Appeal No. UKEAT/0121/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BULDINGS,7 ROLLS BUILDING, FETTER LANE, LONDON EC41 1NL

At the Tribunal
On 13 August 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS C ARTHUR	APPELLANT
HERTFORDSHIRE PARTNERSHIP UNIVERSITY NHS FOUNDATION TRUST	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR N BIDNELL-EDWARDS (of Counsel) Instructed by: Hillary Cooper Law 90 Long Acre Covent Garden London WC2E 9RZ
For the Respondent	MS I OMAMBALA (of Counsel) Bevan Brittan LLP Kings Orchard 1 Queen Street Bristol BS2 0HQ

SUMMARY

PRACTICE AND PROCEDURE Striking-out / dismissal

PRACTICE AND PROCEDURE Imposition of deposit

Rules 37(1) and 39(1) Schedule 1 **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**

The Employment Tribunal ("ET") had struck out the Claimant's claim of protected disclosure detriments and dismissal as having no reasonable prospect of success. In the alternative, the ET would have made deposit orders (two orders of £250) as a condition of pursuing those claims. The Claimant appealed.

Held: allowing the appeal against the strike out of the Claimant's claims but upholding the ET's alternative decision to make deposit orders

The ET had erred in law in holding there was no qualifying disclosure when the information disclosed was already known to the recipient. It had also erred - given the degree of dispute between the parties and the test for causation in a protected disclosure detriment case - in applying too low a threshold when determining whether the Claimant's claims had no reasonable prospect of success. The same could not be said, however, in respect of ET's alternative decision to impose deposit orders as a condition of the continued pursuit of the protected disclosure claims; it had not lost sight of the burden of proof under section 48(2) **Employment Rights Act 1996** and had reached a permissible view that the claims had little reasonable prospect of success – an assessment that involved an exercise of judicial discretion, which an experienced ET was best placed to make.

The matter would be remitted to the ET to formally draw up the deposit orders, which would stand in substitution for its previous strike out decision

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HER HONOURABLE MRS JUSTICE EADY

Introduction

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1. This appeal raises questions as to the approach of the Employment Tribunal ("ET") to the striking of the claim and the making of deposit orders.

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2. In giving this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the full Hearing of the Claimant's appeal against a Judgment of the ET sitting at Watford (Employment Judge Manley, sitting alone on 7 December 2018), sent out to the parties on 29 January 2019, by which the ET struck out the Claimant's of public interest disclosure

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detriment and dismissal. In the alternative, the ET held that it would have made deposit orders as a condition of such claims being pursued.

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3. The Respondent does not contest the Claimant's appeal against the ET's decision to strike out her claims but does contend that the deposit orders - made by the ET in the alternative - should be upheld.

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4. The parties were both represented by counsel before the ET, albeit Ms Omambala did not then appear for the Respondent.

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The Background and the ET's Decision and Reasoning

5. The Claimant had been employed by the Respondent since July 2015. At the time of her dismissal, in June 2017, the Claimant was employed as the Respondent's Head of Medical Staffing. Her line manager was MM.

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6. It is the Respondent's case that the reason for the Claimant's dismissal related to her conduct. The Claimant contends that it was because she had made earlier protected disclosures. She also complains that she suffered 28 or 29 detriments short of dismissal that were due to her protected disclosures.

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7. The ET set out the public interest disclosures ("PIDs") relied on by the Claimant as follows (I here adopt the same numbering for the disclosures used by the ET, albeit the Claimant had previously cited further matters as qualifying disclosures but had informed the ET she was no longer pursuing PIDs 1, 5, and 6):

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(1) PID 2 was stated to be that:

> **"On 1 September 2016 the Claimant had a one-to-one meeting with MM in the Hatfield site. In this meeting the claimant repeated to MM what she had discovered and mentioned copying MM into an email outlining the claimant's discovery. The claimant stated her belief that this meant there were doctors in the organisation which haven't been cleared from transmittable diseases and then replied that she had seen the email and the doctors had been outsourced before her time and she would look into it."**

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(2) PID 3 was that:

> **"On 11 October 2016 the claimant disclosed her discovery that there had been breaches of the data protection laws in that person identifiable information had been sent out to non-authorised individuals."**

Further particulars of that disclosure had then been provided by the Claimant (see as set out by the ET at paragraph 9).

