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EMPLOYMENT TRIBUNALS

Claimant: Ms A McDermott

Respondents: 1. Sellafield Limited
2. Nuclear Decommissioning Authority
3. Ms H Roberts

PRELIMINARY HEARING

Heard at: Manchester **On:** 7 July 2020

Before: Employment Judge Batten (sitting alone)

Representation

Claimant: Mr C Milsom, Counsel
Respondents: 1 and 3: Mr D Panesar, one of Her Majesty's Counsel
2: Ms R Levene, Counsel

RESERVED JUDGMENT

The claimant's applications for strike out, alternatively Deposit Orders against all 3 respondents are refused.

REASONS

The proceedings

1. On 19 March 2019, the claimant presented clams of detriment for making protected disclosures and of victimisation against 3 respondents. On 3 May 2019, each of the respondents filed their responses to the claim. It is accepted that the claimant is a contract worker pursuant to section 41 of the Equality Act 2010 ("EqA") and/or a worker pursuant to section 43K of the Employment Rights Act 1996 ("ERA").

2. On 31 July 2019, at a case management preliminary hearing, the second and third respondents' applications to be removed from the proceedings,

and the second respondent's application for strike out of the claim or deposit orders, were refused. Case management orders were made and the case was listed for a 14-day final hearing.

3. Following a disclosure exercise conducted by their solicitors in late 2019, the parties became involved in protracted correspondence regarding disclosure. The claimant submitted subject access requests to the first and second respondent which produced further documents which the claimant says should have been disclosed in these proceedings. On 4 February 2020, the claimant made her application which led to this preliminary hearing. All 3 respondents wrote to the Tribunal to respond to the application when they received it, earlier this year. On 17 June 2020, the claimant's application was revised and redrafted by Counsel who appears for the claimant at this preliminary hearing.

4. This preliminary hearing had been listed on 29 May 2020. Due to the current situation regarding COVID-19 and following instructions from the President of Employment Tribunals (England & Wales) and guidance from HM Government, all final hearings in the Employment Tribunal were, at that time, converted to a telephone hearing for case management to take place instead of the listed hearing. The claimant therefore wrote to the Tribunal to request that the final hearing be postponed and that instead her application be considered. That request was granted.

5. This preliminary hearing therefore took place on what would have been the first day of the final hearing of the claim. The "Code V" in the heading indicates that this was a remote hearing by video conference call to which the parties have consented and because the parties' representatives are able to deal with preliminary issues remotely.

The preliminary hearing

6. This preliminary hearing was tasked with considering the claimant's application for the following matters to be determined:

   (1) whether the response(s) filed by each of the respondents should be struck out, it being contended that:

      a) the respondents have conducted the proceedings in a scandalous, unreasonable and/or vexatious manner;

      b) there has been egregious non-compliance with Tribunal orders;

      c) it is no longer possible to have a fair hearing; and

      d) that the responses have no reasonable prospects of success.

   (2) in the alternative, whether any of 5 specific allegations or arguments made by the respondents in their responses have little reasonable

prospects of success such that the respondents should be liable to a deposit. The 5 specific allegations/arguments contested by the claimant are: the second respondent's denial of control/knowledge, and therefore liability; the denial that the claimant made protected acts/disclosures; the assertion that the contract was ended due to financial management; the assertion that the contract was ended due to performance concerns; and the denial that any protected acts/disclosures were a material factor in the termination of the claimant's contract.

7. The claimant's original application made on 4 February 2020, had also sought unless orders for disclosure of specific documents. That part of the application does not appear in Counsel's redrafted application of 17 June 2020. At the start of this preliminary hearing, it was clarified by Counsel that the claimant did not pursue such matters today. In any event, it was agreed with the parties' representatives that the Tribunal would deal only with those matters set out at paragraph 6 above.

8. Further, Counsel for the claimant confirmed that the claimant's application would be pursued only on the basis of items b), c) and d) of paragraph 6(1) above and that item a) was no longer pursued. Essentially, therefore, the application was pursued in respect of the respondents' approach to disclosure and in respect of the issue of merits of the responses. Counsel for the first and third respondent told the Tribunal that the respondents had been informed that matter a) would not be pursued at 7.00pm the previous evening and he therefore reserved the respondents' position on costs.

9. There is considerable dispute between the parties over the factual detail in this case. The parties' representatives agreed that, for the purposes of this preliminary hearing, the Tribunal was not tasked to make findings of fact or to hear evidence.

