EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114277/2019 and others

Preliminary Hearing Held by telephone on 24 February 2021 (A)

Employment Judge A Kemp

Mr I Mkwebu	**Claimant** **In person**
The Aedan Burt Care Trust (ABC Trust)	**First Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
Elizabeth Sophia Jans	**Second Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
[Claim against Third Respondent dismissed]	
Victoria Elrick	**Fourth Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
John Burt	**Fifth Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
Aedan Burt	**Sixth Respondent** **Represented by** **Mr D McFadzean** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claims against the sixth respondent are struck out under Rule 37 in so far as claims are made under sections 47B or 103A of the Employment Rights Act 1996.

2. The application to strike out the claims against the sixth respondent made under the Equality Act 2010 is refused.

REASONS

Introduction

1. This Preliminary Hearing was arranged to consider an application for strike out of the Claims made against the sixth respondent. Three earlier Preliminary Hearings have been held on 30 March 2020, 19 May 2020 and 21 July 2020, following each of which a Note was issued. On the last date I also issued a Judgment with regard to an application to amend by the claimant, which he has since appealed. The appeal has yet to be determined. It was originally dismissed on the sift, the claimant has sought a Rule 3(10) hearing, and that has yet to take place, with no date for the same yet intimated to the claimant I was informed.

2. The parties were agreed that the present hearing should proceed notwithstanding that extant potential appeal. They were further agreed firstly that it should proceed by telephone and not remotely as originally fixed, in respect that the claimant has suffered a health condition he set out in email correspondence, and secondly that it should be restricted to the sole issue of whether or not to strike out the Claims against the sixth respondent as he had sought.

3. The claimant has made a number of claims, which were discussed in the most recent Judgment and Note. They are primarily for discrimination under a number of provisions of the Equality Act 2010 but also for unfair dismissal, and (although this is disputed) for having raised a health and safety matter said to be a protected disclosure, being a claim for

automatically unfair dismissal for having made a protected disclosure and colloquially known as whistle-blowing, under section 103A of the Employment Rights Act 1996, together with detriments said to have been suffered before dismissal under section 47B, as well as (potentially at least) other statutory claims (again with the respondent disputing whether they are before the Tribunal), The claims are all defended.

4. The pleadings in the claims made are not easy to follow. Not only are there nine individual initial Claim Forms, but there are also additional documents which include what may be further and better particulars, and the application to amend which was partly granted, partly refused, and which is separately under appeal. In the Note from the earlier Preliminary Hearing I sought to have a List of Issues which can set out comprehensively and in one place all the claims made, and all elements of those claims. The parties are not however agreed on that, with the list prepared by the respondent not being agreed by the claimant. The claimant stated that he provided further and better particulars after the last Preliminary Hearing, in an email of 28 September 2020, which has not yet been addressed in case management. The respondent does not accept that the document does provide further and better particulars. The list of issues and what is before the Tribunal, including what if anything amounts to an application to amend, are matters that will require to be addressed separately by case management, but at present it does mean that the extent of the pleadings in the case are not clear. The pleadings by the claimant are also to an extent narrative in style. I take into account that the claimant is acting for himself, and not legally qualified, although he has eloquently referred in submission to a number of statutory provisions and authorities.

5. The claimant as stated represents himself, and Mr McFadzean represents all of the respondents. The application to strike out did not particularise the basis on which it was sought, but was confirmed during submission as set out below. Whilst the claim was commenced against six respondents, that against the third respondent has been dismissed on withdrawal.

Context

6. The claimant was employed by the first respondent. It is a Trust. A Trust is a separate legal person. Trusts are governed both by the terms of the Trust deed, and by statute, principally the Trusts (Scotland) Act 1921 and the Trusts (Scotland) Act 1961. The Trust was set up to manage the affairs, including provision of care, of the sixth respondent who is its beneficiary. The sixth respondent is an adult. The first respondent employed the claimant to carry out various roles in respect of the care of the sixth respondent. Although he is seriously disabled by his injuries physically, it is understood that the sixth respondent's mental capacity is unaffected, and that he is a highly intelligent man.

