EMPLOYMENT TRIBUNALS

Claimant: Mr M Lazer

Respondent: London Fire Commissioner & Anr.

OPEN PRELIMINARY HEARING

Heard at London South: by CVP **On:** 2 October 2020

Before: Employment Judge Truscott QC (sitting alone)

Appearances
For the claimant: in person
For the respondent: Mr M Khoshdel of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The second respondent, Mr G Sebright, is removed from the proceedings under Rule 34.

2. The claimant is not permitted to amend his claim.

3. The respondent is permitted to amend its response.

4. The claim of age discrimination has no reasonable prospect of success and is struck out under Rule 37(1)(a).

5. The claim of harassment is struck out as it has no reasonable prospects of success under Rule 37(1)(a).

6. The claim of victimisation is struck out as it has no reasonable prospects of success under Rule 37(1)(a).

7. The hearing fixed for 21, 22, 23 and 24 June 2021 is discharged.

REASONS

Preliminary

1. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote

hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. This Preliminary Hearing was listed to determine the following issues which were identified at a Preliminary Hearing on 9 July 2020 as follows:

(i) The Respondents' application to remove the Second Respondent as a party to these proceedings (Rule 34 Employment Tribunal Rules 2013).
(ii) The Respondents' application for the claim in its entirety to be struck out (Rule 37(1).
(iii) The Respondents' application for the Claimant to pay a deposit (Rule 39).
(iv) Any applications by the Claimant to amend his claim.
(v) Identifying the issues and making case management orders for the full merits hearing.

3. The Claimant confirmed that he was not making an indirect age discrimination claim. The Claimant applied to amend his claim by adding further information in a substantial number of pages worth of incidents and explanations for his claim. The Claimant also provided a number of additional emails. There are a number of references to the contents of recordings taken in the workplace. The Claimant confirmed that these were covert recordings. The Tribunal took no account of these.

4. A bundle of documents which included the Claim Form and the Grounds of Resistance was provided to the Tribunal which will be referred to where necessary.

5. Both parties provided detailed skeleton arguments and the Claimant provided a written response to the argument for the respondent.

The claim

6. The Claimant commenced employment with the First Respondent on 12 November 2018 and remains in the First Respondent's employment. At the hearing, the Claimant explained that at the time of the alleged incidents he was aged 38 and says that he is perceived as a 23 year old.

7. The ET1 claim lists a number of incidents as follows:
18/02 "berates me like a child"
22/02 "his fatherly side was coming out"
06/03 "GS shouts at me like a child and tells me off like a parent"
17/06/19 "Warns me like a child"
16/09 "GS infantalises me again"
17/10 "GS sees me as a grumpy child"

8. In the additional information section of the ET1, the Claimant provides further elucidation, he again refers to being treated like a child and that he was discriminated against on the ground of his age.

9. The contents of the amendment application are not repeated here. The amendment proposed by the Claimant is as follows:

6. Amendment 1 concerns an incident of Harassment from **Caroline Davis** in **06/2019**, following my first report of **Caroline's** behaviour previously to **Respondent Glenn Sebright** in **02/2019**, this time the harassment involved the dangerous task of building 3 large easels with inappropriate equipment, lack of health and safety considerations and training to handle equipment in the office and around others in close proximity, in order to humiliate me in front of the office and my peers, this took place within the time frame presented and is already mentioned in brief in the initial claim form where it is labelled **''16/09''** in section **8.2 of the ET1** form where this and other acts of harassment by a senior member of staff (**Caroline Davis**) was reported to the respondent (**Glenn Sebright**) and in an act of harassment the respondent also then addressed me in a derogatory, patronising and ageist manner in response.

7. Amendment **2** took place on **11/11/19** and is a written and recorded entry, when, as mentioned in brief in the initial ET1 claim form, I the claimant was reassigned, in an act of Harassment and Victimisation, to a new line manager, **Kirstin Rowan** (the Internal Communications Manager and a direct report in to **Glenn Sebright**), used hostile and inappropriate language towards me. Within 1 week of **Kirstin Rowan** being assigned as my new line manager she asks me ***''are you going to put your lipstick on?''*** when we were going for a team photo for our department newsletter and also repeatedly blanks me when I greet her in the mornings in order to create a hostile atmosphere and intimidate me. And **Kirstin** also spoke to me in a threatening manner in the handover meeting in **December 2019** that we had as a parting shot (detailed at **15mins** on recording dated **13/12/2019**) where **Kirstin** said there would have been trouble if I had stayed in her team.