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(3) PID 4 was:

> **"Also on 11 October 2016 the claimant forwarded the unredacted version of 6 October 2016 Panel Pack to MM in response to MM's request that the claimant forward the unredacted email to her so she could report it on Datix."**

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8. In respect of PID 2 the ET noted that a clear factual dispute arose, as MM did not accept that the conversation took place. Allowing that the Claimant might establish the fact of that conversation, the ET accepted that the content contended by the Claimant might also amount to a disclosure of information which tended to show a breach of a legal obligation and that, in her

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reasonable belief, it was in the public interest. On the evidence available, however, the ET could see "*No connection whatsoever between that information and what subsequently happened to the Claimant*." In addition, the ET further noted (see paragraph 27):

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> **"…I cannot see that it was mentioned again, and it was certainly not a matter which was referred to in the dismissal letter. I am satisfied that the Claimant has no reasonable prospects of showing any causal connection between that disclosure, if it is made out, and subsequent events. Putting this part of the claimant's claim at its highest and bearing in mind that strike out is exceptional, my finding is that the Claimant has no reasonable prospect of success in showing PID led to any detriments or her dismissal. I have decided to strike that part of the claim out."**

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9. As for PIDs 3 and 4 - which related to the same issue (by PID 4, the Claimant was forwarding details of the data breach she had raised by PID 3) - the ET could not see that the Claimant had any reasonable prospect of showing that these amounted to the disclosure of

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information: the ET considered it was clear that MM had been aware of the data breach when she met with the Claimant on 11 October. Had there been any disclosure of information, however, the ET would have accepted that it would tend to show a breach of legal obligation

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and that the Claimant believed that the disclosure had been made in the public interest.

10. Turning to the question of causation, the ET allowed that there was, arguably, more of a connection to what followed, given that the data breach was investigated and formed part of the

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decision to dismiss. That said, the ET noted that it was only one of several matters investigated and formed only part of the dismissal decision, reasoning at paragraph 29:

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> **"…What is more, the respondent showed no sign of any concern with any disclosure made by the claimant. Rather the concern was the data breach itself, the claimant's own misconduct. Some of the matters raised, indeed the main part of what was raised, emanated from staff concerns which were unconnected to any facts which were connected to the alleged breach of data. There was a further matter about the conduct of the claimant during her suspension. My view is that she has no reasonable prospect of showing that any PIDs, if there were any, were causally connected, that is that they were the principal reason for the dismissal."**

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11. As for the other detriments complained by the Claimant, the ET noted that these started with the meeting on 11 October itself and concerned the investigation and the disciplinary process that the Respondent undertook that, the ET recorded, arose from allegations made by

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other staff members about the Claimant's conduct. The data breach only formed a small part of the investigation and the subsequent disciplinary process. Specifically, the ET found there was only a very limited connection between PIDs 3 and 4 and that was about the data breach itself, not about the Claimant having informed MM about it.

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12. In the alternative to striking out the Claimant's claims, the ET went onto consider whether it should make deposit orders as a condition of the pursuit of those claims. In this regard, the ET noted the first question was whether the claims had little reasonable prospect of success. If so, the ET would then consider whether to order a deposit, having made reasonable enquiries into the Claimant's ability to pay. The ET noted, at paragraph 22:

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> **"…Again, I must bear in mind that I have not heard oral evidence but do have contemporaneous documents. I also may consider where the burden of proof lies. I have a wider discretion here as the sanction is not as serious as strike out. The question is whether I assess, at this early stage, that the claims lack merit and, if they do, whether that should be marked by the making of a deposit order."**

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13. On the question whether to make a deposit order, the ET concluded that it was "*Clear that these allegations or arguments, if they do not have no reasonable prospect of success, have little reasonable prospect of success.*" Taking account of the information available regarding the Claimant's means, the ET concluded that, had it not struck out the PID claims, it would have ordered deposits to be paid of £250 in respect of the detriments short of dismissal and £250 in respect of the dismissal; £500 in total. No issue is taken with the amounts of the deposits thus ordered.

