EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 22 October 2020
Judgment handed down on 9 April 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MR DANIEL COX — APPELLANT

ADECCO & OTHERS — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	MR BEYZADE BEYZADE (of Counsel) and MR HENRY KING (of Counsel) Instructed by: Advocate 50-52 Chancery Lane London WC2A 1HL
For the First Respondent (Adecco)	MR RICHARD HAYES (In-house lawyer) Adecco Millennium Bridge House 2 Lambeth Hill London EC4V 4BG
For the Second Respondent (Giant Professional Ltd)	MR MARK GREEN (of Counsel) Instructed by: DAS Law North Quay Temple Back Bristol BS1 6FL
For the Third Respondent (London Borough of Croydon)	MS HOLLIE HIGGINS (of Counsel) Instructed by: Browne Jacobson LLP Victoria Square House Victoria Square Birmingham B2 4BU

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES, PRACTICE AND PROCEDURE

You can't decide whether a claim has reasonable prospects of success if you don't know what it is. Before considering strike out, or making a deposit order, reasonable steps should be taken to identify the claims, and the issues in the claims. With a litigant in person, this involves more than just requiring the claimant at a preliminary hearing to say what the claims and issues are; but requires reading the pleadings and any core documents that set out the claimant's case.

The issues were not sufficiently identified in this case, which was the backdrop to the errors of law the tribunal made in determining that the claim of protected disclosure detriment or dismissal had no reasonable prospects of success because the tribunal: (1) failed to sufficiently analyse the information the claimant contended he had disclosed; (2) failed to consider the context in which the disclosure was made; (3) misdirected itself as to the test for whether protected disclosure were in the reasonable belief of the claimant made in the public interest; and (4) failed to properly analyse to whom the disclosure was made, and whether it was arguable that any qualifying disclosure was protected.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgment of Employment Judge Martin made at a preliminary hearing on 12 July 2019. The judgment was sent to the parties on 17 August 2019.

The factual background

2. Little of the factual background is set out in the judgment. The following is designed to set out the background as best I can understand it from the pleadings, the alleged protected disclosure and the relevant contentions of the parties. Obviously, I make no findings of fact, and do not limit the approach to be adopted by the employment tribunal in determining the factual disputes, to any extent. However, some consideration of the facts asserted by the parties is necessary to understand this appeal.

3. The claimant worked in the Special Educational Needs Department of the third respondent from 9 October 2017. He was an agency worker. The claimant describes his initial role as an Education, Health and Care Plan ("EHCP") Assistant. He was initially employed by the first respondent, who assigned him to the third respondent. The claimant contends that he was approached in January 2018 by Sheryl Brand-Grant, Interim 0-25 SEND Placements & Personalisation Manager for the third respondent and asked to apply for the role of EHCP Co-Ordinator. The claimant contends that he told Ms Brand-Grant that he was not qualified for the role, but nonetheless was persuaded to apply for it. The claimant contends that he was informed that he had been successful in the application. The respondents contend that the claimant entered into a contract with the second respondent from 29 January 2018. It appears that from this time the claimant was charged out to the third respondent as an EHCP Co-Ordinator, or in any event at an increased rate. It also appears to be common ground that the claimant did not, in fact, work

as an EHCP Co-Ordinator, but continued in his original role. The claimant contends that one of his colleagues did work in the EHCP Co-Ordinator role, despite not being qualified to do so.

4. Colleagues discovered that the claimant was being charged out to the third respondent by the second respondent at a rate in excess of that for an EHCP Assistant. The claimant contends that staff at the first respondent gave his colleagues this information. The claimant sent a number of emails raising his concerns and attended meetings with staff of the first respondent and the third respondent at which he raised these issues. His principal concern, at least initially, was that he considered his personal data had been given to his colleagues in breach of the GDPR. This culminated in the claimant writing on 5 July 2018 to the first respondent alleging that there had been breaches of the GDPR in respect of his pay information, that he had been underpaid and that staff were being put into jobs for which they were not qualified. In the pleadings the claimant contends that he had disclosed information that tended to show that there had been fraud; essentially, that the second respondent was overcharging the third respondent by claiming that staff were working at a higher level than they were, and then not passing on the additional payment to the workers. On 8 July 2018, the claimant states that he was informed by the first respondent that his assignment with the third respondent had been terminated.