7. The sixth respondent's solicitor set out the circumstances of the sixth respondent in an email to the Tribunal, which included the following (the italics being in the original, and understood to be a quotation from a medical report):

> *"Aedan suffered a spinal fracture at C2 level – his cervical vertebrae – when he was 2 years old, in a road traffic accident. This means that he is tetraplegic and has no movement or feeling below that level. He can only move his head. He is paralysed from the neck down and requires to be ventilated as he cannot breath himself. He has very complex daily care needs to keep him alive. He is able to speak. He is normally breathed (rather than ventilated with a portable ventilator) as he has had surgery to embed electrodes in his chest which stimulate his phrenic nerves and cause his diaphragm to contract this allowing him to breathe himself. He needs 2 carers with him most of the time to address his numerous care needs. Aedan also suffers from curvature of the spine, (scoliosis) and a life threatening condition caused autonomic dysreflexia which causes death if not treated immediately. This can happen at any time if his autonomic system misreads normal signals from his body such as his bladder being overfull and causes his blood pressure to rise. He has a supra pubic catheter to deal with his bladder which needs emptying regularly and needs bowel care done regularly to prevent constipation. His bladder and bowels do not work normally. If his ventilator breaks down he has to be manually bagged to keep shoving air into his lungs. His life is precarious. He needs to be in a constant temperature or his temperature can drop /rise causing death. He can't*

regulate his own temperature and lives in an air conditioned house. He is dependent on his staff to spot the signs of dysreflexia and treat immediately and for food and drink. He takes medication to control the spasms that he suffers as a result of his spinal cord lesion at C2 but still suffers from these and these can cause his shoulders to dislocate regularly.

As will be appreciated, for Mr Burt to be involved in the proceedings will be a huge undertaking involving significant staff resources and potential delays in proceedings, notwithstanding that Mr Burt is mentally fully capable and can speak for himself. In a situation in which Mr Burt is not the employer, is not employed by the employer, is not an officer of the employer, is not an agent of the employer, and is the employer's service user, the claims that the Claimant wishes to make cannot lie against Mr Burt. The First Respondent has already made clear that it will meet any awards that are successfully made by the Claimant. There are no concerns about funds being available in the event of a successful claim – indeed given that the First Respondent is a trust for the benefit of Mr Burt and contains funds to allow him to live, and to allow him to be cared for by employees, it is absolutely natural that the First Respondent would be meeting any claims. It is a matter of great concern that the Claimant would see it as appropriate in these circumstances to seek to force Mr Burt, in Mr Burt's circumstances, to continue to be a Respondent to a claim which, if it proceeds to a full hearing, is highly likely to involve a significant number of consecutive days in Tribunal."

Sixth Respondent's submission

8. Mr McFadzean had produced a written submission. In brief summary Mr McFadzean argued that the claims of discrimination and whistle-blowing (if made for the latter of them, which he did not concede) as directed against the sixth respondent should be struck out as having no reasonable prospects of success, under Rule 37(1)(a). He confirmed that he accepted that although he had argued that the claim against the sixth respondent was unnecessary given that any award would be paid by the first respondent which had the funds to do so, and had invited the claimant to withdraw it, there was no basis for such an argument in Rule 37, and he confirmed that he did not seek to argue that a fair hearing was not possible given the circumstances of the sixth respondent under sub-paragraph (e). He supplemented his written submission in oral submission

primarily in response to the claimant's submission. In the argument that there were no reasonable prospects of success he also included an argument that there was no jurisdiction against the sixth respondent.

9. He argued that the claimant was not an employee of the first respondent, nor a worker, nor an agent. He argued that he had not instructed, caused or induced any act or omission of the first respondent, nor had the sixth respondent aided that, such that he could have no liability under the 2010 Act. He argued by reference to section 111(7) of that Act that the claimant did not fall within the terms of that section, and that although the views of the sixth respondent may have been taken into account, the decisions were made by the first respondent.

10. He argued that the section 43 and 103A claims were not before the Tribunal, and in any event the provisions relied on by the claimant did not apply to his situation or circumstances, given the status of the sixth respondent who was not an employee or worker of the first respondent, but its beneficiary. In relation to the arguments for a purposive construction made by the claimant, he argued that they were wrong in law.