Evidence and hearing arrangements

10. The Tribunal was provided with 2 hard copy bundles of documents: one prepared by the claimant and the other prepared by the first and third respondents' representative. To these were added a copy of a 'Services Agreement' between the first and second respondent. The Tribunal was told that the documents presented at this preliminary hearing formed a small proportion of the disclosure expected - it is clear from the requests for disclosure that there is potentially considerably more documentation to be put in evidence at a final hearing.

11. The Tribunal was also provided with a witness statement from the claimant, and a witness statement from Ms Emma Mills, who is the solicitor with day-to-day conduct of the proceedings on behalf of the first and third respondents. The Tribunal read the statements and neither witness was called to give evidence in light of paragraph 9 above. Counsel for each party submitted a skeleton argument and a bundle of authorities. The Tribunal heard detailed submissions from each Counsel.

12. As explained above at paragraph 5, this preliminary hearing took place by video conference. The case had attracted considerable public interest and the video conference was joined by up to 70 observers; the numbers varied as observers joined and left the conference from time to time. In the circumstances, and to maintain order, all the attendees were muted when the video "room" was opened. The Tribunal then went through the list of the parties, witnesses and representatives, un-muting them individually in order to say 'hello' and to clarify that it was only the representatives of the parties, as set out above, who would be speaking for each party during the hearing. The parties were advised that they would thereafter be muted during the hearing and that they should establish a method of communicating privately with their representative during the hearing, for example by email or text message. The observers were informed that they were muted and were also asked to switch off their cameras, in order to save bandwidth.

13. Following a short discussion of administrative matters and opening statements by Counsel, the Tribunal adjourned for approximately 2 hours, to read the skeleton arguments, authorities, the witness statements and documents in the 2 bundles. Upon reconvening the hearing at 1.00pm, all attendees were muted as before and, as agreed, only Counsel for each party was un-muted so that they could speak. Counsel for each party appeared on the screen of the video conference throughout in 3 windows. Submissions commenced just after 1.00pm and each of the 3 representatives was given up to an hour to deliver their submissions.

Relevant background

14. Prior to September 2018, the claimant had been engaged as an HR consultant to work for the first respondent under a contract between the first respondent and Capita plc. From 1 September 2018, the first respondent engaged the claimant through the claimant's personal service company, Interim Diversity Limited, until 27 November 2018. The claimant contends that her remit was equality, diversity and inclusion, including to address the work culture of the first respondent following an allegation of sexual harassment against a senior manager.

15. The first respondent is a wholly owned subsidiary of the second respondent. It is the claimant's case that the relationship between the first and second respondents is one of agency in that the first respondent acted as the agent of the second respondent. The third respondent is the HR director of the first respondent.

16. In September 2018, the claimant was tasked to conduct a review of the first respondent's HR department. It is the claimant's case that the first and third respondent failed to act when the claimant passed on concerns which staff had raised with the claimant. On 9 October 2017, the claimant, and a number of senior HR managers, received an anonymous letter ostensibly written by HR staff, containing allegations about the third respondent's

conduct and the first respondent's HR department leadership. The claimant contends that the contents of the letter reflected her concerns.

17. On 16 October 2018, the claimant submitted a draft of her report and shortly afterwards the first respondent's HR team met to discuss the report. The claimant advised that an investigation to address sexual harassment should be undertaken; that the respondent's "Safe Call" policy was not being followed; and that HR management was conflicted in respect of complaints by its staff. It is the claimant's case that the third respondent acted to suppress the claimant's report.

18. In late 2018, the first respondent entered into discussions about costs savings to address a financial shortfall. One area identified for savings was the money it spent on external consultants. In this context and because of what the first respondent says were concerns about the performance of the claimant, notice was given to end the claimant's contract. The claimant says that the third respondent made the decision to end the claimant's contract.

19. The claimant had taken annual leave, returning on 29 October 2018. On her return, the claimant received a telephone call to inform her of the review of budgets as a consequence of which the claimant's contract with the first respondent was to be terminated on 30 days' notice. The contract end date was later confirmed to be 27 November 2018. The claimant contends that her contract was terminated because of the content of her report and recommendations, which she says were acts of whistle-blowing and which were not welcomed by the respondents. The claimant also relies on a report by PriceWaterhouseCoopers, which was commissioned by the second respondent after the claimant had left and which points to the same and continuing issues which the claimant had reported.

