensibly be regarded as the agent of HEENW, the "North West Deanery" or Pennine. HEE is clearly answerable to the Secretary of State. HEENW is responsible to HEE, not the other way round. The thought that Lead Employers would appoint HEE as its agents for any purpose seems a little far-fetched.

105. Subject to the claimant's ability to pay, the test for making a deposit order is satisfied.

Amount of deposit order and time for payment

106. Accepting as I do for present purposes that the claimant has very little spare money, I consider that a deposit order in a relatively modest amount would be sufficient to make the claimant think about whether he really wants to proceed against Pennine. I also think, based on the claimant's evidence, that if I were to order the claimant to pay one-eighth of his take-home pay, and give him 4 weeks to raise the amount, he could afford to do so, despite his other financial commitments.

107. I therefore fix the amount of the deposit order in the sum of £250.00.

26 February 2018

_____
Employment Judge Horne

SENT TO THE PARTIES ON

6 March 2018

FOR THE TRIBUNAL OFFICE