Claimant's submission

11. The following is again a brief summary of the submission made by the claimant. The claimant argued that the claims should not be struck out. He argued that the sixth respondent had been involved in the decision making. He referred to an email on 11 October 2019, written after he had made a grievance, which was sent by Ms Fiona Mundy an employee of the first respondent stating in summary that the views of the sixth respondent would be taken into account in decisions affecting the claimant, and the role he did nor did not perform, and would do so in future as views may change. He also referred to an email from another employee of the first respondent Victoria Elrick, who is the fourth respondent, referring to the fact that the sixth respondent had read the email from the claimant raising a grievance. The claimant argued that the sixth respondent had colluded with employees of the first respondent in a manner that led to the detriments, and then the dismissal.

12. These comments are made in the context of the sixth respondent having used a racially offensive term to the claimant, described as the N word, in April 2018. That the sixth respondent both did so and was wrong to do so has not been disputed.

13. The claimant accepted that the sixth respondent was not an employee of the first respondent, nor a worker contracted to it. He referred to section 43A2 and section 43K(1)(a) and (2)a). The sixth respondent had been involved in his recruitment, and was at the interview. The work was carried out at the sixth respondent's home, where he lived alone albeit with carers attending. The Equal Opportunities Policy of the first respondent, part of his contract of employment, included the following:

> "Monitoring the success of the Equal Opportunities Policy will be achieved by a review of records obtained from the following sources:
>
> 1. Perceptions of staff, particularly when they themselves are of an ethnic minority, for example.
> 2. Review of disciplinary records
> 3. Exit interviews
> 4. Provision of an Equal Opportunities Monitoring form for completion in the job application pack
> 5. Review of job application forms and interview notes for both successful and unsuccessful candidates.
>
> The Nurse Manager, Assistant Manager or Team Leader will review this data on a regular basis and identify if improvements are needed and discuss this with Aedan. Action needed to make this improvement will then be taken."

14. He argued that he had used the grievance policy, raising issues under the Equal Opportunities Policy, and had been victimised for doing so. He argued that the terms of sections 111 or 112 were engaged.

15. He also argued that the Tribunal should have regard to the Human Rights Act 1998, and that there was he argued engagement with Articles 6 and 10. He referred to ***Gilham v Ministry of Justice [2019] UKSC 44, Campbell v Mirror Group*** (no citation was given), the terms of section 149 of the Equality Act 2010, ***McTigue v University Hospital Bristol***

NHS Trust UKEAT/1054/15, Day v Lewisham and Greenwich NHS Trust [2017] at the Court of Appeal and ***Cox v Ministry of Justice [2015] UKSC.*** He argued that he should be able to take a claim against the individual he considered responsible for the decisions that were taken, that they had followed disclosures as to health and safety, that in turn led to detriments and ultimately his dismissal. He argued that the case law extended the definition of worker such as to apply to the circumstances of the sixth respondent who determined the terms of his engagement, was therefore a worker for the purposes of the 1996 Act and as such a claim could be taken against him as also an employer for those same purposes.

The law

16. The question of whether or not to strike out a claim or response is addressed in Rule 37, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which provides:

> "**37 Striking out**
>
> (1) At any stage of 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) that it is scandalous or vexatious or has no reasonable prospect of success
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious……
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)"

17. Rule 37 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

> "**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

18. In the Equality Act 2010 there is provision for a claim against parties other than the employer. The terms of sections 109 - 112 are as follows:

"109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if—

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

(b) it is reasonable for A to do so.

(4) A person (B) commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (3)(a) which is false or misleading in a material respect.

(5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

[(5A) A does not contravene this section if A—

(a) does not conduct a relevant marriage,

(b) is not present at, does not carry out, or does not otherwise participate in, a relevant marriage, or

(c) does not consent to a relevant marriage being conducted,

for the reason that the marriage is the marriage of a same sex couple.

(5B) Subsection (5A) applies to A only if A is within the meaning of "person" for the purposes of section 2 of the Marriage (Same Sex Couples) Act 2013; and other expressions used in subsection (5A) and section 2 of that Act have the same meanings in that subsection as in that section.]

