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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr C Beevers	**AND**	(1) FICC Markets Standards Boards Limited (2) Mr J Yallop (3) Mr G Harvey (4) Mr C Nichols (5) Mr S O'Connor

Heard at: London Central **On**: 9-10 January 2020
Chambers: 16-17 January 2020

Before: Employment Judge Glennie

Representation
For the Claimant: Ms A Mayhew, of Counsel
For the Respondent: (R1, 2, 4 & 5) Ms D Sen Gupta QC
(R3) Mr P Edwards, of Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is as follows:

1. **In relation to the First Respondent:**

   1.1 The Tribunal has jurisdiction to hear the complaint of unfair dismissal, including automatic unfair dismissal.

   1.2 The Tribunal does not have jurisdiction to hear the original complaint of detriments on the grounds of making a protected disclosure.

   1.3 The Claimant's application to amend the claim so as to make the complaint of detriments on the grounds of making a protected disclosure that were included in the original claim, against the First Respondent, is allowed.

2. **The Tribunal does not have jurisdiction to hear the complaints against the Second, Third, Fourth and Fifth Respondents included in the original claim form.**

3. **The Claimant's application for permission to amend the claim so as to join the Second, Fourth and Fifth Respondents and to make against them the complaints made in the original claim form is allowed.**

4. **The Claimant's application for permission to amend the claim so as to join the Third Respondent and to make against him the complaints made in the original claim form is refused.**

5. **The following allegations of detriment are struck out on the grounds that they have no reasonable prospect of success:**

   5.1 (List of issues 5.1.12, Respondents number 10) Failure to disclose reports into Second and Third Respondents' potential misconduct.

   5.2 (List of issues 5.1.13, Respondents number 11) Not accepting that the Claimant had made any qualifying disclosures.

   5.3 (List of issues 5.1.11(vii) and 5.1.12, Respondents number 17) First Respondent's failure to disclose the rationale behind the investigation / disciplinary process concerning the Third Respondent.

REASONS

1. The First Respondent (FMSB) is a private sector body established by the fixed income, currencies and commodities markets to develop and encourage standards of practice and conduct within the industry. The Second Respondent is the non-executive Chair of the First Respondent. The Third Respondent was the Chief Executive of the First Respondent until his resignation on 17 January 2019. The Fourth and Fifth Respondents are non-executive Directors of the First Respondent.

2. The Claimant was employed by the First Respondent as Senior Technical Officer from 12 June 2017 to 29 June 2019, when he was dismissed on the stated grounds of gross misconduct. The reason for this dismissal is the subject of dispute in these proceedings.

3. The procedural history of the proceedings is as follows. The Claimant did not undertake early conciliation with any party prior to presenting his claim to the Tribunal on 5 July 2019. In the claim form the Claimant made complaints of unfair dismissal contrary to s.94(1) of the Employment Rights Act 1896; automatic unfair dismissal under s.103A of the 1996 Act; and of detriments on the grounds of making a protected disclosure under s.47B of the 1996 Act. The

unfair dismissal complaints were necessarily brought against the First Respondent only. The detriment complaints were brought against the First Respondent and variously against the Second to Fifth Respondents.

4. Box 2.3 of the standard claim form asks each Claimant whether they have an ACAS early conciliation certificate number. The Claimant ticked the box marked "no" and then in response to the question: "if no why don't you have this number?" ticked the box marked "my claim consists only of a complaint of unfair dismissal which contains an application for interim relief". The same questions were repeated later in the form in relation to the additional Respondents and the Claimant ticked the same boxes in relation to each of those.

5. The claim was vetted by an Employment Judge on receipt by the Tribunal and before the proceedings were served on the Respondents. The standard vetting form provides for accepting the whole claim form; not accepting part of the claim; or rejecting the whole claim form. The Employment Judge concerned did not indicate any of these specifically but gave a direction to list a one day hearing for the interim relief application that was also contained within the claim. As a result of this on 18 July 2019 a letter was sent to the Claimant's solicitors stating that the claim had been accepted, and it was then served in the usual way on the Respondents.

6. The Respondents all presented responses to the claim on or before the due date of 15 August 2019. It is not necessary to set out in detail the full contents of those responses. The First, Second, Fourth and Fifth Respondents did not take any point about early conciliation or jurisdictional matters related to that. The Third Respondent, however, did take such a point. In paragraph 6 of the grounds of resistance of the Third Respondent the contention was raised that the Tribunal did not have jurisdiction to consider the claims against the Third Respondent for a number of reasons. The first of these, in sub paragraph (a), was that the Claimant had failed to lodge an early conciliation notification form with ACAS as required by s.18A(1) of the Employment Tribunals Act 1996 in respect of his claims against the Third Respondent, and had failed to provide an ACAS EC Certificate number in s.2.8 of the claim form.

7. This contention was developed in paragraphs 7-12 of the Third Respondent's grounds of resistance, with reference to s.18A(1) of the Employment Tribunals Act and Regulation 3(1)(d) of the Employment Tribunals (Early Conciliation, Exemptions and Rules of Procedure) Regulations 2014 (the 2014 Regulations).

8. An interim relief application took place on 3 September 2019 before Employment Judge Hodgson. That application was refused; the Third Respondent was not involved in that hearing and it appears that there was no discussion of the early conciliation point.