The proceedings

5. The claimant submitted a claim to the employment tribunal on 14 August 2018. The claimant's principal claim was that he had been subject to detriment and/or dismissed for making protected disclosures.

6. Employment Judge Downs held a preliminary hearing for case management on 18 February 2019. Schedule A to the Order set out "the Issues". They were somewhat vague and did

not identify the specific disclosures, or the basis upon which they were contended to be qualifying and protected. An order was made for the claimant to provide additional information in respect of the disclosures. The preliminary hearing that was subsequently held by EJ Martin was fixed:

> **"The Tribunal shall determine at that hearing the application by the First respondent that the claims shall be struck out and/or that the claimant pay a deposit. Additionally, the hearing shall determine any contested applications to amend the Claim and any timely application by the Second and Third respondents to strike out the Claim or order that the claimant pay a deposit. As appropriate the tribunal shall also timetable this matter to final hearing."**

7. The first respondent had applied for strike out or a deposit order by email dated 9 October 2020, on the basis that from 29 January 2018 the claimant had not been an employee of the first respondent, and that there was no, or little, reasonable prospect of success in the allegation that he had made a protected disclosure.

8. On 5 April 2019 the third respondent applied for strike out or deposit order, principally on the basis that there was no, or little, reasonable prospect of the claimant establishing that he had made a protected disclosure. On 10 April 2019 the second respondent made a similar application.

9. The applications were considered by EJ Martin on 12 July 2019. The claimant was a litigant in person. Other than the claimant providing additional information (and some other documentation), there had been no further clarification of the issues, and it does not appear that EJ Martin had a list of issues to work from. It is important, wherever possible, to have properly identified the issues in a case before considering strike out.

10. Things often go wrong at preliminary hearings when considering strike out, or deposit orders, where there has been insufficient consideration of the issues. In this case, a good starting

point would have been to identify with care the protected disclosures asserted, and the basis upon which they were contended to be qualifying and protected.

The Law

Public interest disclosure

11. The term "qualifying disclosure" is defined by section 43B Employment Rights Act 1996 ("ERA 1996"), which provides, so far as is relevant:

> **"43B.— Disclosures qualifying for protection.**
>
> **(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,**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **…**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
>
> **… or**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."**

12. There must be a disclosure of information. A disclosure of information may be made as a part of making an allegation. In **Kilraine v London Borough of Wandsworth** [2018] ICR 1850, Sales LJ held that:

> **"In order for a communication to be a qualifying disclosure it has to have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)"."**

13. In the reasonable belief of the worker making the disclosure, the information must tend to show one of the matters set out at paras. 43B(1) (a) to (f) ERA 1996: in **Chesterton Global**

Ltd v Nurmohamed [2018] ICR 731, Underhill LJ described this as "wrongdoing". I shall adopt that useful shorthand in the rest of this judgment.

14. In the reasonable belief of the worker making the disclosure, it must be made in the public interest. The worker must believe, at the time of making it, that the disclosure is made in the public interest, and that belief must be reasonable. Underhill LJ considered this requirement in **Chesterton**:

> **"26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B(1).**
>
> **27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in *Babula's* case [2007] ICR 1026 (see para 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**
>
> **28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the "Wednesbury approach" (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking- that is indeed often difficult to avoid – but only that that view is not as such determinative.**
>
> **29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.**

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase *"in* the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

31. Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. Although Mr Reade in his skeleton argument referred to authority on the *Reynolds* defence (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127) in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras 10—13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. This seems to have been essentially the approach taken by the tribunal at para 147 of its reasons."