[(5BA) If A is a protected person, A does not contravene this section if A—

(a) does not allow religious premises to be used as the place at which two people register as civil partners of each other

under Part 2 of the Civil Partnership Act 2004 ("the 2004 Act"), or

(b) does not provide, arrange, facilitate or participate in, or is not present at—

(i) an occasion during which two people register as civil partners of each other on religious premises under Part 2 of the 2004 Act, or

(ii) a ceremony or event in England or Wales to mark the formation of a civil partnership,

for the reason that the person does not wish to do things of that sort in relation to civil partnerships generally, or those between two people of the same sex, or those between two people of the opposite sex.

(5BB) In subsection (5BA)—

"protected person" has the meaning given by section 30ZA(2) of the 2004 Act;

"religious premises" has the meaning given by section 6A(3C) of the 2004 Act.]

[(5C) A does not contravene this section by refusing to solemnise a relevant Scottish marriage for the reason that the marriage is the marriage of two persons of the same sex.

(5D) A does not contravene this section by refusing to register a relevant Scottish civil partnership for the reason that the civil partnership is between two persons of the same sex.

(5E) Subsections (5C) and (5D) apply only if A is an approved celebrant.

(5F) Expressions used in subsections (5C) to (5E) have the same meaning as in paragraph 25B of Schedule 3.

(5G) A chaplain does not contravene this section by refusing to solemnise a relevant Scottish forces marriage for the reason that the marriage is the marriage of two persons of the same sex.

(5H) Expressions used in subsection (5G) have the same meaning as in paragraph 25C of Schedule 3.]

(6) Part 9 (enforcement) applies to a contravention of this section by A as if it were the contravention mentioned in subsection (1)(c).

(7) The reference in subsection (1)(c) to a contravention of this Act does not include a reference to disability discrimination in contravention of Chapter 1 of Part 6 (schools).

111 Instructing, causing or inducing contraventions

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a) by B, if B is subjected to a detriment as a result of A's conduct;

(b) by C, if C is subjected to a detriment as a result of A's conduct;

(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether—

(a) the basic contravention occurs;

(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—

(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.

112 Aiding contraventions

(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

(2) It is not a contravention of subsection (1) if—

(a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and

(b) it is reasonable for A to do so.

(3) B commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (2)(a) which is false or misleading in a material respect.

(4) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating to the provision of this Act to which the basic contravention relates.

(6) The reference in subsection (1) to a basic contravention does not include a reference to disability discrimination in contravention of Chapter 1 of Part 6 (schools)."

19. In cases of public interest disclosures for detriment, a claim can competently be brought against a fellow worker. Section 47B(1A) of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to a detriment on the ground of having made a protected disclosure by a fellow worker. The right not to be dismissed for making a protected disclosure is provided for in section 103A. Section 47B does not apply where the worker is an employee who is dismissed, under sub-section (2).

20. Section 43K of that Act has an extended definition of "worker" under sub-section (1)(a) as a person who "works or worked for a person in circumstances where

(i) He is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person, or by both of them."

21. Section 43K(2)(a) states that employer includes "in relation to a worker falling within paragraph (a) of sub-section (1) the person who substantially determines or determined the terms on which he is or was engaged"

22. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. 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. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

23. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

24. Lord Hope of Craighead stated at paragraph 37:

" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often

highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

25. Those comments have been held to apply equally to other similar claims, such as to public interest disclosure claims in ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603***. The Court of Appeal there considered that such cases ought not, other than in exceptional circumstances, to be struck out on the ground that they have no reasonable prospect of success without hearing evidence and considering them on their merits. The following remarks were made at paragraph 29:

"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence."

26. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given at paragraph 30:

"Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian ***(Balls v Downham Market High School and College [2011] IRLR 217***, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (***ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51*****,** Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (***ED & F Man … ; Ezsias …).*** But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for

the tribunal to pre-empt the determination of a full hearing by striking out (***Ezsias*** … Maurice Kay LJ, at para 29)."

27. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

28. That it is competent to strike out a discrimination claim was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392***, in which Lord Justice Elias stated 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."