9. There then took place on 21 November 2019, again before Employment Judge Hodgson, a telephone preliminary hearing for case management. In paragraph 2.5 of Schedule A in his note of that hearing Employment Judge Hodgson recorded the following:

> "The parties also questioned whether the claims against individual Respondents, and the claim of ordinary unfair dismissal, should have been accepted having regard to the obligation to enter into early conciliation".

It is apparent that at this stage all of the Respondents were seeking to rely on the issue as to early conciliation.

10. The issues for me to decide are as follows:

1. Whether any part of the claim should be rejected on the grounds that the Claimant did not comply with the requirements of s.18A of the Employment Tribunals Act 1996 regarding early conciliation (this applied to all complaints against the Second to Fifth Respondents and the complaints against the First Respondent except for the complaint of automatic unfair dismissal under s.103A of the Employment Rights Act).

2. If any part of the claim is rejected, whether the Claimant should have permission to amend the claim so as to restore those parts.

3. Whether the claim against the Third Respondent was presented in time and, if not, whether or not it was reasonably practicable for the complaint to have been presented within time and if not, whether it had been presented within such further time as was reasonable.

4. Whether any part of the claim should be struck out on the grounds that it has no reasonable prospect of success, or made the subject of a Deposit Order on the grounds that it has little reasonable prospect of success.

11. Issues 1, 3 and 4 above arise from Employment Judge Hodgson's Orders made on 21 November 2019. Issue 2 arises from an application made by the Claimant on 23 December 2019.

12. There is also on the Tribunal's file an application by the Third Respondent to strike out the claims against him on ground of abuse of process etc. Employment Judge Hodgson directed that it would be for the Tribunal conducting this preliminary hearing to decide whether it would determine this application in the course of that hearing or not. In the event there was insufficient time for me to do so, and I have not determined that particular application.

<u>Early Conciliation</u>

13. The issues as to early conciliation arise in the context of s.18A of the Employment Tribunals Act 1996, which provides in the material parts as follows:

> *(1) Before a person ("the prospective Claimant") presents an application to institute relevant proceedings relating to any matter, the prospective Claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.*

(4) If –

(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or

(b) the prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective Claimant.

(7) A person may institute relevant proceedings without complying with the requirement in sub section (1) in prescribed cases.

The cases that may be prescribed include (in particular) –

… cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are.

(8) A person who is subject to the requirement in sub section (1) may not present an application to institute relevant proceedings without a certificate under sub section (4).

(10) In sub sections (1), (2), (7) "prescribed" means prescribed in Employment Tribunal Procedure Regulations.

14 It was common ground between the parties that these requirements go to the Tribunal's jurisdiction. It was also common ground that all parts of the claim are relevant proceedings within the definition contained in s.18 of the Employment Tribunals Act.

15 Regulation 2 of the 2014 Regulations includes the following definitions:

Prospective Claimant means a person who is considering presenting a claim for to an Employment Tribunal in relation to relevant proceedings;

Prospect Respondent means the person who would be the Respondent on the claim form which the prospective Claimant is considering presenting to an Employment Tribunal.

16 Regulation 3 includes the following exemptions from early conciliation:

(1) A person ("A") may institute relevant proceedings without complying with the requirement for early conciliation where –

(b) A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings.

> *(d) The proceedings are proceedings under part X of the Employment Rights Act 1996 and the application to institute those proceedings is accompanied by an application under s.128 of that Act* …. [i.e. an application for interim relief].

17 In the present case the Claimant relied on arguments arising under Regulation 3 as follows:

(1) Under Regulation 3(1)(d), Ms Mayhew contended that the proceedings were under Part X of the Employment Rights Act and were accompanied by an application under s.128. Ms Mayhew further argued that "the proceedings" in the legislation means the whole of the content of the claim form, while Mr Edwards and Ms Sen Gupta QC argued that "the proceedings" means an individual complaint.

(2) Alternatively, Ms Mayhew argued that Regulation 3(1)(b) applied because the effect of Regulation 3(1)(d) was that the complaint of automatic unfair dismissal did not amount to "relevant proceedings". Mr Edwards and Ms Sen Gupta disputed that proposition.

18 All Counsel agreed that the meaning of "proceedings" in the Regulations was central to the issues, and that there is currently no appellate authority directly on the point. Ms Mayhew nonetheless relied on two decisions of the Employment Appeal Tribunal as giving at least guidance on the principles to be applied.

19 The first of these was **Science Warehouse Limited v Mills [2016] IRLR 96**. In that case the Claimant had contacted ACAS and was issued with an early conciliation certificate. She then presented a claim form to the Tribunal containing complaints of pregnancy and maternity discrimination. In its response, the Respondent alleged misconduct on her part, saying that had she not resigned, she would have been subject to an investigation and potentially to disciplinary action. The Claimant then sought to amend her claim to plead victimisation on the basis that her claim to the Tribunal was the protected act. The Respondent argued that, before being permitted to amend the claim, the Claimant should once again invoke the early conciliation procedure. The Employment Tribunal held against that contention and allowed the new claim to be brought in by amendment.

20 As is evident from Counsel's agreement that there is no direct authority on the point that I have to decide, this case concerned a somewhat different situation from that which has arisen in the present one. In essence, however, the Employment Appeal Tribunal upheld the Employment Tribunal's decision to allow a new claim that has arisen after presentation of the claim form to be brought in by amendment, against the existing Respondent, without the need for a further reference to ACAS. HHJ Judge Eady QC concluded that in this situation the matter fell to be decided by the Employment Tribunal exercising its case management powers. HHJ Eady's judgment contained the following observations:

> "27 As for the objection that the amendment of an existing claim form is not included within the prescribed exceptions permitted under s.18A(7), I consider that this is because the question of amendment of existing proceedings falls within the case management powers of the ET; no specific exemption needed to be made. Thus it is that a claim that does not include an EC number will not be accepted by the ET (Rule 10 of the ET Rules 2013), but no such provision is made in respect of an application to amend an existing claim".