8. And finally, Amendment **3**, which involves another recording of an incident (23/01/2020), this time concerning my new manager within the new department I have been transferred to. My new manager who is 35 years old (3 years younger than me) addresses me as ***''young man''***, I was 38 years old, when telling me off about supposedly forgetting to turn a office monitor off one time. This amendment is requested to show that my appearance and perceived age is obviously a contributing factor to my experience and the approach of management in LFB.

10. In relation to his public interest disclosure claim, he sets out its clear basis in his skeleton argument in response to the respondent.

In point 33. The respondent enters into semantics re the reporting of the Health and Safety concerns I reported to Glenn Sebright Respondent 2. The fact is that the claimant reported the concerns re health and safety (and injuries caused to the claimant) and harassment in the form of being tasked and singled out of a department of over 20 staff to put together 3 large easels in the middle of an office in his office chair within arms reach of colleagues next to and behind him without training and the appropriate equipment and this was wholly unnecessarily but to purposely humiliate as there was, unbeknownst to him, at the time a resident team/staff member (engineer) who sat with the property management team 20ft away from the Comms department who's job it was to do such things in safe surroundings with the appropriate training and equipment.

11. The Claimant has provided a table of what he now claims:

Date	Incident description	Events	People Concerned
12/2018	Seating incident – Ageist language from CD to ML	Caroline questioned me like a child re seating location	Caroline Davis
18/02/2019	Gayle Ward harassed ML on behalf of Caroline	Gayle warns ML to not sit in Ops even though other FRS staff do	Gayle Ward
18/02/2019	Stephanie Liosatos harasses ML about post	Stephanie shouts at me to PICK UP THE MAIL in post room	Stephanie Liosatos
20/02/2019	CD harasses ML about seat location again	Caroline drags me in to a meeting with no notice to tell me that I should move seat for a false reason	Caroline Davis
22/02/2019	Mark Lazer emailed Glenn.S. to report Caroline Davis's behaviour	I reported the ageist/obsessive behaviour of Caroline to Glenn	Caroline Davis and Glenn Sebright
25/02/2019	Glenn says it is still fine to sit in Ops	Glenn emails Mark.L to say it is fine to sit in Ops/alone	Glenn Sebright
25/02/2019	After Caroline speaks to Glenn he suddenly is against me sitting in Ops	Caroline persuades Glenn to tell me to not sit in Ops and he turns hostile against me	Glenn Sebright and Caroline Davis
08/03/2019	Glenn sets impossible task in order to criticise me unjustly	Glenn asks me to procure LGA ticket and train tickets, he know the latter is impossible, he is victimising me as a result of me reporting Caroline previously	Glenn Sebright
14/03/2019	Glenn shouts at me about not being able to procure train tickets to LGA in Brighton	Glenn vindictively set the impossible task of booking tickets to Brighton LGA, he then shouts at me unjustly like a father to a child	Glenn Sebright
15/03/2019	Liz O'Hare lies about Meeting	Liz O'Hare tries to get me in trouble with Glenn when misleading me about not having to attend a meeting, Glenn then is angry at me	Liz O'Hare and Glenn Sebright
21/03/2019	Glenn show investigates Liz incident	Glenn pretends to investigate Liz lying to me to get me in trouble and he takes no action	Liz O'Hare and Glenn Sebright