29. In ***Mechkarov v Citi Bank NA [2016] ICR 1121*** the EAT summarised the law as follows:

> "(a) only in the clearest case should a discrimination claim be struck out;
> (b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;
> (c) the claimant's case must ordinarily be taken at its highest;
> (d) if the claimant's case was 'conclusively disproved by' or was 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it could be struck out;
> (e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

Discussion

30. The standard against which the application for strike out must be judged is a very high one. It is only in the clearest of cases, in which there is no core of disputed fact, that it is permissible. When considering claims made by those who are representing themselves it is not sufficient only to consider the case as pled, but all the material before the Tribunal, (see for example ***Morgan v DHL Services Ltd UKEAT/0246/19)***. One of the difficulties in this case is the less than clear way in which the claimant has set matters out. Precisely what he claims, and why, is not easy to decern. His documents include issues that may or may not properly be before the Tribunal, such as claims under sections 100 or 104 of the Employment Rights Act 1996 to which he referred in a message dated 28 September 2020. The claims under section 47B and 103A were discussed during the hearing, although the respondent argues that they are not before the Tribunal. The extent of the issues before the Tribunal has also not yet been finalised as the parties have not agreed that, or the issue determined by case management, and the claimant's appeal against the earlier refusal of part of his application to amend is outstanding. That is not an entirely sold background on which to assess the current applications. The claimant has not obtained independent legal advice, but has referred to both statutory provisions and authority which indicate both much research on the points, and some understanding of the complexities of the law in this area.

31. I have decided that the sixth respondent has not met the test for strike out of the claims made under the Equality Act 2010. It is clear that the sixth respondent was not an employee of the first respondent, nor was he a worker (the claimant accepted both of those matters). There is no basis put forward that could lead to a conclusion that the sixth respondent was an agent of the first respondent. He was the beneficiary of the trust itself, being the first respondent. I then considered the terms of section 111 of the 2010 Act. In sub-section (1) A would be the sixth respondent, B either the first respondent or one of its employees and C the claimant. A basic contravention is defined in that sub-section and includes the terms of section 39 as to detriment or dismissal. The section refers to instructing,

causing or inducing discrimination (with inducing being direct or indirect). The terms of sub-section (7) are not as clear as they might be. They require that the sixth respondent be in a position to commit a basic contravention in relation to the first respondent or one of its employees. I was not referred to, nor have I found, any authority which explains that term, or any other source of material to shed light on its intended meaning. It appears to me, on what may be termed a provisional basis, that its meaning is that the sixth respondent must be shown to have had a sufficient degree of control or influence so as to be able to instruct, cause or induce the discriminatory act. Other meanings are however possible, and it may well be that the meaning and effect of the clause are best determined after all of the evidence has been heard. That will include what did, or did not, take place involving the sixth respondent. It is at least arguable that its meaning is not such that the sixth respondent is always excluded from the terms of the section. The section is drafted in a reasonably wide manner. It is to be construed purposively. It is possible, and it can be put no higher, that the evidence may show that the sixth respondent acted in a way which did either instruct, cause or induce (directly or indirectly) decisions of which the claimant complains, such as to take the claimant off a shift for the attendance of the sixth respondent at a wedding, that the claimant was then not offered other shifts, and that he was then dismissed. It is possible that the acts involving the sixth respondent in that regard, if they occurred, were conduct extending over a period. They may not be in either of those cases, but at this stage one cannot know.

32. I then turned to section 112. There is no equivalent to section 111(7) in that section, and the issue is whether the sixth respondent "aided" a contravention of the Act under its terms. That is a question of fact. It is at least arguable that the sixth respondent did so, if one considers the events in April 2018, and the alleged involvement of the sixth respondent to some extent in decisions taken as to the shifts referred to above, and the later dismissal. Whether there was that involvement and if so to what extent, then whether that meets the definition of the term "aided", depends on the evidence. But at this stage I must take the claimant's case at its highest. I

do so having regard to the documentation he has referred to, his pleadings, and the submission he made. It is true that the pleadings remain not clear in some respects, and the issues are yet to be finalised, but there is I consider a sufficient basis provided by the claimant in his submissions to me such that it is not possible to say that there are no reasonable prospects of success in the claims under the 2010 Act.