> "28 Furthermore, s.18A does not purport to address the case of an existing Claimant, merely that of the prospective Claimant. For those who are existing Claimants, who seek to add additional claims to existing proceedings, this will be a matter for the ET, exercising its case management powers under Rule 29 of the ET Rules 2013 and applying the well known guidance laid down in cases such as Selkent v Moore".

> "30. It seems to me that the most the Respondent can really say is that an ET considering whether or not to allow an amendment might consider the potential avoidance of EC to be a relevant factor. I do not see, however, that it can be determinative".

21 Ms Mayhew also referred to **Mist v Derby Community Health Services NHS Trust [2016] ICR 543**, also a decision of HHJ Eady QC. In that case, the Claimant gave notification to ACAS, naming a Foundation Trust as the prospective Respondent and then presented a claim to the Tribunal against the Foundation Trust. Subsequently, the Claimant made a further notification to ACAS of a potential claim against a Community Health Services Trust, a different body from the Foundation Trust, albeit giving an incorrect name for the Community Health Services Trust. ACAS issued a second certificate in that name. An Employment Judge then allowed an application by the Claimant to amend the claim to join the Community Health Services Trust as a Respondent. A different Employment Judge dismissed the Foundation Trust from the proceedings and struck out the claim against the Community Health Services Trust as being out of time. The Claimant appealed, and the Community Health Services Trust cross-appealed on grounds including that there had been a failure to comply with the requirements of the early conciliation procedure in that the Claimant had failed directly to identify the Community Health Services Trust when notifying ACAS.

22 In paragraph 24 of her judgment HHJ Eady QC referred to **Science Warehouse Limited v Mills** saying;

> "I ruled that an Employment Tribunal retains the general power to permit an amendment by an existing Claimant in a claim before it, even where this would add a new claim that had not itself been the subject of an early conciliation notification"

23 HHJ Eady QC then observed in paragraph 28 of her judgment that the determination of an application to add a Respondent is a question of discretion

having regard to all of the circumstances and then in paragraphs 59-61, made the following observations, relied on by Ms Mayhew:

> "59 … the Second Respondent argues that the Claimant failed to comply with early conciliation requirements in respect of the Second Respondent itself: although she did make a notification to ACAS … she did not then use the Second Respondent's correct title, referring instead to its address, Newholme Hospital. Does that matter? In my view, it does not. Primarily that is because I do not think that the Claimant was required to undertake early conciliation in respect of her application to amend to include a claim against the Second Respondent. In respect of the relevant proceedings, the Claimant was no longer a "prospective Claimant". She had already presented her claim form; she was now asking the Tribunal for leave to amend to amend it. The question was thus entirely for the Tribunal"
>
> "60 That approach has the attraction of being consistent with Rule 34 of the 2013 Rules, which specifically addresses the addition or substitution of parties in Employment Tribunal proceedings without reference to any further early conciliation requirements. It also gives effect to the overriding objective by allowing the Tribunal to deal with the case before it in a proportionate manner, avoiding unnecessary formality, seeking flexibility in the proceedings and avoiding delay and expense."
>
> "61 Was this, in any event, a relevant matter to which the Tribunal should have had regard in the exercise of its discretion in these circumstances? Before the Employment Tribunal the Second Respondent apparently did not consider it was: it was not a point taken below and I am not persuaded that the Employment Tribunal would have erred in overlooking a minor error in the identification of the prospective Respondent in an early conciliation certificate that was (on my view) unnecessary in any event. Again, I take comfort from the fact that this would also be consistent with any sensible reading of Rule 34 and is in keeping with the overriding objective"

24 Again, the situation in that case was different from that in the present one. There was some discussion before me as to whether HHJ Eady's observation that she did not think that the Claimant was required to undertake early conciliation in respect of the application to amend to include the Second Respondent was obiter and/or, given the formulation "I do not think", not intended to give a decision on the point. I have concluded that I should take the decisions and observations in both **Science Warehouse Limited v Mills** and **Mist v Derby Community Health Services NHS Trust** as not being binding authority applying to the present case, but as giving guidance on the approach that ought to be followed.

25 With that in mind, I return to the statutory provisions. I have concluded that "relevant proceedings" in the Regulations cannot mean the contents of the whole claim form, since Regulation 3(1)(b) specifically contemplates relevant and non-relevant proceedings being contained in the same claim form. In my judgment, "proceedings" must mean causes of action or complaints (if there is a difference between these, it is not material in the present case).

26 I also consider that the words “relevant proceedings” must mean the same in the Employment Tribunals Act as in the 2014 Regulations. Section 18A(1) provides that, before instituting relevant proceedings, a prospective Claimant must provide information to ACAS “about that matter”. The scope of the expression “that matter” is not a factor in the present case because the Claimant did not provide any information at all to ACAS.

27 It follows, therefore, that I find against Ms Mayhew’s argument that “the proceedings” means the whole of the content of the claim form and that Regulation 3(1)(d) means that there was no requirement to enter into early conciliation because of the application for interim relief.