28/03/2019	Glenn lodges incorrect Probation extension form	Glenn attempts to ‘’extend’’ my 4mth probation period in an act of harassment. HR stop him from doing so.	Glenn Sebright and HR
08/04/2019	Glenn is forced to apologise by HR	HR force Glenn to apologise to me about the Probation form he should not have lodged	Glenn Sebright
11/04/2019	Glenn questioning my use of leave	Glenn is pointedly focusing on my leave use, he doesn’t like me to be out of the office even on leave	Glenn Sebright
26/04/2019	Glenn questions my use of leave at a meeting	Glenn is purposely focusing on leave use again to make me feel unsettled.	Glenn Sebright
13/05/2019	I request the ability to work remotely as Glenn mentioned I would when joining LFB	I gave Glenn my remote working application to be able to work on project work remotely and try to adjust work/life balance after hearing about my father’s very ill health (8cm Brain tumour)	Glenn Sebright
22/05/2019	Glenn and I meet and he shouts and lies to me about remote working criteria	Glenn shouts at me for applying for remote working, says I’m not as experienced as Jane Stern, not been at LFB long enough and am not allowed till 1 year, this is false	Glenn Sebright
22/05/2019	Glenn warns me about my leave yet again	As previously Glenn warns me about my leave ‘’as before watch your leave’’	Glenn Sebright
29/05/2019	Caroline Davis evicts me from Glenn’s quiet desk whilst I train on LYNDA training	Caroline Davis harasses me on purpose by evicting me from Glenn’s office where it has been agreed I can train, she says so she can make a call	Caroline Davis
31/05/2019	Patrick Gallagher biasly persuades me to recant appeal for working from home	Patrick is a senior analyst in HR and campaigns against staff being offered remote working sneakily persuades me to recant my appeal	Patrick Gallagher
10/06/2019	In a meeting about remote working Glenn shouts at me	Glenn shouts and chastises me about appealing the remote working application	Glenn Sebright

		and shouts at me for this, also for recanting this and asking how I can help to make his life easier	
11/06/2019	Glenn again focuses on leave unnecessarily	Even though I have 17.5 days total of leave Glenn harasses me about leave arrangements. He is purposely harassing me.	Glenn Sebright.
12/06/2019	Caroline Davis instructs me to make 3 large easels in full view of the open office in dangerous conditions to myself and others	I was given a hand screwdriver and instructed to make 3 large easels next to colleagues which required power tools and training to make.	Caroline Davis
17/06/2019	Glenn leaves one of two leave entries unreviewed	It is near impossible for someone to leave one of two leave entries unreviewed next to another, Glenn is purposefully causing me issues regarding leave to harass me.	Glenn Sebright
22/08/2019	Caroline Davis evicts me from Glenn's office after it was planned 2/3 weeks prior with herself, Glenn and Fenella	In an act of harassment and victimisation Caroline purposely evicts me from Glenn's office for her entertainment even though it was planned weeks before and there were at least 3 rooms available at the time	Caroline Davis
09/09/2019	I report dangerous easel task to Glenn by my harasser and he responds by ignoring this and using ageist language towards me	I reported Caroline's continued harassment towards me and the dangerous task in the office and he ignores my report, speaks in an ageist way towards me and send me a threatening disciplining email	Glenn Sebright
16/09/2019	GS 'show' looks into reports regarding Caroline's actions	Glenn fails to ask Caroline about the 7 issues I highlight to him, he chooses 3 of the 7 I assume he thinks she can make semi believable excuses for and tells me he sees nothing to answer	Glenn Sebright and Caroline Davis

17/10/2019	Glenn sends me a threatening letter regarding reporting concerns and warns of disciplinary action	Glenn sends a one sided, patronising, inflammatory letter shielding Caroline and ignoring his duty to investigate concerns and take official action	Glenn Sebright
17/10/2019	I report Glenn's actions to his manager Sue Budden	As Glenn has not taken action regarding Caroline's actions and Glenn himself has been behaving inappropriately I report Glenn to Sue	Glenn Sebright and Sue Budden
01/11/2019	Glenn Sebright meets with me and assigns me to close friend and colleague Kirstin Rowan	Glenn tells me that he is assigning me to Kirstin Rowan as he says he doesn't have enough time to meet with me and she would be better placed to manage me	Kirstin Rowan and Glenn Sebright
11/11/2019	Kirstin Rowan makes inappropriate, harassing remark (Other recordings of Kirstin are also available)	Kirstin Rowan asks me inappropriately if I am going to go and put lipstick on before a team meeting. This is designed to make me feel unsettled and demean me.	Kirstin Rowan
14/11/2019	Sue Budden emails me to tell me that she is forwarding my report to HR	After delaying the process for 3 weeks Sue Budden emails me to tell me that she will forward my concerns to HR	Sue Budden
14/11/2019	Catherine Gibbs (HR Employee relations) emails me to say she is now handling the complaint	Catherine Gibbs said that she was handling my report of concerns and said that she would reply by 26/11/2019.	Catherine Gibbs
25/11/2019	Catherine says she will be delaying the process by 3 weeks more	In actual fact Catherine only replies on December 23rd, a full month after she as given it and 2 months after Sue	Catherine Gibbs
13/12/2019	Kirstin threatening comment in handover meeting	Kirstin spoke to me in a threatening manner in the handover meeting in December 2019 as a parting shot, Kirstin said there would have been trouble if I had stayed in her team.	Kirstin Rowan