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<u>The Relevant Legal Framework</u>

14. The Claimant was seeking to pursue claims of protected disclosure detriment and dismissal. The definition of a protected disclosure is found at Part IVA of the **Employment Rights Act 1996** ("the ERA"). It is noteworthy that at Section 43L(3) it is provided that:

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> **"Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention."**

15. By Section 47B, under Part V of the **ERA**, it is then provided that:

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> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**

16. Section 48 **ERA** provides that a complaint of whistleblowing detriment can be pursued

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before an ET and, on such a complaint, by Sub-section (2), it is stated that:

> **"…It is for the employer to show the ground on which any act or deliberate failure to act was done."**

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17. Where the reason for a dismissal is a protected disclosure, Section 103A, **ERA** provides that it will be an automatically unfair dismissal.

18. Turning then, to the rules that will apply to the ET proceedings relating to such

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complaints, these are found at Schedule 1, **Employment Tribunal Constitution and Rules of Procedure Regulations 2013**, ("the ET Rules"). By rule 37, the ET is given the power to strike out a claim on the basis that (relevantly in this case) it has no reasonable prospect of

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success. In considering whether to exercise its power under rule 37, it is uncontroversial that an ET should not normally do so when material facts are still in issue (**Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603 CA).

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19. It is also common ground is that the operation of this power requires a two-stage test: (1) has one of the grounds of strike out in Rule 37(1) been established on the facts? (2) if so, is it just to proceed to a strike out in all the circumstances (which will include considering whether

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other, lesser, measures might suffice), see **Hassan v Tesco Stores Ltd** UKEAT/0098/16, applying **HM Prison Services v Dolby** where, at paragraph 19, it was observed:

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"The second stage exercise of discretion in Rule 37(1) is important not just where the striking out ground established is minor or excusable. It is a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit."

The basis for this is that Rule 37 is permissive and not mandatory.

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20. As to whether claim has no reasonable prospect of success, the ET must be satisfied that the claim or allegation has no such prospect, not just that success is thought unlikely (see **Balls v Downham Market High School and College** [2011] IRLR 217 EAT). The approach the ET

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is to take is to take the allegations in the Claimant's case at their highest. If there remain disputed facts, there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue (see **Ukegheson v Haringey London Borough Council** [2015] ICR 1285 EAT).

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21. The power to make a deposit order is provided by rule 39 of the **ET Rules**, as follows:

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"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response 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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

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(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

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(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

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(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

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22. The test for the ordering of a deposit is thus that the party has little reasonable prospect success; as opposed to the test for striking out under rule 37(1)(a), which is that there is *no* reasonable prospect. The distinction between the two different types of sanction was highlighted by the EAT in **Hemdan v Ishmail** [2017] IRLR 228 where Simler J (as she then was) observed that the purpose of a deposit order is "*To identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs, ultimately, if the claim fails*" (see paragraph 10); it is "*emphatically not…to make it difficult to access justice or effect a strike out through the back door*" (paragraph 11).

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23. As for the approach the ET ought to adopt in considering whether to make a deposit order, in the case of **Wright v Nipponkoa Insurance** [2014] UKEAT/0113/14, I observed as follows (see paragraph 34):

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> **"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."**

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24. As further noted in **Wright**, when determining whether to make a deposit order, an ET is not restricted to a consideration of purely legal issues; it is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (and see **Van Rensburg v Royal Borough of Kingston-Upon-Thames and others** [2007] UKEAT/0095/07).