The claimant's application

20. Counsel for the claimant made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted in respect of the conduct of the proceedings that:- the disclosure provided by the respondents was wholly inadequate because documentation was provided in response to the claimant's FOI and DSAR which had not been provided during disclosure in the Tribunal proceedings; the claimant's request for further disclosure went unanswered; the metadata for the letters of complaint had been removed and such was admitted by the first respondent's solicitors; the respondents have therefore deliberately failed or refused to disclose documents in their possession; the respondents took advice on the claimant's crowd-funding activities with a view, the claimant says, to preventing her accessing financial support thereby; the Information Commissioner is investigating the respondents; and, as a result of the respondents' failure to give full disclosure, the claimant did not trust the respondents and so the Tribunal should conclude that a fair trial is no longer possible.

21. In relation to merits, Counsel for the claimant submitted that: the case centres on why the claimant's role ended; that there is no core of disputed facts - rather there is a core of disputed assertions; that the evidence does not support the respondents' assertion that there were in fact any concerns about the claimant's performance and therefore such a suggestion is false; the first respondent had embarked on further tendering for consultant services despite terminating the claimant's contract; that the second respondent had invited the claimant to continue working for it despite the alleged performance concerns; and that the fact that the third respondent took the decision to terminate the claimant's contract when she did can only be because of the claimant's report and how it was received by the respondents.

22. Counsel for the first and third respondents made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that: - the respondents had acted in accordance with the overriding objective by taking a proportionate and reasonable approach to disclosure; that the respondents had provided additional voluntary disclosure; the respondents' conduct did not involve any deliberate or persistent disregard of the Tribunal's procedure; the fact that the respondents make "no admissions" as to certain discussions or their content does not indicate that they had misled the Tribunal and, in doing so, the claimant has mis-stated the respondents' defences; that the claimant seeks to require the respondents to incur unnecessary expense because she expects disclosure which is beyond that which is relevant to the issues in the case; and the claimant's complaints about the storage and transmission of data are not matters within the Tribunal's jurisdiction and, in any event, the Information Commissioner is investigating;

23. On merits, it was submitted for the first respondent that: the circumstances of the case are such that strike-out is not appropriate; there is a clear dispute of fact between the parties in this case; the issues of whether the claimant's disclosure(s) were made in the reasonable belief of the claimant and in the public interest, and also whether the claimant was subjected to detriment(s) or victimised because of her disclosures, are all matters that the Tribunal should determine on the facts at a final hearing; that the performance concerns are evidence which needs to be explored and explained at a final hearing; and that the claimant's application amounts to an attempt to deprive the respondents of the opportunity to pursue their defences.

24. Counsel for the second respondent made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that: - the second respondent had complied with the direction for disclosure and behaved appropriately in relation to disclosure; that the claimant has failed to appreciate the difference between disclosing relevant documents for the purposes of proceedings in the Employment Tribunal and providing personal data under a DSAR; that the claimant seeks certain documentation that is subject to legal professional privilege; and that a fair hearing is still possible.

25. As to merits, Counsel for the second respondent supported what had been said by Counsel for the first and third respondents. It was also submitted that: the claimant had confused the role of the second respondent, as a governor commissioning a second report after the claimant's contract had ended, so as to suggest this indicated that the second respondent had been involved or interested in the termination of the claimant's contract.

Applicable law

26. Rule 37 of the Employment Tribunal Rules gives a Tribunal the power to strike out all or part of a claim or response, at any stage of the proceedings upon the application of a party. The power to strike out is a draconian step which should be rarely exercised.

27. Rule 39 of the Employment Tribunal Rules gives a Tribunal the power to make a Deposit Order in circumstances where the Tribunal considers that any specific allegation or argument in a claim or response has "little reasonable prospect of success". The threshold for the making of a deposit order is therefore lower than that for strike out.

28. Rule 41 of the Employment Tribunal Rules provides that the Tribunal may regulate its own procedure, giving effect to the overriding objective and avoiding undue formality, and that the Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. Parties to proceedings in the Employment are therefore required to disclose those documents in their possession or under their control which are relevant to the issues to be determined in the case and, in doing so, must not mislead the Tribunal or the other parties as to the effect of those documents which have been disclosed.