25/12/2019	Catherine Finally replies to my concern report	Catherine delayed her response till the last day the office was open and sent it to my work email so it was quite possible I wouldn't have seen it till after new year when it could have been too late to go to ACAS for help	Catherine Gibbs

Relevant Legal Framework
Age discrimination

12. The Equality Act was a largely consolidating measure of prior discrimination law. In relation to age, one element of the 2006 Age Regulations that was not carried over — at least expressly — into the Equality Act was a specific provision in Reg 3(3)(b) making it clear that direct discrimination on the ground of age embraced direct discrimination caused by the perception of age. Reg 3(3)(b) stipulated that for the purposes of direct discrimination, the reference to the claimant's age included the claimant's 'apparent age'. Thus, a person had the right to claim discrimination on the ground of age if any less favourable treatment suffered was on account of a perception about his or her age, whether or not that perception was correct. While this particular provision has no direct equivalent in the Equality Act, it remains the case that misperception about a person's age can found a direct discrimination complaint if it can be shown that less favourable treatment is causally linked to the misperception. This protection from discrimination by perception derives from the way in which direct discrimination is defined in S.13 EqA. S.13(1) stipulates that 'A person (A) discriminates against another (B) if, *because of a protected characteristic*, A treats B less favourably than A treats or would treat others' (our stress). Previously, direct discrimination was defined in Reg 3(1)(a) of the Age Regulations in terms of less favourable treatment '*on grounds of B's age*'. The removal of the claimant's own age from the equation means that a person is now protected if he or she is directly discriminated against on account of age in general. In this way, discrimination by perception is woven into the very fabric of the definition of direct discrimination.

Public Interest Disclosure

13. The general right not to suffer detriment (short of dismissal) due to having blown the whistle is contained at ERA 1996 s 47B(1) which provides as follows:

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

14. No qualifying period of employment is necessary to claim this right. The claim is brought to an employment tribunal in the normal way. This general right against a worker's employer has been supplemented by an additional right for a whistleblower to bring a claim against an individual co-worker or agent of the employer who subjects them to a detriment because they have made a protected disclosure (ERA 1996 s 47B(1A) which also has the indirect effect of widening the vicarious liability of the employer.

15. There is an initial burden on the claimant to show on a balance of probabilities that: (a) there was in fact and law a legal or other relevant obligation on the employer or other relevant person; and (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject: **Boulding v. Land Securities Trillium (Media Services) Ltd** UKEAT/0023/06 (3 May 2006, unreported), per Judge McMullen. This particularly applies where the Claimant does not have the requisite service to claim unfair dismissal.

16. The Claimant requires to prove that he made a qualifying disclosure within the meaning of section 43B (1):

> "In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
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> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
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> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

17. It has been held that a qualifying disclosure must be a disclosure of information, which means the conveying of facts, as opposed to mere allegation: **Cavendish Munro Professional Risks Assessment Ltd v. Geduld** [2010] IRLR 38. In **Kilraine v. London Borough of Wandsworth** [2018] ICR 1860 CA, the Court of Appeal supported the EAT's view that a rigid dichotomy between information and allegation should not be read into section 43B, but that a disclosure must contain sufficient detail and content to be capable of tending to show one of the prescribed categories of information in section 43B (1). Ultimately, this will be an evaluative judgement for the Tribunal to make, see paragraphs 30 – 36. Further, it was held that the context in which the disclosure is made is a relevant consideration, see paragraph 41.