33. I also took into account that the respondent argues that the Tribunal has no jurisdiction on these issues because of time-bar. That however depends firstly on what the facts found are. They include the issue of whether or not there was conduct by the sixth respondent extending over a period, and if so what period, under section 123 of the 2010 Act. That depends on the evidence led on the same, and at this stage one cannot know how that issue will be determined. In so far as the sixth respondent is concerned, it is for example asserted that he had induced, or aided, the decision not to offer him any shifts, and that that continued up to the point of dismissal. There are other issues arising, but if that is held to have been established in the evidence it is possible that the claims against the sixth respondent are not subject to the primary time bar. If it is otherwise there is the secondary issue of whether it is in any event just and equitable to allow it to proceed, also under section 123. That depends on all the circumstances, and it has been accepted, as set out in the Note following the last Preliminary Hearing, that these issues are best addressed at a Final Hearing. There is at least a possibility of the claimant prevailing on all or some of these issues, and as such I cannot say that the claimant has no reasonable prospects of success on such points.

34. That is far from saying that there are reasonable prospects of success in the claims against the sixth respondent, or that the claims may succeed in whole or part, but the test is as described a high one. I consider that the respondent has not met it. The application to strike out the claims under the 2010 Act raised against the sixth respondent must therefore fail.

35. I turn to the claim as to protected disclosures, otherwise referred to as whistle-blowing. I shall proceed on the basis that the claims are properly before the Tribunal in the sense that they have been pled sufficiently and

competently. That issue is one that is not yet determined but for the purposes of a strike out application it is appropriate to assume that that is so. The first difficulty for the claimant in his claim (not against the first respondent his employer, as that is a separate matter) against the sixth respondent is the terms of section 47(2), which provide that the section does not apply where the worker is an employee and the detriment is dismissal. The claimant was an employee. He was dismissed. That dismissal was by the first respondent as his employer. The import of the provision is that in such a situation no claim lies against another worker for a dismissal alleged to be automatically unfair where the reason or principal reason is that the claimant had made a protected disclosure.

36. The second difficulty for the claimant is the terms of section 47(1A) which provide that "A worker (W) has the right not to be subjected to any detriment by any act, or a deliberate failure to act, done –

(a) by another worker of W's employer in the course of that other worker's employment or

(b) by an agent of W's employer with the employer's authority".

37. That is the foundation of the claim by the claimant in respect of detriment, and dismissal, for having made protected disclosures as laid against the sixth respondent. The sixth respondent is not however another worker of the first respondent, as the claimant accepted. The sixth respondent is not a worker who has worked for the first respondent at any stage. The claimant was not introduced to the first respondent to work for it at all, let alone by the sixth respondent. There is no basis to hold that the claimant could fall within the terms of section 43K.

38. There is also no basis to conclude that the sixth respondent was an agent of the first respondent acting with authority as referred to above. The two potential routes for a claim against the sixth respondent are therefore not met for either detriment or dismissal, and for the latter the issue of dismissal cannot be raised by someone said to be a worker in any event, where the claimant is an employee, as here. That means that the sole rights to claim unfair dismissal (automatically under section 103A) and for any detriments lies against the first respondent, the employer.

39. The claimant sought to argue that that conclusion should not be reached. He did so by three methods, firstly by reference to the Human Rights Act 1998, secondly by reference to the terms of the 1996 Act and thirdly by reference to case law.

40. On the first of these, I am not satisfied that any argument under that Act lies in the present circumstances. The claimant has a right to a fair trial, and a right to freedom of expression, but those rights are not directly justiciable in the Employment Tribunal. Whist the Tribunal is a public authority and has duties under that Act, the claims made against the first respondent, and others, are to proceed to a Final Hearing in due course, and the claimant will have a fair trial of his claims. He does not have a right to choose against whom he can claim. That right is conferred on parties, and the Tribunal, by statutory provision. The claimant sought to argue that he had a right under the 1998 Act to be able to sue the sixth respondent as an individual, but such a right does not I consider flow from the terms of the 1998 Act. The rights the claimant has are those deriving from statute, in this case the 1996 Act and the 2010 Act, and they have the provisions to which I have referred, which I do not consider can be said to be in breach of the Human Rights Act 1998.