28 I have therefore gone on to consider whether any exemption arises under Regulation 3 of the 2014 Regulations.

29 I find that under Regulation 3(1)(d) the word “proceedings” must be read in the same way as “relevant proceedings”, therefore meaning individual causes of action or complaints. Essentially, there seems to me to be no reason to read it in any different sense. I find, therefore, that there is an exemption for proceedings under Part X of the Employment Rights Act when accompanied by an application under s.128. I have concluded that this does not mean that there is an exception only in the case of a complaint of automatic unfair dismissal. Section 94 complaints of unfair dismissal are brought under Part X and so, if such a complaint is made on a claim form that also makes an application under s.128, that complaint as well as the associated complaint of automatic unfair dismissal is exempt under Regulation 3(1)(d).

30 I do not, however, agree with Ms Mayhew’s submission that the effect of Regulation 3(1)(d) is to render otherwise relevant proceedings not relevant. The scheme of s.18A(7) is to provide for exemptions. This is reflected in Regulation 3. This means, with regard to Regulation 3(1)(b), that the unfair dismissal complaints remain relevant proceedings (albeit subject to the exemption under Regulation 3(1)(d)), and so it is not the case that the Claimant has instituted relevant proceedings on the same claim form as proceedings which are not relevant proceedings. All of these proceedings on this claim form were relevant proceedings, and the exemption in Regulation 3(1((b) does not therefore apply.

31 Ms Mayhew argued that a consequence of taking the approach that I have described above would be that a Claimant might find himself in the situation of presenting two sets of proceedings, one making a complaint or complaints of unfair dismissal with an associated application under s.128, and another raising any other complaints, after having undertaken early conciliation. That, I find, is not a reason for reading the provisions in a different way from that which I have set out above, and which I consider reflects their true meaning. Additionally, I consider that the consequence described is no stranger than the situation that would apply in the present case if I were to take the opposite view, and in which the Claimant would then be relieved of the obligation to enter into early conciliation in relation to multiple Respondents who are not concerned with his unfair dismissal complaints or with his s.128 application.

32 I therefore find that there was no requirement for the Claimant to enter into early conciliation in relation to his complaints of unfair dismissal, both under s.103A and under s.94. The Tribunal has jurisdiction to hear those complaints. With regard to all other complaints, namely the detriment complaints against the First Respondent and all of the complaints against the Second to Fifth Respondents, I find that the Tribunal lacks jurisdiction by reason of the Claimant's failure to comply with the requirements as to early conciliation.

The Claimant's amendment application

33 The Claimant's application to amend was made with a view to the contingency that I might decide the early conciliation points against him, as indeed I have, to the extent set out above.

34 The Respondents argued that the requirement to enter into early conciliation applied to the application to join (or perhaps re-join) the Second to Fifth Respondents and to restore the detriment complaints against the First Respondent. Mr Edwards and Ms Sen Gupta contended that, to the extent that the Employment Appeal Tribunal indicated otherwise in **Science Warehouse Limited v Mills** and **Mist v Derby Community Health Services NHS Trust**, HHJ Eady's observations were obiter and/or not binding on me. I have already referred to that argument above.

35 Further to this, in **Drake International Systems Ltd v Blue Arrow Limited [2016] ICR 445**, support for the approach advocated by HHJ Eady was given by Langstaff J, again in the Employment Appeal Tribunal. In this case the Claimant had named a parent company of a number of subsidiaries as the prospective Respondent when contacting ACAS and had issued the Employment Tribunal claim that followed against that company. The response identified one of the subsidiaries as the relevant company, leading the Claimant to apply to join that subsidiary, without seeking a further early conciliation certificate. In the course of his judgment Langstaff J observed as follows:

> "25. If the claim against the current Respondents was entirely unrelated to the proceedings against the parent company, I can well see that the Tribunal might have declined to permit the amendment. It had a discretion. That discretion was to be exercised in a manner satisfying the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions": **Selkent Bus Company Limited v Moore [1996] ICR 836, 842** per Mummery J. If there were any sustained suggestion of abuse of the procedures, I would expect a Judge to be alert to it and to decline amendment. There may be other occasions on which he might choose, for proper reason within the **Selkent** rubric, to do so. But it seems to me that in exercising any discretion the judge would have in addition to be bound by the overriding objective……Fairness and justice which the overriding objective seeks to promote include in rule 2:
> (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) avoiding expense. "

> "26 Further and separately, the 1996 Act and early conciliation Regulations speak of a "prospective Claimants'" in relation to proceedings which have not yet been instituted. It makes no sense to talk of a "prospective" Claimant once relevant proceedings have been instituted. In so far as applications to substitute fresh Respondents to an existing claim is concerned, then if permission is refused, the applicant will be a prospective Claimant in relation to those Respondents: but at the time the application is made, that person is not, since "the matter" is then subject to existing proceedings and will, subject only to the grant or refusal of the amendment, either remain the subject of existing proceedings, or become the subject of proceedings yet to be instituted".

36 I have therefore concluded that I should approach the amendment application applying the **Selkent** principals, and on the basis that the arguments about early conciliation may be relevant, but do not provide a necessarily fatal objection to the Claimant's application. In other words, I find that it is not a jurisdictional bar to the application that the Claimant has not engaged in early conciliation either as regards the detriments claim against the First Respondent (to the extent that that argument is available) or with regard to the Second to Fifth Respondents.