29. Rule 31 gives the Tribunal the power to order disclosure or documents at the Employment Judge's discretion. The overarching factor is relevance and the Tribunal can exercise its discretion not to admit evidence which is only marginally relevant to the issues in the claim or which is unnecessarily repetitive. In addition, there is an ongoing duty of disclosure, so that documents which come to light after the date of an order for disclosure shall be disclosed once they become available, or once their relevance is apparent.

30. It is important that parties comply with case management orders. However, it does not inevitably follow that the sanction for a failure to comply with a case management order is a striking out of the claim or response. The appropriate sanction depends upon a range of circumstances. The power to strike out the claim must be exercised in accordance with the overriding objective in rule 2, which is to deal with a case fairly and justly. A claim or response should only be struck out if it is a proportionate response to the offence: *Bennett v Southwark London Borough Council [2002] IRLR 407*. It will be a very unusual case in which a Tribunal is justified in striking out a

response on procedural grounds when a claim is approaching trial: *James v Blockbuster Entertainment Limited [2006] IRLR 630*. In general terms, striking out a response will only be proportionate where a fair trial is no longer possible.

31. The merits of a claim or response must be assessed by reference to the pleadings alone: *Chandhok v Tirkey [2015] ICR 327*. Striking out of a discrimination claim or response is therefore an exceptional course of action for a Tribunal because such claims are fact-sensitive and the reverse burden of proof requires careful evaluation and is a matter of high public interest: *Anyanwu v South Bank Student's Union [2001] IRLR 305*. Where there is a core of disputed facts, a Tribunal should not pre-empt the determination of the case at a full hearing by striking out the claim or response.

32. Section 43B of the ERA provides that a disclosure qualifying for protection is a disclosure of information which, in the reasonable belief of the worker is in the public interest and tends to show one of 5 matters set out in section 43B.

33. Section 27 of the EqA provides that a person (A) is victimised by another (B) if the person, A, does a protected act and is subjected to a detriment by the other person, B, because A did the protected act. A protected act includes making an allegation that B or another person has contravened the EqA.

34. In the course of submissions, Counsel for each party referred the Tribunal to a number of authorities, including the *Presidential Guidance on General Case Management* and case law as follows:

Lana v Positive Action Training in Housing (London) Limited [2001] IRLR 501
ASLEF v Brady [2006] IRLR 576
ABN AMRO Management Services, Royal Bank of Scotland v Hogben [2009] UKEAT/0266/09
Patel v Lloyds Pharmacy Limited [2013] UKEAT/0418/12
Sud v London Borough of Hounslow [2015] UKEAT/0156/14
Hak v St Christopher's Fellowship [2016] ICR 411
Hemdan v Ishmail and another [2017] ICR 486
Unite the Union v Nailard [2018] IRLR 730
Chidzoy v BBC [2018] UKEAT/0097/17
ED&F Main Liquid Products Limited v Patel and another [2003] EWCA Civ 472
Weir Valves & Controls (UK) Limited v Armitage [2004] ICR 371
Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330
Balls v Downham Market High School & College [2010] UKEAT/03436/10
Tayside Public Transport Co. Limited v Reilly [2012] CSIH 46
Mechkarov v Citibank NA [2016] ICR 1121
Mbuisa v Cygnet Healthcare Limited [2019] UKEAT/0119/18

HM Attorney General v Barker [2000] co/4380/98
De Keyser Limited v Wilson [2001] IRLR 324
Pearson Education Limited v Prentice Hall India Private Limited [2005] EWHC 636 QB
Pillay v INC Research UK Limited [2011] UKEAT/0182/11
Arriva North London North Limited v Maseya [2016] UKEAT/0096/16

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Conclusions

35. The Tribunal first considered the allegations made by the claimant about the respondents' approach to disclosure.

36. On 31 July 2019, at a case management preliminary hearing, the Tribunal made an Order for disclosure by the parties of "*a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case"* and copies were thereafter to be provided upon request by another party. The Tribunal considered that the wording of the disclosure order is important. It does not require the parties to provide copies of every single document relating to the claimant or her company's contract with the first respondent. Relevance to the issues in the case is required.

37. This is a claim about protected disclosures and detriment, and a claim of victimisation. At the final hearing, a Tribunal will have to determine whether, in accordance with the definition in section 43B ERA, the claimant made disclosures which qualify for protection and if she had a "reasonable belief" in the disclosure(s) she made. Likewise, the Tribunal will have to determine whether allegation(s) related to the EqA were made. If the disclosures and allegations are protected, the Tribunal shall decide whether the claimant suffered the detriment contended for and if so, whether the detriment was because of the protected disclosure or protected act. However, it is not the task of a Tribunal, in dealing with such claims, to determine the veracity, facts or substance of the protected disclosure(s) and/or allegation(s) contended for.