15. A "protected disclosure" is one that is made in accordance with section 43A ERA 1996:

"43A. Meaning of "protected disclosure".

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

16. A qualifying disclosure becomes a protected disclosure because of whom it is made to. The most common examples are the employer of the person who makes the disclosure or some other person who is responsible. This is provided for by section 43C ERA 1996:

"43C.— Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person."

17. Workers are protected against being subject to detriment done on the ground that they made protected disclosures by section 47B ERA 1996:

> **"47B.— Protected disclosures.**
>
> **(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. …**
>
> **(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker" , "worker's contract" , "employment" and "employer" have the extended meaning given by section 43K."**

18. Employees are protected against being dismissed for making protected disclosures by section 103A ERA 1996:

> **"103A. Protected disclosure.**
>
> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.""**

19. The terms "worker" and "employee" are defined by section 230 ERA 1996:

> **"230.— Employees, workers etc.**
>
> **(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—**
>
> > **(a) a contract of employment, or**
> >
> > **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**
>
> **and any reference to a worker's contract shall be construed accordingly.**
>
> **(4) In this Act "employer" , in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed. …**

> **(6) This section has effect subject to sections 43K, 47B(3) … and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker" , "worker's contract" and, in relation to a worker, "employer" , "employment" and "employed" have the extended meaning given by section 43K."**

20. An extended meaning of the term "worker", and related expressions, is provided for by section 43K ERA 1996:

> **"43K.— Extension of meaning of "worker" etc. for Part IVA.**
>
> **(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—**
>
> **(a) works or worked for a person in circumstances in which—**
>
> **(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, …**
>
> **(2) For the purposes of this Part *"employer"* includes—**
>
> **(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged …"**

Strike out

21. The President of the EAT, Choudhury J, helpfully summarised the current, and well-settled, state of the law on strike out in **Malik v Birmingham City Council** UKEAT/0027/19:

> **"29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:**
>
> **"Striking out**
>
> **37.— (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..."**
>
> **30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see *Anyanwu & Another v South Bank University and South Bank Student Union* [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of *Mechkarov v Citibank N.A* [2016] ICR 1121, which is referred to in one of the cases before me, *HMRC v Mabaso UKEAT/0143/17*.**

> **31. In *Mechkarov*, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:**
>
> **(1) only in the clearest case should a discrimination claim be struck out;**
>
> **(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;**
>
> **(3) the Claimant's case must ordinarily be taken at its highest;**
>
> **(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and**
>
> **(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."**
>
> **32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In *Community Law Clinics Solicitors Ltd & Ors v Methuen* UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that *"the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."***
>
> **33. A similar point was made in the case of *ABN Amro Management Services Ltd & Anor v Hogben* UKEAT/0266/09, where it was stated that, "*If a case has indeed no reasonable prospect of success, it ought to be struck out*." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council* [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out."**

22. A similar approach to that taken to strike out in discrimination claims is taken in protected disclosure claims: **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126.

23. In addition to the summary of the current state of the law on strike out, I consider that **Malik** is important because of the consideration the President gave to dealing with strike out of claims made by litigants in person.

24. Guidance for considering claims brought by litigants in person is given in the Equal Treatment Bench Book ("ETBB"). In the introduction to Chapter 1 it is noted, in a very well-known passage:

> **"Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration,**

anger, bewilderment and disadvantage, especially if appearing against a represented party.

The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.

Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal.

All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants."