18. The editors of Harvey at CIII(4)(C) [21] summarise the position as follows:

> "… in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (the actual result in *Cavendish*), a disclosure may contain sufficient information even if it also includes allegations… The question therefore is whether there is *sufficient* by way of information to satisfy s 43B and this will be very much a matter of fact for the tribunal. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide."

19. Once a disclosure has taken place it becomes necessary to consider whether or not that disclosure can be categorised as a qualifying disclosure. This largely depends upon the nature of the information revealed. As an initial starting point, it is necessary that the worker making the disclosure has a reasonable belief that the disclosure tends to show one of the statutory categories of 'failure' (ERA 1996 s 43B (1)). It needs to be stressed that what is required is only that the worker has a reasonable belief and it is not necessary for the information itself to be actually true. It follows that a disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect. This was made clear by the Employment Appeal Tribunal in **Darnton v. University of Surrey** [2003] IRLR 133 EAT. In that case the employment tribunal had held that the claimant had not made a qualifying disclosure because the allegations relied upon were not factually correct. In allowing the employee's appeal, the Employment Appeal Tribunal confirmed that the proper test to be applied is whether or not the employee had a reasonable belief at the time of making the relevant allegations. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

20. The determination of whether a belief is reasonable is dependent on his subjective believe, but that belief must be objectively reasonable: **Babula v Waltham Forest** College [2007] IRLR 346.

21. In **Chesterton Global Ltd. v. Nurmohamed** [2018] ICR 731 CA at paragraphs 35 - 37, on the issue of public interest, it was held:

> "[35] …It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. That is in my view the ordinary sense of the phrase "in the public interest"…
>
> [36] The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be… The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.
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> [37] Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

22. The ‘Laddie factors’ referred to are: (a) the number of workers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; (c) the nature of the wrongdoing disclosed; and (d) the identity of the wrongdoer.

Harassment

23. Under section 26(1), harassment occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:

- violating the worker's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

25. Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

Victimisation

Section 27 provides that:

> “A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (*a*) B does a protected act, or
>
> (*b*) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (*a*) bringing proceedings under this Act;
>
> (*b*) giving evidence or information in connection with proceedings under this Act;
>
> (*c*) doing any other thing for the purposes of or in connection with this Act;
>
> (*d*) making an allegation (whether or not express) that A or another person has contravened this Act.”

Removal of party

26. Rule 34 of the Tribunal Rules provides:

> 34. – The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.

27. The First Respondent is likely to be vicariously liable for the Second Respondent in line with **WM Morrison Supermarkets PLC v. Various Claimants** [2020] UKSC 12.

Requirement of fair notice of a claim

28. It is trite to say that parties should know, in advance, reasonable details of the nature of the complaints that each side is going to make at the hearing, see **White v. University of Manchester** [1976] ICR 419 EAT.

Amending the claim

29. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

(i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.

(ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim. As Harvey notes at paragraph 312.01 in relation to this type of amendment: *"*So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.

(iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

30. In essence, **Selkent** said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]" before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." This approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201.

31. The Tribunal may take account of the apparent merits of the claims that the Claimant is seeking to introduce **Gillet v. Bridge 86 Ltd** UKEAT/0051/17

32. There is also Presidential Guidance.

33. In **Galilee v. Commissioner of Police of the Metropolis** [2018] ICR 634, the Employment Appeal Tribunal examined the authorities on the effect of granting an amendment on the time limits for claims.

34. When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence. Although the allegations in the original claim and in the amendment

were not identical, Rimer LJ, giving the only reasoned judgment of the Court, held that 'the thrust of the complaints in both is essentially the same'. The fact that the whistleblowing claim would require an investigation of the various component ingredients of such a case did not mean that 'wholly different evidence' would have to be adduced. **Evershed v. New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50.

Striking out

35. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially:-
>
> > "(i) At any stage in the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds – (a) Where it is scandalous or vexatious or has no reasonable prospect of success…"
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> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
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> > "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"
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> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

36. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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37. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

38. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

(i) Ordinarily, the Claimant's case should be taken at its highest.