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<u>The Appeal and the Claimant's Submissions in Support</u>

25. By grounds (1) to (4) and ground (7), the Claimant challenges the ET's decision to strike out her whistleblowing detriment and dismissal claims. By ground (1), she complains that the ET failed to apply the necessary two-stage process before striking out those claims (see **<u>Dolby</u>** at paragraph 15 and **<u>Hassan</u>** at paragraph 19). Even if the ET had correctly directed itself as per the second stage required, the Claimant further contends there was no demonstration that it had actually exercised its discretion. Under ground (2), the Claimant argues that the ET erred in finding that PIDs 3 and 4 could not amount to protected disclosures on the basis that the Respondent was already aware of the information disclosed; Section 43L **ERA** expressly allowed for this possibility. The ET had further erred by considering whether the Claimant had been dismissed or subjected to detriments because of the PIDs relied on, but failed to allow for the possible cumulative effect of her disclosures. By grounds (3) and (4), the Claimant contends the ET erred by effectively requiring her to provide documentary proof that a protected disclosure had been taken into account when reaching the decision to dismiss. It had also failed to have regard to the warnings against striking out the protected disclosure claims before all the evidence had been heard (see **<u>Ezsias</u>**) and had failed to consider the application of the burden of proof in relation to the detriment claims, which ought properly to have required the ET to adopt an approach equivalent to that applicable to complaints of unlawful discrimination, see Section 48(2) of the **ERA.**

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26. Finally, by ground (7), the Claimant submits that the ET's decision to strike out her protected disclosure claims was perverse. At a general level, the Claimant contends that must be so, given the ET recognised there was a direct conflict as to the reasons why different actions were taken or decisions reached. More specifically, the Claimant objects to the following findings: (i) that her dismissal could not have been caused by a protected disclosure because it

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was not referred to in the letter of dismissal (see paragraph 27); (ii) that her dismissal could not have been caused by a protected disclosure because it was only one of several matters investigated and the Respondent showed no sign of concern in relation to any disclosure made by the Claimant, notwithstanding that the dismissal was expressly caused, in part, by matters disclosed by her (see paragraph 29); and (iii) that the Claimant's PIDs could not have caused her to suffer detriment because there was only a limited connection between PIDs 3 and 4 and that connection was "*about the data breach itself, not that the Claimant told MM about it*" (see paragraph 30).

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27. Turning to the alternative decision, that deposit orders should be made as a condition of the Claimant pursuing her protected disclosure claims, the Claimant pursues challenges under grounds (5), (6) and (8) of the Notice of Appeal (albeit grounds (6) and (8) also relate to the strike out decision). In general terms, the Claimant observes that the ET only provided perfunctory reasons for making deposit orders, essentially relying on its reasons for striking out the claim; she contends that the errors made in respect of the strike out decision thus infected the decision to make deposit Orders - in both cases, the ET failed to have regard to relevant matters in terms of its engagement with the Claimant's claims.

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28. By ground (5), the Claimant complains that the ET misapplied the law, failing to consider the likelihood of her being able to establish the essential facts of her case (see **Wright**). The ET had assumed that her claims concerned events that were largely undisputed facts (see paragraph 20), but that was not so - in particular, the reasons why actions were taken were very much in dispute and there was no evidence at the Preliminary Hearing to provide a proper basis for the ET to find that the Claimant's case had little reasonable prospect of success.

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29. Under ground (6), the Claimant further complains that the ET failed to apply the relevant law to the facts pleaded in respect of her protected disclosures. Specifically, the ET failed to have regard to the totality of information contained in PID 3 (expressly rejecting it as a qualifying disclosure on the basis that MM was aware of the data breach), failing to appreciate MM had only stated that she had sent out the pack of information on 6 October, not that the Claimant had mentioned the earlier data breach when the pack had previously been sent out by another employee. It had failed to engage with the full extent of the Claimant's pleaded case and that was an error of law.