38. The Tribunal considered the documentation which the claimant says was not disclosed and the issues in the case. The Tribunal concluded that the claimant has misunderstood the duty of disclosure in Tribunal proceedings which is in effect limited to the disclosure of those documents relevant to the issues. The claimant has confused such a duty with the requirement of disclosure in response to the SAR, which is an absolute duty to disclose everything relating to the individual making the SAR. In the circumstances, the Tribunal considered that the respondents had not breached their duty of disclosure when they did not disclose all documents in their possession which relate to the claimant or her company's contract.

39. The Tribunal also considered that it would be disproportionate to strike-out the responses merely because the claimant alleges that more documents are in the respondents' possession than have been disclosed. The requirement is relevance to the issues in the case. In any event, as the claimant has obtained the further documents through her SAR, it is open to her to introduce those documents by way of disclosure under the ongoing duty of disclosure if she considers they are relevant to the issues.

40. The Tribunal noted that the claimant has argued that the respondents had deliberately failed to comply with the Order for disclosure. However, there was no evidence to support the suggestion of a deliberate act by the respondents, or any of them, in this regard. Submissions for the claimant focussed on an allegation that there was little documentation disclosed by the respondents of communications between its personnel about the reasons for termination of the contract as advanced by the first and third respondents, and that notes of the claimant's termination meeting had come to light only through the SAR. The latter allegation was shown to be incorrect, however, as the notes in question appear in the first respondent's disclosure list, as item 209. The Tribunal accepted the respondents' submission that much of the communication was oral and not recorded at the relevant time; such matters are best dealt with in oral evidence and cross-examination. The claimant argued that the first respondent's new contracts for HR services, their timing and value, were matters which had not been addressed in the respondents' disclosure and which she believed should have been. However, it is the first respondent's case that the need for financial savings extended throughout the business, not just its HR functions, and that the claimant's contract was one small part of a wider exercise. Hence, when the claimant claims that the respondents spent £millions on contracts after hers was ended, such figures relate to a large-scale re-contracting process and are therefore not relevant in the way the claimant believes. Disclosure of such would be disproportionate.

41. The claimant pointed to the fact that the second respondent had disclosed only one document in response to the order for disclosure, but had produced a further document on the morning of this preliminary hearing. The second respondent's case is that it had no involvement in the management of the claimant or the service company's contract/its termination, whereas the claimant's case is that the second respondent must have had some form of control over the first respondent because it proceeded to investigate the first respondent, through PriceWaterhouseCoopers, after the claimant had left. The second respondent disputes the claimant's view of its relationship with the first respondent and maintains that it has no relevant documents. The Tribunal considered the position but did not find that the fact that the second respondent's disclosure consisted of 2 documents, one of which was late, must lead to a conclusion that the second respondent had deliberately, or even inadvertently, withheld relevant documents from the claimant.

42. The allegation of a deliberate failure to comply with the Tribunal's Order for disclosure, is a very serious allegation to make. The Tribunal did not find that it was made out in this case in respect of any of the respondents. Many serious allegations contained in the original application, of 4 February 2020, have been abandoned prior to this preliminary hearing. In addition, the first respondent's solicitor had given a reasonable explanation about what had happened in respect of the meta-data for the complaints and the oversight had since been rectified.

43. In addition, the Tribunal considered the claimant's submissions on the matter of the respondents having sought advice on the claimant's crowd-funding activities with a view, the claimant says, to preventing her accessing financial support thereby. The Tribunal read the documents in the claimant's bundle on this point which suggest that the second respondent had sought advice on taking down a crowd-funding page set up by the claimant. The Tribunal considered that a party is entitled to take advice on the activities of another in litigation but that such conduct as was evidenced by the documents did not amount to unreasonable conduct or obstruction of the claimant. In addition, the Tribunal accepted the submission of the second respondent's Counsel, that the claimant had published statements about the case and the respondents, on the crowd-funding site, which were highly contentious and, as public bodies, the respondents felt bound to investigate what action was available to them in light of the statements made.

44. The Tribunal approached its consideration of the claimant's application for strike out on merits by taking the respondents' responses at their highest.