41. The second argument was made in relation to section 43K of the 1996 Act, and that its terms should be construed so as to permit the claims against the sixth respondent. In my judgment that section extends the definition of worker so as to extend the class of persons who may make claims, not the class of persons against whom claims can be made. That is I consider the purpose of that provision derived from its terms, and the scheme of the Act as a whole. In this regard it is relevant to repeat the fact that the claimant has a claim against the first respondent as his employer. He is not being prevented from arguing either ordinary unfair dismissal under section 94, or automatically unfair dismissal under section 103A, nor (so far as the claims are made, which is disputed by the respondent) detriment under section 47B as against the first respondent, where those claims are within the jurisdiction of the Tribunal.

42. The third argument was made in relation to a number of authorities. The claimant's argument, in summary, is that a purposive construction should be given to the statute so as to confer on the claimant a right to pursue his claim against the sixth respondent in light of that body of authority. I have considered them all, but do not consider that they support the argument that the claimant makes. The facts and circumstances of those claims were entirely different. They were not similar to the circumstances of the present case where the claimant, an employee and who has claims related to protected disclosures against his employer the first respondent, also seeks to make claims against an individual who was not employed by the first respondent either as an employee, or a worker.

43. ***Gilham v Ministry of Justice [2019] UKSC 44,*** was an issue as to whether a Judge was a worker entitled to claim in respect of whistle-blowing at the Employment Tribunal. It was held that she was, and although it is correct to note that at paragraphs 26 and 27 reference was made to her human rights there was a reference to a right to claim in court, and secondly that the decision was to utilise a purposive construction to allow the definition of worker to extend to a Judge in her circumstances partly as the failure to do so would deny her a Tribunal remedy. That was where she otherwise could not pursue a claim of whistle-blowing against any other party. The claimant can pursue his claim against the first respondent. He wishes to do so it also against the sixth respondent. I do not consider that that case would permit me to find that he can. It would not serve any purpose of the legislation as he does have the claim agains the first respondent. It would require such a departure from the terms of the statute that would not be a permissible interpretation. It would go against the grain of the legislation, particularly the terms of section 47(2).

44. ***Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22*** did not appear to me to have any relevance to the issues before me, and dealt with different rights, involving the disclosure of drug addiction of a model. The claimant did not give a full citation, and if the case above is not that which he referred to he may raise that separately by an application for reconsideration.

45. ***McTigue v University Hospital Bristol NHS Trust 2016 IRLR 742,*** in which the claimant was an employee of an agency and was engaged to work for the respondent at one of their centres, was then referred to. She had a written contract of employment with the agency and was also issued with an Honorary Appointment or contract by the respondent. She made claims based on her having made protected disclosures to the respondent, alleging that she was subjected to detriments (including her removal from the engagement) by the Respondent. The Tribunal held that she had not satisfied the terms of section.43K(1)(a)(ii), but the EAT allowed the appeal. It was sufficient that the respondent substantially determined the terms on which she was engaged to do the work. If both the agency and the respondent substantially determined the terms of her engagement, the fact that the respondent substantially determined the terms of her engagement meant that the Respondent was her 'employer' for the purposes of s.43K(2)(a). That is however very different from the circumstances of the claimant, which are referred to above, and that case was not one about seeking to convene an individual. It was also a case involving an agency worker, which the claimant was not. Whilst he sought to argue that he was employed by the sixth respondent, there is I consider no basis to do so. As an employee of the first respondent, the terms of section 43 are not engaged in respect of the claimant. A purposive construction may be appropriate where there is otherwise no remedy available but here the claimant has a remedy if his allegations are upheld, against the first respondent.