25. At para. 26 of Chapter 1 ETBB, consideration is given to the difficulties that litigants in person may face in pleading their cases:

"Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:

- **Failing to choose the best cause of action or defence.**
- **Failing to put the salient points into their statement of case.**
- **Describing their case clearly in non-legal terms, but failing to apply the correct legal label or any legal label at all. Sometimes they gain more assistance and leeway from a court in identifying the correct legal label when they have not applied any legal label, than when they have made a wrong guess." [emphasis added]**

26. I consider that the ETBB provides context to the statement by the President of the EAT in **Malik** about the importance of not expecting a litigant in person to explain their case and take the employment judge to any relevant materials; but for the judge also to consider the pleadings and any other core documents that explain the case the litigant in person wishes to advance:

"50. The claimant was not professionally represented. He had, however, produced a detailed witness statement which, as I set out above, contained some material which might support an allegation of race discrimination. He also placed before the Tribunal other documents in which he attempted to set out his case. These included documents entitled "Additional information", which are appended to the claim form and which contained some of the matters referred to in his witness statement.

51. In my judgment, the obligation to take the Claimant's case at its highest for the purposes of the strike-out application, particularly where a litigant in person is involved, requires the Tribunal to do more than simply ask the claimant to be taken to the relevant material. The Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it. Insofar as it concludes that there is nothing of substance behind it, it should, in accordance with the

> **obligation to adequately explain its reasoning, set out why it concludes that there is nothing in the claim."**

27. Because the material that explains the case may be in documents other than the claim form, whereas the employment tribunal is limited to determining the claims in the claim form (**Chapman v Simon** [1994] IRLR 124), consideration may need to be given to whether an amendment should be permitted, especially if this would result in the correct legal labels being applied to facts that have been pleaded, or are apparent from other documents in which the claimant seeks to explain the claim. The fact that a claim as pleaded has no reasonable prospect of success gives an employment judge a discretion to exercise as to whether the claim should be struck out: **HM Prison Service v Dolby** [2003] IRLR 694; **Hasan v Tesco Stores Ltd** UKEAT/0098/16. Part of the exercise of that discretion may involve consideration of whether an amendment should be permitted should the balance of justice in allowing or refusing the amendment permit if it would result in there being an arguable claim that the claimant should be permitted to advance. In **Mbuisa v Cygnet Healthcare Ltd** UKEAT/0119/18, HHJ Eady QC held at para. 21:

> **"Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where – as Langstaff J observed in Hassan – the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."**

28. From these cases a number of general propositions emerge, some generally well-understood, some not so much:

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

29. If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it?

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse

the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.

31. Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals,

should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focussed as possible.

33. I have referred to strike out of claimants' cases, as that is the most common application, but the same points apply to an application to strike out a response, particularly where the respondent is a litigant in person.

34. In many cases an application for a deposit order may be a more proportionate way forward.

35. This is the background to the specific errors of law alleged in this case.

The analysis necessary to consider strike out in this case

36. In this case, the application for strike out required the employment judge to consider:

(1) What was the information that the claimant contended he disclosed;

(2) What wrongdoing did the claimant contend he reasonably believed that information tended to show;

(3) On what basis did the claimant contend that he reasonably believed that the disclosure was made in the public interest (this required consideration of the basis on which the claimant contended he believed the disclosure was in the public interest and the basis upon which he contended that belief was reasonable);

(4) To whom did the claimant contend the disclosure was made, and on what basis did he contend that a disclosure to that person made it a protected disclosure;

(5) What did the claimant contend was done on the grounds of him making the protected disclosure and on what basis did the claimant contend the reason, or principal reason, for his dismissal was making the protected disclosure.

37. These issues require reasonable analysis before it is possible to consider whether the claim has no reasonable prospect of success. I will use them as a framework for analysing the judgment, grounds of appeal and responses. It necessarily involves taking the grounds of appeal out of order, but I consider it is logical.

The approach adopted by the judge

38. EJ Martin looked to the claimant to identify how he put the claim, rather than focussing on what his pleadings stated. At para. 7 she stated:

> **"After hearing the respondent's applications, I spent time with the claimant so that the claimant could identify precisely what parts of the disclosure he relies on as being information and how this tended to show criminality and how it was in the public interest. The burden is on the claimant to show that the disclosure was a protected disclosure. I wanted to be sure that the parts of this letter where he said information was clear to me. I first considered each individual matter I was taken to in isolation and then considered the letter in its totality."**

39. While the employment judge did refer to the letter, she did not refer to any of the conversations and communications leading up to the letter being sent that the claimant contended in his pleadings (and, indeed, in the letter itself) provided the context.