37 In **Selkent** Mummery J said that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances could include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

38 In relation to time limits, Mummery J stated that the Tribunal must consider whether the complaint to be added was out of time and, if so, whether the time limit should be extended. That point has been the subject of some refinement in later authorities, but in the present case the parties all agreed that I should decide the issue as to time limits at this stage.

39 I found that additional factors came into the equation when considering the Third Respondent's position, beyond those affecting the other Respondents. The conclusions I shall express in the following paragraphs apply to the application in respect of the First, Second, Fourth and Fifth Respondents only.

40 The nature of the amendment is to add a "new" cause of action, namely the complaint of detriments on the grounds of making protected disclosures. I have described it as "new" in inverted commas because it previously appeared in the claim form: it is "new" because I have decided that, so far as that original pleading is concerned, the Tribunal does not have jurisdiction to hear it. It is not "new" in the sense that it is now being raised for the first time. The cause of action arises from the alleged protected disclosures that are relied upon for the complaint of automatic unfair dismissal. These Respondents have presented a fully pleaded response.

41 Ms Sen Gupta's argument about time limits, in relation to the application to amend, was that as at the date of the application, the detriment complaints were out of time, and that an extension of time should not be granted. Ms Mayhew accepted the first of these propositions, but contested the second.

42 Section 48(3)(b) of the Employment Rights Act 1996 provides that, where a complaint is presented outside the primary limitation period, the Tribunal may still hear it if it has been presented:

"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 the period of three months."

43 Was it not reasonably practicable for the detriment complaints to be presented within the primary limitation period? It was clearly possible for them to be so presented, as the Claimant could have undertaken early conciliation and then presented the claim in time, and without there being an adverse finding on jurisdiction.

44 The test however, is not whether it was possible, but whether it was reasonably practicable. The argument that arises in the present case was foreseen (but not adjudicated upon) by HHJ Eady in **Eon Control Solutions Limited v Caspall UKEAT/0003/19**, in the following words in paragraph 54 of the judgment:

"…..the ET might have seen it as relevant that Claimant had not been given a notice of rejection and advised of the means by which he might apply for a reconsideration at an earlier stage……., although no doubt the Respondent would have countered this suggestion by pointing out that it had raised the issue some time before the Preliminary Hearing and the Claimant (who was legally represented throughout) had taken no steps to rectify the error earlier."

45 These were, in effect, the competing arguments in the present case. Ms Mayhew pointed to the facts that the Tribunal had not rejected the detriment complaints at the vetting stage and that the early conciliation point had not been mentioned at the Interim Relief hearing. She further argued that it had only become identified as a live issue at the Preliminary Hearing on 21 November 2019. Mr Edwards (arguing, of course, on behalf of the Third Respondent, but making a point that I found equally applicable to all Respondents) submitted that, if the jurisdictional point came as a shock to the Claimant, it was a shock that was delivered in August 2019 in the Third Respondent's response, and that the Claimant had done nothing to remedy the situation until after the November Preliminary Hearing.

46 There was no evidence before me as to what view the Claimant and/or his advisers were taking of the point between August and November 2019, nor would I necessarily expect there to be any. That said, I take into account the arguments presented by Ms Mayhew on the jurisdictional issues. I have decided against the Claimant on those arguments, but I do not consider that it could be said that it should have been obvious from when the claim was presented, or

from when the Third Respondent took the point, that this would be the outcome. The Employment Judge who carried out the initial vetting did not pick up the point, nor (apparently) did the other Respondents' advisers. In the circumstances, I do not consider that it was unreasonable for the Claimant not to have had the point in mind at an earlier stage.

47 The test to be applied is not, of course, whether the Claimant acted reasonably or unreasonably; it is whether it was not reasonably practicable for the claim to have been presented within time. The reasonableness or otherwise of the Claimant's actions (or inaction) does, however, have a bearing on the question of reasonable practicability. I have conclude that it was not reasonably practicable for the Claimant to present the detriment complaints within time for the following reasons:

47.1 The Claimant had apparently presented those complaints within time, in the original claim form.

47.2 The Tribunal did not reject those complaints and listed an Interim Relief hearing without comment.

47.3 The First, Second, Fourth and Fifth Respondents did not take the point in their Response.

47.4 The Third Respondent did take the point in his Response. Given that the other Respondents and the Tribunal had not done so, and that there were arguments (albeit ultimately unsuccessful) against the jurisdictional point, it was reasonable for the Claimant to continue to rely on the original claim form, rather than obtaining early conciliation certificates and presenting a second claim.

47.5 It was also a reasonable approach to apply to amend the claim, contingently on the outcome of the jurisdictional issue, once it was apparent that the jurisdictional issue was live.

47.6 In short, returning to the arguments set out by HHJ Eady in **Eon Control Solutions**, I found that the above factors outweighed the argument that the Claimant could have done something to remedy the situation when the Third Respondent raised the jurisdictional point.

48 The second element of the test is whether the Claimant presented the claim within such further period as was reasonable. Ms Sen Gupta submitted that he did not, as the amendment application was made on 23 December 2019, just over a month after the Preliminary Hearing on 21 November. I have no doubt that the Claimant could have made the application sooner than that. The test, however, is whether he acted within such further time as was reasonable. Here, I take into account the factors that this application was contingent on the outcome of the jurisdictional argument, and did not raise anything different from what had already been pleaded in the claim form. There was no disadvantage to the Respondents in the lapse of time after the November Preliminary Hearing, so

long as the application was made sufficiently in advance of this hearing. A period of just over a month was, in my judgment, reasonable in the circumstances.