(ii) Strike out is available in the clearest cases – where it is plain and obvious.

(iii) Strike out is available if the Claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

39. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

40. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

Deposit Orders

41. A deposit order can be made if the specific allegation or argument has <u>little</u> reasonable prospect of success. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring

a sum to be paid and by creating a risk of costs ultimately if the claim fails' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

42. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

CONCLUSION

Removal of party

43. The First Respondent is the employer of the Second Respondent and is the person responsible for the actions of all of its employees, including the Second Respondent. It has offered in the Amended Grounds of Resistance to indemnify the Second Respondent in accordance with the principle of vicarious liability. The Claimant will not suffer any prejudice from the removal of the Second Respondent as his actions fall to be considered as the London Fire Commissioner's actions The Claimant will still be able to pursue its allegations against the First Respondent citing Mr Sebright's alleged behaviour to support his claims. Accordingly, the Second Respondent is removed from the proceedings.

The ET1 as it stands

44. The Claimant says he was perceived as a 23 year old but that is not consistent with the narrative he provides and there is no evidence of any sort to support it. He alleges he was treated as or spoken to as a baby or a child but neither of these would corelate with being perceived as a 23 year old. The references to 'fatherly side' and 'grumpy' do not support his claim which commenced as an assertion. As it stands, the claims in the ET1 have no prospects of success.

Claimant's application to amend

45. The Claimant seeks to make three amendments to his age discrimination claim, expand the claim for whistleblowing and add additional claims.

46. The Tribunal holds that:

a. the three amendments proposed are not minor amendments, they are completely new facts. There are the addition of factual details to the existing allegation of whistleblowing which was not particularised in any way in the ET1. The additional allegations of harassment were not referred to in the ET1.

b. The claims may be out of time. If amendment was granted, the relevant date for the purposes of limitation would be the date the application is granted. Any allegations which relate to matters prior to 22 September 2019 would, on the face of it, have been out of time at the date the claim was originally presented. Amendment 1 may be out of time as it relates to a matter before 22 September 2019, amendments 2 and 3 may be out of time because the relevant date is the granting of the application. The Claimant says that that these are all continuing acts.

c. Whilst the case is in its early stages, the amendment should not have been necessary as the matters pleaded were all matters that could have been included in the claim form, with the exception of amendment 3.

47. The Tribunal is not satisfied that the Clamant has given a satisfactory explanation of the late amendments has been provided. The Claimant was at work at the time he presented his claim. He was able to articulate a number of specific heads of claim under the provisions of the Equality Act 2010 and the Employment Rights Act 1996 so had either received advice or was able to undertake research himself. The matters now sought to be introduced are factual matters were within his knowledge at the time. The Claimant said that there was not enough room on the claim form but it is possible to attach a document containing narrative to the claim form.

48. The Tribunal considered that there was no merit in the claims which are sought to be introduced. They all proceed on assertions which are unsupported in evidence. The claims are examined in detail in the next section.

49. The Tribunal considers that the Respondent is likely to be prejudiced by the introduction of stale factual allegations which involve individuals who were not named in the original claim. These complaints will extend the amount of evidence and factual enquiry that the Tribunal will have to undertake.

50. Weighing all the relevant considerations, the Tribunal decided not to permit the amendments.

Amended Grounds of Resistance

51. The Respondent is permitted to amend its Grounds of Resistance as corrected at the hearing. The amendment included accepting responsibility for the second respondent.

Strike out

52. The Tribunal considered the claim in the ET1 against the relevant legal tests and then considered the claim as it would have been had the amendment been allowed again against the relevant legal tests.

53. Where the Claimant alleges that “18/02 I inform GS about behaviour of CD after she openly berates me like a child repeatedly about my seat position even though Asst Dir GS authorised it. To which GS chastised me & lodged official disciplinary letter & condoned CDs actions”. The Claimant’s claim is based on his alleged feeling that he was treated like a child without explaining how Mr Sebright acted so as to objectively examine such allegation. Section 13 of the amended particulars does not link the protected characteristic with the unwanted conduct.