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30. Finally, by ground (8), the Claimant contends that the ET failed to provide adequate reasons for its decision. In making deposit orders, it had simply relied on the reasons provided for the strike out decision and failed to demonstrate a separate application of the relevant test. Moreover, the ET had only considered whether the dismissal or detriments could have been caused entirely by PID 2 or PIDs 3 and 4. The Claimant's further particulars had, however, made clear her contention that she was dismissed or subjected to detriments due to the combined effects of her PIDs; the ET's reasoning failed to demonstrate that it had addressed that point. More generally, the ET had failed to explain how it had taken into account the burden of proof under Section 48(2) **ERA** and the requirement that a protected disclosure need only have materially influenced the detrimental act complained of.

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<u>The Respondent's Submissions in Reply</u>

31. As noted above, the Respondent does not contest the appeal in respect of the ET's strike out decision. Specifically, Ms Omambala clarified that the Respondent accepted that - as identified by grounds (2) and (3) of the appeal, on the face of the ET's Judgment there was an error of law regarding its approach to a qualifying disclosure; in those circumstances, the

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Respondent did not seek to keep hold of the strike out decision. That said, the Respondent contended that the ET's alternative finding - that the Claimant should be ordered to pay deposits as a condition of her pursuit of her protected disclosure claims - should be upheld.

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32. In relation to ground (5), the Respondent notes that the ET correctly identified the threshold for making a deposit order: whether an application or argument has little reasonable prospect of success, acknowledging the different test applicable between this and the making of

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a strike out decision. At paragraph 22, the ET had further recognised that the making of a deposit order was a matter for its discretion (accepting that, even if it formed the view that the allegations or arguments in the claim lacked merit or had little reasonable prospect of success, it

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needed to consider whether it was appropriate, as an exercise of discretion, to make such an order0; there was nothing on the face of the reasoned Judgment to suggest any misdirection or misapplication of the law.

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33. As for ground (6), the Respondent observes that the Claimant's pleaded case - as set out in her ET1 and her further particulars - was before the ET, which also had the benefit of submissions from counsel for both parties. It could not seriously be contended that the ET

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failed to have regard to the totality of PID 3 - see the ET's reference to the full particulars provided in relation to this at paragraphs 7 and 8. In any event, the ET went on to consider the question of causation and had explained its reasons for concluding that this was weak (see

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paragraphs 29 and 30). It had before it the relevant documentation relating to the PIDs relied on and that relating to the disciplinary process and outcome. It had been entitled to reach the view that it did as to the likelihood of success.

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34. For completeness, addressing the perversity challenge under ground (7), the Respondent noted that the threshold for such a ground of appeal was a high one; the matters relied on by the Claimant did not come close to meeting that test.

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35. Turning then, to the adequacy of reasons complaint under ground (8), the Respondent observes that the EAT ought to avoid taking too technical a view of the language used by the ET, see **Greenwood v NWF Retail Limited** [2011] ICR 896 EAT and **UCATT v Brain**

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[1981] ICR 542 Court of Appeal. The ET had not simply made a deposit order on the basis of its reasoning in relation to the strike out but had expressly reminded itself of the separate test required for the making of such an order; it was, however, entitled to refer back to its earlier

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assessment of the evidence before it. It had not wrongly put a burden on the Claimant but had looked for a causal connection between the protected disclosures and the dismissal or detriments and was entitled to conclude that there was little reasonable prospect of such a

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connection being found. Any error arising in respect of the ET's reasoning relevant to the strike out did not affect the decision to make deposit orders: it required a lesser test to be met. The basis of the ET's reasoning and decision was apparent from the Judgment, read as a whole.