45. The first and third respondents advance arguments that the contract for the claimant's services was terminated in the context of a funding shortfall across the business and consequent need to reduce the first respondent's spending on consultants, such as the claimant, and where it was decided that the claimant's contract should be cut because the first respondent determined that the claimant did not provide value for money due to poor performance. The contract in question provided for early notice of 1 month, to terminate, and there is no suggestion that the first respondent was in breach of contract by giving notice as and when it did. Further, the first respondent contends that the fact that the second respondent offered the claimant an opportunity to work for it, after the termination of her contract with the first respondent does not, of itself, negate what the first respondent says about funding and performance issues and also serves to indicate that the first and second respondent acted independently of each other.

46. The claimant is concerned that performance issues were introduced through the disclosure of 3 letters of complaint which had not been shown to her before or specifically referred to in the pleaded responses. The claimant argues that these letters were so related to the protected acts that they should have been included in the respondents' relevant disclosure in any event. As a result, the claimant is suspicious of their provenance, a

suspicion unfortunately compounded by the inadvertent removal of the meta-data by the first respondent's solicitors' digital security system, albeit that the matter has since been clarified and corrected.

47. The second respondent's case is that the first respondent is a wholly owned subsidiary of the second respondent, but it is a separate legal entity to the second respondent and not its agent, and that the second respondent has no control over the first respondent and had nothing to do with the contract for the claimant's services. The claimant's contentions as to an agency relationship remain unclear.

48. The detriment contended for is the termination of the claimant's service company's contract by the third respondent, on behalf of the first respondent and the claimant says that the second respondent had an involvement in that decision. The basis for the decision to terminate that contract and the timing of that decision, apparently coming so soon after the claimant says she made protected disclosures and allegations are important matters that the respondents must explain. There are 3 letters of complaint which support the first and third respondents' position as to performance issues. It is therefore entirely possible that the contract for the claimant's services did not provide value for money as the respondents contend.

49. In essence, the claimant's submissions on the merits, or lack of merits, of the responses rely upon a number of matters which she has presented as fact, where the Tribunal considered that such matters amount to the claimant's version of events and contentions as to a situation without regard to the respondents' cases or explanations. Counsel for the first and third respondents highlighted a number of inconsistencies and inaccuracies in the claimant's case, for example, a contention about matters said to be known about a Safecall in August 2018, which was in fact not made until early September 2018, and the suggestion that the respondent had imposed only one 'litigation hold' on documents, when there had been several. In addition, Counsel submitted that the claimant's concerns about the 3 complaints arose because she simply does not want those matters to be put in evidence against her and he suggested that the claimant had unreasonably inflated her application to include a contention that the complaints were fabricated without any foundation for such a serious suggestion. In those circumstances, Counsel questioned the credibility of the claimant's approach to the litigation and this application.

50. It is apparent to this Tribunal that there is a significant core of disputed facts in this case, and a number of matters that will require oral evidence. The Tribunal at the final hearing will need to make careful findings of fact on many aspects which are not evidenced by the documents. Whilst the Tribunal understands that there is a significant amount of documentary evidence, it also understands that the respondents will call 8 – 10 witnesses to give oral evidence, and that a number of matters of evidence are not illuminated in the documentation. In those circumstances, the Tribunal has decided that the responses in this case cannot be said to have no or little

reasonable prospects of success and that strike out, or indeed Deposit Orders, are not appropriate. To determine otherwise would be to pre-empt the final hearing in the absence of witness testimony which is essential evidence in such a fact sensitive case as this one.

51. The Tribunal therefore considered that the claimant's claims of detriment for whistle-blowing and victimisation for allegations of discrimination should proceed to a final hearing together with the responses which shall not be struck out. A fair trial is still possible. The Tribunal will need to investigate why the respondents acted as they did at the relevant time, at a fully contested final hearing. Given the core of disputed facts between the parties, the Tribunal considers it is not appropriate to deprive the respondents of the opportunity to defend this claim.

52. For all the above reasons, the claimant's application must fail. The responses shall not be struck out and deposit orders shall not be made. The claim shall proceed to final hearing, notice of which shall follow in due course.

Employment Judge Batten
Date: 10 August 2020

JUDGMENT SENT TO THE PARTIES ON:
13 August 2020
AND ENTERED ON THE REGISTER.

FOR THE TRIBUNAL OFFICE