49 I have considered whether the position of the Second, Fourth and Fifth Respondents is different from that of the First Respondent by virtue of the fact that, following my determination of the jurisdictional issues, they do not (pending determination of the application to amend) have the status of respondents. It seems to me that the reasoning I have set out above in relation to time limits is equally applicable to them.

50 I have therefore found that, by virtue of an extension of time, the complaints that the Claimant seeks to bring by way of amendment were presented within time.

51 Turning to the timing and manner of the application, I have already addressed questions of timing above, and my observations on that aspect in relation to the time issue are equally applicable here.

52 Ms Sen Gupta further argued that this was a case of abuse of the procedures, as raised by Langstaff J in **Drake International Systems**, in that the Claimant was trying to circumvent the early conciliation process. It is the case, as I have stated above, that the Claimant has not given any evidence as to his state of mind about the early conciliation issue, and I would have found this aspect easier to assess had there been some such evidence or explanation. Given, however, the limited nature of what is required (a Claimant need do no more than notify ACAS of his claim, and then decline to take part in any conciliation), it seems to me unlikely that the Claimant has been consciously trying to evade the process: I can see no reason why he would wish to do so.

53 The circumstances of the application include that the factors already mentioned above, that these Respondents have been aware of the detriment complaints from the outset, did not take the jurisdictional point, and presented a fully pleaded response. I find that it would be something of a "windfall" for the Respondents if the detriment complaints against them were to be ruled out because of a technical failing on the Claimant's side. There would be no evidential prejudice to them if I allow the application. The converse is true from the Claimant's perspective. If I do not allow the application, he will be deprived of the opportunity to have the complaints heard, because of a technical failing.

54 Taking all of the above into account, I have concluded that the balance of hardship and injustice on each side is such that I should allow the application to amend the claim, with regard to the First, Second, Fourth and Fifth Respondents.

55 I find the position to be different, however, as regards the Third Respondent. All of the matters I have set out so far in relation to the other Respondents are applicable to the Third Respondent, save for my conclusions about time limits. That was the subject of the third issue for me to decide, to which I shall now turn.

Time issues: Third Respondent

56 Mr Edwards relied on the same time limits point as Ms Sen Gupta in opposing the application to amend. With one exception, the same points arose in relation to the Third Respondent as in relation to the other Respondents. The difference was that the Third Respondent took the jurisdictional point in his Response. Although this lent some additional force to Mr Edwards' submission that the Claimant should have taken action sooner than he did, ultimately I concluded that the position was the same regardless of which Respondent had taken the point.

57 The Third Respondent, however, relied on further arguments with regard to time limits. The relevant provisions in section 48 of the Employment Rights Act 1996 are as follows:

> (3) *An employment tribunal shall not consider a complaint….unless it is 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…*
>
> (4) *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.*

58 Mr Edwards submitted that there was no reasonable prospect of the Tribunal finding that the complaint against the Third Respondent was presented within time, essentially because there was no reasonable prospect of the Tribunal finding that he had had any involvement in matters concerning the Claimant within three months before the claim was presented (on 5 July 2019). He therefore contended that the claim against the Third Respondent should be struck out under rule 37(1)(a) of the Rules of Procedure, which provides that this may be done when a claim has no reasonable prospect of success. There was no point about reasonable practicability relied on in relation to this issue.

59 Mr Edwards relied on the following dates, which were not in themselves controversial:

59.1 The Third Respondent was involved in the decision to suspend the Claimant that was taken on 17 August 2018.

59.2 The First Respondent sent an instruction to the Third Respondent to have no further involvement in the disciplinary process on 18 August 2018.

59.3 The Third Respondent was suspended from work on 6 November 2018.

59.4 He resigned with immediate effect on 17 January 2019.

60 Mr Edwards submitted that it was inherently implausible that the Third Respondent would have had any involvement in decisions concerning the Claimant after being told not to do so on 18 August 2018, and that it became even more implausible that he would do so with each successive stage of suspension and resignation.

61 Mr Edwards accepted, and it is the case, that it is possible that the Third Respondent had some involvement in the relevant decisions in spite of being instructed not to, being suspended, and resigning. That, however, is not the test. Had the point gone no further than an instruction not to be involved, I might well have concluded that that the test of no reasonable prospect had not been satisfied: an individual might defy, or be allowed to defy, an instruction. I find it less plausible that the Third Respondent might have been involved after himself being suspended. I find it implausible, to the point of there being no reasonable prospect of the Tribunal so finding, that the Third Respondent had any involvement in decisions concerning the Claimant after he had resigned from his employment. There is nothing in the Claimant's pleaded case that displaces the implausibility of this.

62 Ms Mayhew submitted that a series of acts commenced with the Third Respondent's actions or instructions and "can be properly attributable to R3 whether or not he had been removed from his post at the time the later acts took place". Ms Mayhew later submitted that the issue in relation to any later act would be "whether R3 carried out that act or is sufficiently responsible for it (even if he did not carry it out) such that there are series of acts or omissions…."

63 I agree that there would be an issue as to whether the Third Respondent carried out any relevant act: I have found that there is no reasonable prospect that a Tribunal would find that he carried out relevant acts after his resignation. I do not agree that there would be an issue as to whether the Third Respondent was "responsible for" later acts done by others. In **Barclays Bank v Kapur [1989] IRLR 387** a distinction was drawn between a continuing act and an act with continuing consequences: for limitation purposes, the latter act does not continue for the duration of its consequences. I consider that Ms Mayhew's contention about "responsibility" for later events is in fact a version of "continuing consequences" and cannot therefore assist the Claimant.