46. In ***Day v Lewisham and Greenwich NHS Trust*** **[2017] EWCA Civ 329** an appeal was allowed by the Court of Appeal in not dissimilar circumstances to those in the preceding case, as the Tribunal had applied the wrong test; it was asking itself which party, as between two, played the greater role in determining the terms on which the claimant was engaged. It did not envisage the possibility that both could substantially determine the terms of engagement. The court rejected the submission that the Tribunal would have been bound to find in favour of the Claimant had it properly directed itself and this matter was remitted to a fresh Tribunal. It is true that it was clearly Parliament's intent in this section to extend the

protection of the whistleblowing provisions, and a court or tribunal in interpreting and applying it should, in a case of ambiguity, seek a solution applying that extension rather than limiting it: ***Hinds v Keppel Seghers UK Ltd [2014] IRLR 754***. *(*a case which the claimant did not cite to me but which my researches led to*)* I do not consider that there is ambiguity either in relation to the statutory provisions for the reasons given, or requiring extension in relation to the claimant's circumstances where his claim lies separately against the first respondent as also explained above.

47. Finally ***Cox v Ministry of Justice [2016] UKSC 10*** concerned whether to impose vicarious liability for the acts of a prisoner in prison in the context of a claim for personal injuries by an employee injured by that prisoner. Vicarious liability confers liability on one party for the acts or omissions of another. What the claimant argues here is the liability of the sixth respondent for his own acts or omissions, and no issue of vicarious liability conferred on him (as opposed to conferred on the first respondent by the acts or omissions of its employees for example) arises.

48. The claimant argued that he would be denied justice if he could not pursue his claim against the sixth respondent. That is an argument that is relevant to the second stage of the test, and whether it is proportionate to strike out a claim having regard to the overriding objective. I consider that it is proportionate to strike out these claims, and I reject the claimant's contention in this regard. Firstly, as already stated, the claimant is not being denied any ability to pursue remedy in regard to his whistle-blowing claim, he has that remedy potentially against the first respondent. Secondly, the Tribunal will consider the facts that it hears evidence on, and is in a position to make findings in fact which may or may not relate to the sixth respondent depending both on what evidence is presented to it, and how it assesses that evidence. Thirdly the claimant is not entitled as a matter of law to pursue claims against an individual in all circumstances, or as he wishes, and he is not being denied justice as he claims, in my judgment. The statutory provisions are the framework that Parliament has chosen to impose, and the effect is to restrict the claims made, in these circumstances, in a way that excludes someone in the position of the sixth respondent. Finally, the claim as to whistle-blowing is but one of the claims

made by the claimant, and the remaining claims include those of discrimination. Whilst it is not impossible that the principal reason for dismissal was because the claimant made, as he alleges, a protected disclosure, and that the dismissal was because of race, whether as direct discrimination, indirect discrimination, harassment or victimisation, to a significant extent at least (which is less of a requirement than that of being the principal reason), the inter-relation of such different claims is not straightforward. If the claimant's discrimination claims are made out, it is possible but far from clear that the whistle-blowing claim would also succeed.

49. In all the circumstances I consider that it is appropriate, proportionate and in accordance with the overriding objective in Rule 2 to strike out the claims under sections 47B and 103A of the Employment Rights Act 1996. That has assumed that they were competently before the Tribunal.

50. There are other claims that the claimant may seek to make to which he has referred in documentation, and the position in those respects is not addressed specifically in this Judgment as it was not raised by the respondent in the application made (Mr McFadzean explaining that he sought strike out of those claims he considered were before the Tribunal, or could be, and there may be others as referred to above). For the avoidance of doubt, therefore, the sixth respondent may if so advised apply to strike out claims made under the Equality Act 2010 on other grounds as the case management of the claims proceeds, as precisely what is claimed and why is yet to be clarified at a case management Preliminary Hearing, or any claims sought to be made against him under the Employment Rights Act 1996 under other provisions of that Act, as at this stage it is not yet settled precisely which claims are made, on what basis, and with what specification, and whether they require an application to amend. If so, that application if opposed will require to be assessed separately.

Conclusion

51. The claim against the sixth respondent is struck out in so far as it is alleged to arise from the claimant having made one or more protected disclosures under sections 47B or 103A of the Employment Rights Act 1996.

52. The claim as directed to the sixth respondent under the Equality Act 2010 is not struck out.

53. A further Preliminary Hearing shall be arranged to address outstanding applications and for case management. Notice of the same shall be issued to the parties separately.

Employment Judge: **Alexander Kemp**
Date of Judgment: **03 March 2021**
Date sent to parties: **08 March 2021**