54. With regard to “22/02 GS said his fatherly side was coming out when being overly intrusive about my leave. 1 of 7+ occurrences, as well as unnecessary ?as before watch your leave’. (Suggesting he saw me as a child&treats me as such). 11/04/19 Qs leave again, schedules mting”. There is no reference to this comment in any email or document. There is not even a theme or pattern established on the

documentary evidence which supports the "7+ occurrences". There is not any reference to age particularly the Claimant's age. Section 12 of the Claimant's amended claims does not explain how such a statement demonstrates less favourable treatment due to the Claimant's age.

55. The remaining claims which all relate to being treated as a child "17/06/19 Leave again! Warns me like a child even after I've assured him in person&via email", "17/10...(GS sees me as a grumpy child)" do not have sufficient particularisation on how it is that the Claimant has been treated less favourably due to his age. At their highest, it is a criticism of the Claimant's behaviour namely acting like a grumpy child as opposed to being treated differently because of his perceived age.

56. In amendment 2, the lipstick comment does not pertain to any protected characteristic of the Claimant. His claim for age discrimination and age harassment fails to explain the link between the lipstick comment and his perceived age.

57. Amendment 3 has the Claimant addressed as ''young man'' by his younger manager. The Tribunal did not consider this demonstrated less favourable treatment because of perceived age.

58. Section 16 particularises the claim for harassment, victimisation and protected disclosures in amendment 1, however, the email evidence does not support the Claimant's assertion that "**Caroline Davis harassed** me further **s26 of the Equality act** tasking me with putting together 3 large easels". The emails disclose that the Claimant was asked to assist and he obliged in a positive and upbeat manner. The behaviour the Claimant asserts is unsubstantiated in the written evidence available to the parties. Meetings and informal discussions were not recorded nor minuted, however emails were sent to record as contemporaneously as possible the substance of the meetings. There is nothing in these notes or emails to indicate that the Respondent engaged in unwanted conduct. Furthermore, there is no evidence to indicate that the Respondent's meetings, or feedback have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

59. Even if this was unwanted conduct which had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment, it cannot be linked to the Claimant's perceived age which is the protected characteristic. There is nothing provided by the Claimant that would amount to harassment contrary to section 26 of the Equality Act 2010.

60. Similar considerations apply to victimisation. The detriment complained of is not such as to have reasonable prospects of success. Changing line managers is to Kirsten Rowan is not a detriment.

61. For the Claimant's claim in relation to protected disclosure to succeed, he must establish:

a. That he has made a protected disclosure(s) within the statutory meaning.

b. That, as a matter of causation, the reason or principal reason for the dismissal was that he made a protected disclosure(s).

62. The Claimant alleges to have made disclosures to Glenn Sebright where it is claimed that he informed Mr Sebright of the health and safety breaches in the setting up of the easels. The emails sent by the Claimant suggest that the issue was not a serious matter and is indicative that the matter was not regarded as a matter to be reported. There is also no explanation provided by the Claimant as to how the disclosure was made other than a bare assertion that it was made to Mr Sebright. This is insufficient even on a *prima facie* basis. The claim has no reasonable prospects of success as there is insufficient *prima facie* evidence of a disclosure of information.

63. His case is based entirely on a personal interpretation that the acts complained of were to do with his age or his perceived age but a person aged 23 is not a baby or a child. The allegations when viewed against the evidence disclose no reasonable grounds that the claims bear reasonable prospects of success that they may be made out at a Final Hearing.

64. The Tribunal considered whether it should make a deposit order rather than strike out the claims but the claims are incurably deficient.

65. The Tribunal then took on board the authoritative exhortation about not striking out discrimination cases and sought not to be too pedantic about the pleadings when weighing up the appropriate course of action as the claimant was a party litigant. The Tribunal exercised its discretion considering the claims in the round and also individually. The Tribunal concluded that the claims based on the perception of the Claimant's age as detailed in the judgment had no reasonable prospects of succeeding and should be struck out under Rule 37(1)(a) of the Employment Tribunal Rules. The Claimant is pursuing perceived grievances with his employer in the Tribunal in circumstances where there is no jurisdictional basis for so doing. The Tribunal also discharged the hearing which was fixed for 21, 22, 23 and 24 June 2021.

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Employment Judge Truscott QC

7 October 2020