64 I have therefore concluded that there is no reasonable prospect that a Tribunal will find that the claim against the Third Respondent was presented within time. There would therefore be no purpose in my allowing the application to amend the claim so as to re-join the Third Respondent, and I reject that application.

Application to strike out / for deposit orders

65 This application was made by the First, Second, Fourth and Fifth Respondents (the FMSB Respondents), and was directed to the complaints of automatic unfair dismissal (by reason of making protected disclosures) and detriment because of protected disclosures. Ms Sen Gupta addressed the matter by reference to a schedule, in which she set out the FMSB Respondents'

contentions as to the Claimant's prospects of success in establishing that the alleged detriments were such and/or of establishing causation.

66 Rule 37(1) of the Rules of Procedure provides, in part, that a tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success. In **Hasan v Tesco Stores Limited UKEAT/0098/16** the Employment Appeal Tribunal identified two stages to the relevant test, namely (in the context of the present case):

66.1 Is there no reasonable prospect of success?

66.2 If so, as a matter of discretion, would it be just to strike out the claim?

67 The requirement that there be no reasonable prospect of success does not mean, at the one extreme, that there is no imaginable way in which the claim could succeed, nor at the other, that the claim is merely more likely to fail than to succeed. In **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126** Maurice Kay LJ referred to prospects of success that are realistic as opposed to merely fanciful.

68 It is often said, and it was common ground in the present case, that a Tribunal considering an application to strike out a claim should take the Claimant's case at its highest. I do not, however, agree with the approach advocated by Ms Mayhew in paragraph 57 of her skeleton argument, to the effect that this means that the Tribunal should assume that the Claimant will make out his case as to the reasons for the detriments and the dismissal. Taken literally, this would mean that, so long as a Claimant asserted that the detriments and dismissal were caused by protected disclosures, the Tribunal would have to assume that he would establish that. This would mean that a whistleblowing claim could never be struck out, so long as the Claimant asserted the relevant elements. I find that the correct approach is as advocated by Ms Sen Gupta, by reference to the following words of Langstaff J in **Romanowska v Aspirations Care Limited UKEAT/0015/14:**

"Sometimes it may be obvious that, taking the facts at their highest in favour of the Claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward. Where, however, there is a dispute of fact, then unless there are good reasons, indeed powerful ones, for supposing that the Claimant's view of the facts is simply unsustainable, it is difficult to see how justice can be done between the parties without hearing the evidence in order to resolve the conflict of fact which has arisen."

68 With regard to the exercise of discretion, in **Morgan v Royal Mencap Society [2016] IRLR 428** Simler J stated that:

"In the same way that courts have expressed reluctance to strike out fact sensitive claims of unlawful discrimination in order to avoid injustice, the same or similar approach has been held to be appropriate in whistleblowing."

69 Rule 39 of the Rules of Procedure provides for the making of deposit orders where an allegation or argument has little reasonable prospect of success. A claim with little reasonable prospect of success has better prospects than one with no reasonable prospect, but again this is not the same as saying that a claim is more likely to fail than to succeed. Again, there is a discretion to be exercised if the Tribunal concludes that there is little reasonable prospect of success.

70 My conclusion in relation to most of the complaints in question is that the factual issues are such that it is not possible for me to determine that there is no, or little, reasonable prospect of success, and/or that it would be wrong to exercise the discretion so as to strike out parts of the claim, or to make deposit orders. It would not be proportionate for me to attempt to set out a detailed analysis of each element of the case that has been identified by Ms Sen Gupta: to do so would entail a full explanation of the disputes of fact and law which would approach that necessary for a full judgment and reasons.

71 I have, however, considered each of the 20 detriments identified by Ms Sen Gupta and, using the numbering given in her document entitled "Schedule 1", I will give in summary from my conclusions on the question of prospects of success.

71.1 The issue as to whether the letter amounted to a detriment is one that depends on the context and should be considered in the light of all the evidence in the case. The First Respondent's assertion about why it caused the letter to be sent is not conclusive of the issue: this would be a matter of evidence, subject to cross-examination.

71.2 The Respondents may be right that there was a reasonable basis for disciplinary proceedings, but that is not conclusive as to the factual reason, or reasons, why they were instituted. The assertion that the disciplinary proceedings were not instituted on the ground that the Claimant had made a protected disclosure would be a matter of evidence.

71.3 There are factual disputes about why the investigation took as long as it did, and why the suspension therefore lasted as long as it did. I do not find that there is necessarily an inherent contradiction in the Claimant's stance that the investigation took too long but was insufficiently detailed: both might be the case. The level of detail in the Respondents' contentions about how the Claimant caused delay demonstrates that these are factual issues which should be assessed on the evidence.

71.4 The question whether the Claimant's requests for documents were disproportionate and unreasonable cannot be the subject of a fair assessment at this stage. It requires consideration in the light of the evidence.

71.5 The Respondents' argument that R2 took over the investigation from R3 at a particular point does not directly address the Claimant's

complaint that R3 should not have been involved at all. I consider that the Respondents' argument on causation – that R3 was involved because they did not know of his connection to the allegations against the Claimant, and not for any reason connected with protected disclosures – has some strength to it. I am not sure, however, that it is as applicable to R3 himself, although the Claimant's position amounts to little more than saying that the point ought to be tested at a hearing. I will address this aspect further below.