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Discussion and Conclusions

36. By grounds (1) to (4) and ground (7), the Claimant challenges the ET's decision to strike out her whistleblowing detriment and dismissal claims. By ground (1), she complains

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that the ET failed to apply the necessary two-stage process before striking out her claims; specifically, she says the ET failed to demonstrate that it had undertaken the second stage of the exercise, and contends that this failure vitiates its decision. I disagree. In my judgement, it is

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apparent that the ET was aware that, even if the "no reasonable prospect" test was met, it remained a matter for its discretion as to whether or not it was appropriate to strike out the

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claims; hence the ET's use of the word "*may*" rather than "*must*", at paragraph 20. Having correctly directed itself as to the test it was to apply, I do not readily infer that the ET then lost sight of the need to consider whether – even if it concluded the claim had no reasonable prospect - to exercise its discretion, when determining whether or not to strike out the claim. Notwithstanding the fact that the Respondent does not resist the appeal against the strike out decision, I would not uphold this ground of appeal.

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37. Under ground (2), the Claimant contends that the ET erred in finding that PIDs 3 and 4 could not amount to protected disclosures on the basis that the Respondent had already been aware of the information disclosed. On this point, as the Respondent has acknowledged, the ET's reasoning does demonstrate an error of law - a failure to have regard to the express provision for this possibility at Section 43L **ERA**. In this regard, I therefore agree with the Claimant and would uphold ground (2) of the appeal.

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38. That, however, only goes so far, because the ET then went on to consider the question of causation in any event. Accordingly, the Claimant seeks to take issue with this further finding, arguing - by grounds (3) and (4) - that the ET then erred by effectively requiring her to provide documentary proof that a protected disclosure had been taken into account when reaching a decision to dismiss, or in respect of the various detriments relied on. She also contends that the ET also failed to have regard to the warnings set out in cases such as **Ezsias** as to the need to exercise caution when considering striking out claims where there was a dispute on the face and, yet further, that it failed to consider the application of the burden of proof in relation to the detriment claims, which ought to have led it to place the burden on the Respondent rather than the Claimant.

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39. Certainly, the ET ought not to have required that the protected disclosures were the principal reason for any detriment; they merely needed to have been a material influence on the relevant decision or act complained of. More specifically, although I do not consider that the ET made the mistake of imposing a burden of proof on the Claimant, or that it lost sight of the burden being on the Respondent under Section 48(2), I do agree that the ET's reasoning gives rise to a real question as to whether it applied a high enough test when deciding to strike out the Claimant's claims. Allowing that, in relation to the detriment claims, the protected disclosures would only need to demonstrate a material influence on the acts complained of, I agree that paragraph 27 of the reasoning might suggest that the ET did not keep this possibility in mind. Although, its reasoning in paragraph 29 - in relation to PIDs 3 and 4 - allows for a broader approach to the question of consideration, I also accept that the ET's conclusion reflects its view of how the evidence was likely to develop, rather than an application of the "no reasonable prospects" test required.

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40. Finally, by ground 7, the Claimant submits that the ET's decision to strike out her protected disclosure claims was perverse. At a general level, she contends that is so because there was a direct conflict as to the reasons why different actions were taken or decisions reached; the Claimant then further objects to specific findings made by the ET at this stage.

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41. In relation to the specific matters cited by the Claimant, I do not agree that these were other than potentially relevant considerations for the ET. At a more general level, however, I would again agree that the reasoning suggests that the ET's conclusion was reflective of its view of the evidence – as to the likelihood of success - rather than the "no reasonable prospect" test it was bound to apply when deciding to strike out the claims. In the circumstances, I consider that the Claimant raises an entirely fair criticism that the ET was applying too low a

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test. On this and grounds 3 and 4, I would therefore allow the appeal against the decision to strike out the Claimant's claims.

42. Turning then to the ET's alternative decision - that deposit orders should be made as a condition of the Claimant pursuing her protected disclosure claims - the Claimant pursues challenges under grounds (5), (6) and (8) of the Notice of Appeal.