71.6 Although R5's dismissal letter asserts that the discrepancy between the two versions of the Claimant's contract did not have an impact on his findings, and although Mr Ogg found no deliberate wrongdoing in this regard, this would be a matter for the Tribunal to determine on the evidence. On causation, the Respondents' assertion that any mix-up was not deliberate would be a matter to be determined on the evidence.

71.7 There is a dispute of fact as to whether the Claimant gave permission for his desk to be accessed.

71.8 I consider that there is some strength in the Respondents' contentions that the provision of information to the Bank of England, the FCA and the Treasury did not amount to a detriment and that the information was provided because those institutions sponsor the First Respondent; also in the argument that the reason why the First Respondent gave an explanation of press reports following the interim relief hearing was that it was being pressed for an explanation. Again, I will address this aspect further below.

71.9 There is a factual issue as to whether the grievance was investigated as an aspect of the ongoing disciplinary proceedings. There is also an evidential issue as to the reason why the First Respondent acted as it did: inevitably, this is bound up with the question what it was that actually occurred.

71.10 My conclusion about this detriment is different. I note that this detriment was not addressed in Ms Mayhew's skeleton argument, although I am not sure whether this is of any significance in itself. In any event, I find that there is no reasonable prospect that a Tribunal would find that refusing to share information about investigations into other employees was a detriment. An employer would not usually do, or be expected to do, this. The reasons why this is so lead me also to conclude that there is no reasonable prospect that a Tribunal would find that the refusal was caused by the Claimant making protected disclosures. There is no obvious reason why an employer would respond in that way, and there is an alternative explanation why they would not provide information about investigations into others, which is the obligations of confidentiality and data protection.

71.11 I have reached a similar conclusion about this detriment. The dismissal letter and the letter from the First Respondent's solicitors each contained a non-acceptance that any protected disclosures had been made. I find that there is no reasonable prospect that a Tribunal would conclude that this amounted to a detriment: when a matter becomes contentious, it is common for those involved to reserve their position about legal issues. I also agree with Ms Sen Gupta's submission that there is no reasonable prospect that a Tribunal would conclude that that this was caused by the Claimant making protected disclosures. There is the obvious alternative explanation that the letters said what they did because this was the First Respondent's position.

71.12 There is a factual issue as to whether the First Respondent created a new mission statement and if it did, why it did so. I consider that, if a new mission statement was created as a way of finding that the Claimant had committed misconduct, that would be capable of amounting to a detriment.

71.13 There are factual and legal issues as to whether the Claimant made any qualifying disclosures and, if he did, whether they were addressed. I disagree with the submission on causation that it is (fatally) circular to assert that the First Respondent failed to address qualifying disclosures because the Claimant had made them: an employer might decide not to address qualifying disclosures because they recognised them as being such.

71.14 There are factual issues as to why the First Respondent did not take the Claimant's expert's report into account and why no finding was made as to which version of the contract was correct. R5 asserted that the issue about the contract had no impact on his findings, but that is also a matter for evidence.

71.15 This is linked to and covered by 70.14 above.

71.16 The First Respondent's submissions amount to little more than an assertion of its case. There are factual issues as to whether there was pressure from DB and why the First Respondent instituted disciplinary proceedings.

71.17 For essentially the same reasons given in relation to detriment 10, I find that this allegation has no reasonable prospect of success. It was not a detriment to fail to disclose the rationale behind the investigation of R3, nor is there any reasonable prospect that a Tribunal would find that the reason for not doing so was other than that stated, namely that the Claimant was not entitled to this information.

71.18 It is a matter of evidence why the allegations were refined, updated or altered. The First Respondent's case is that this occurred because

further evidence came to light, but this itself would be a matter for evidence.

71.19 This allegation appears to be essentially a summary of what has gone before: it perhaps adds little to the other allegations, but to the extent that they involve evidential disputes, so does this.

71.20 There is a factual issue as to why the Claimant was dismissed.

72 I have therefore concluded that there is no reasonable prospect of the Claimant succeeding in allegations 10, 11 and 17 above. I have then considered whether these allegations should, as a matter of discretion, be struck out. I have concluded that they should be. There will be a modest saving in time in terms of the evidence and the Tribunal's deliberations if they are removed from the issues to be determined. The Claimant would not be left with no case at all to pursue.

73 Although I can see some strength in the Respondents' case in relation to detriments 5 and 8, I have concluded that the threshold of there being no reasonable prospect of success has not been reached in those instances. I have considered whether these allegations have little reasonable prospect of success, such as to fall within the terms of Rule 39. On this point, I have concluded that, although it is possible to see merit in the Respondents' position on these allegations, they should not be viewed in isolation, but in the overall context of the case. On that basis, I do not find that the test of little reasonable prospect of success has been satisfied. If I am wrong about that, the same point would lead me as a matter of discretion not to make deposit orders in respect of these allegations.

74 The practical effect of all of the above is that the claim continues against the First, Second, Fourth and fifth Respondents, minus the 3 allegations that have been struck out; and that the claim ceases against the Third Respondent.

75 Finally, it has taken me longer than I would have wished to produce the judgment and reasons, for which I apologise to the parties. This has occurred because of pressure of work, aggravated by the difficulties arising from the coronavirus pandemic.

Employment Judge Glennie

Employment Judge Glennie

Dated: ……14 May 2020……..

Sent to the parties on:

15/5/2020.....

…….....
For the Tribunal Office