43. By ground (5), the Claimant complains that the ET misapplied Rule 39, failing to consider the likelihood that she would be able to establish the essential facts of her case. I am not, however, persuaded that the Claimant's criticisms in this regard are made out. On my reading of the ET's Judgment - read as a whole - it is clear that the ET understood where the disputes lay. Accepting that there were disputes between the parties, the ET was entitled - and, indeed, best placed - to take a view as to the likelihood of the Claimant succeeding in her case. In relation to PID 2 - the disclosure regarding doctors who had not had necessary vaccinations or clearances - the ET correctly took the Claimant's case at its highest (that is, that the conversation took place as she alleged) but was entitled to have regard to the fact that there was simply no further reference to this conversation. Not only was there no reference to it in the dismissal letter, there was nothing to link any of the detriments or the dismissal to PID 2. Thus, even if - as I have allowed - the ET applied too low a threshold when deciding to strike out the claim, a different test applied when considering the question whether to make a deposit order. In that regard, the ET was not restricted to a consideration of purely legal issues, but was entitled to have regard to the likelihood of the Claimant being able to establish the facts essential to her case (see **Van Rensburg**) and, in doing so, to reach a provisional view to the credibility of the assertions being put forward.

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44. Although it is right to say that the ET had to have a proper basis for doubting the likelihood of the Claimant being able to establish the facts essential to her claim, it is apparent that it did: on the material before it, the ET permissibly doubted that the necessary link would be shown between the PIDs and the detriments or dismissal. For the reasons given by the ET, as explained in its Judgment, I see no error of law in its approach to the test under rule 39 of the **ET Rules**.

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45. Under ground (6), the Claimant further complains that the ET failed to apply the relevant law to the facts pleaded in respect of her protected disclosures; specifically, she contends that the ET failed to have regard to the totality of the information contained in PID 3 and failed to engage with the full extent of her pleaded case.

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46. It seems to me, however, that the criticism made in this regard fails to engage with the substance of the ET's reasoning. On the material before it, the ET was entitled to take the view - albeit on a purely preliminary basis - that the issue for the Respondent had not been the Claimant disclosing or discussing the data breach, but the fact that the breach occurred. In reaching this view, I do not consider the ET lost sight of the fact that it had not heard all of the evidence and that there were a number of disputes between the parties. It was permissibly taking a view as to the likelihood of success of the claim, having regard to the Claimant's pleaded case and the material available at that preliminary stage.

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47. I also agree with the Respondent that the ET did not err in applying a burden of proof on the Claimant; it was looking generally at whether causation was likely to be established in this case and was entitled, using its experience of such litigation, to take the view that it was not.

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48. Finally, by ground (8), the Claimant contends that the ET failed to provide adequate reasons for its decision, arguing that it failed to demonstrate how it had addressed her case that she had been dismissed, or subjected to detriments, due to the combined effects of her protected disclosures, and had failed to demonstrate that it had had regard to the possibility that the Respondent had taken against the Claimant because she was seen as a troublemaker or someone likely to raise matters of complaint or concern.

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49. Again, however, I am unpersuaded. The ET obviously took PIDs 3 and 4 together but did not lose sight of the more general possibility that the Claimant was seen as a thorn in the flesh (often the fate of the whistle-blower who raises a number of protected disclosures). Allowing for this possibility, it is apparent that the ET concluded that, given the other matters that had been relied on by the Respondent in taking the decisions in issue, and given the lack of evidence available at that stage to show any connection to the protected disclosures, there was little reasonable prospect of the Claimant's case being made out.

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50. The ET is permitted a broad discretion in determining whether to make a deposit order under rule 39. Given the limits on the power of the EAT to interfere with such an exercise of judicial discretion, I am not persuaded that the Claimant has made good her challenges to the deposit orders, and I therefore dismiss the appeal in that regard.

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51. Accordingly, the appeal is allowed in relation to the ET's striking out of the Claimant's claims and I duly set aside the decision in this regard. On the other hand, I dismiss the appeal against the ET's alternative decision that deposit orders should be made and thus direct that the alternative finding - that deposit orders should be made - should thus stand in substitution for the decision to strike out.

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