The information the claimant alleged he disclosed

40. By the time of the preliminary hearing, the claimant's case was set out in a number of documents:

(1) The claim form;

(2) Additional information;

(3) A Scott schedule; and

(4) Draft amended particulars of claim.

41. From these documents it was clear, as I consider it was on a fair reading of the original claim form, that the claimant contended that his disclosure was principally made in a letter of 5 July 2018, but that the letter was the culmination of a number of communications as contended at ground 3 of the Notice of Appeal. These included "the meetings on 02nd July 2018; 03rd July 2018; the telephone calls with Emma Hyde: and email correspondences with Emma Hyde". It is clear that the claimant contended that he had disclosed information that:

(1) He was being charged out at too high a rate;

(2) His (and possibly others') personal data had been disclosed to his colleagues; and

(3) People were being put into roles for which they were not qualified.

42. This is clear from reading the documents as a whole and, for example, para. 3 of the claimant's additional information.

43. EJ Martin does appear, to some extent, to have identified these three types of information the claimant contended he had disclosed.

44. The first, being charged out at too high a rate (paras. 8 and 9), is no longer relied upon.

45. In respect of the second, data protection breaches, it is not clear to me whether EJ Martin accepted that there could, arguably, have been a disclosure of information. At para. 10, EJ Martin stated:

> **"Here the claimant says he raised concerns about how people could have information about his pay. And says that it must be a breach of his data but does not give any further information."**

A

46. It may be that EJ Martin concluded that it was not arguable that the claimant disclosed any information about GDPR. On balance, I do not consider that is what she concluded. She states that the claimant does not give "any further information"; not that it is not reasonably arguable that he disclosed any information. If I am wrong in that, I consider that the claimant is correct in the contention at ground 4(c) of the Notice of Appeal, that such a conclusion would fail to take into account a relevant matter, as it was clear that the claimant asserted that his pay data had been given to a colleague. It must at least be arguable that this was a disclosure of information.

B

C

47. At para. 17, EJ Martin considered the contention in respect of unqualified staff:

> **"In his submissions the Clamant explained he was referring to another person called Mr J who was not qualified. He may well have been, however this information is not in the letter and it was not possible to identify who the claimant was talking about. This is an unsupported allegation which the legislation does not give protection to."**

D

48. The reasoning appears to be that if the unqualified person was not named there could not possibly be a disclosure of information. I do not accept that a disclosure about people can only ever be a disclosure of information if names are named. A disclosure could, at least arguably, have sufficient factual content and specificity such as is capable of tending to show "wrongdoing" without specifying names. If EJ Martin did conclude there was not even an arguable claim that the claimant disclosed information about unqualified staff, I consider that the claimant is correct in the contention at para. 4(c) of the Notice of Appeal, that she failed to take account of relevant information set out in the letter of 5 July 2018. Furthermore, I consider the reasoning is too brief to ascertain what conclusion EJ Martin reached. There was no consideration of **Kilraine** and EJ Martin may have been reverting to the unhelpful approach of adopting a stark contrast between allegation and information.

E

F

G

H

Reasonable belief that the information tends to show "wrongdoing"

The type of wrongdoing

49. The third respondent focused much of its argument (which was adopted by the other respondents) on the contention that the claimant only ever argued that the information he disclosed tended to show there was wrongdoing by way of fraud; an allegation that is now not pursued. It is certainly the case that fraud was the core contention. However, the claimant was a litigant in person and it was necessary to consider his pleadings with care, but without pedantry. I consider it is clear that he was also alleging breaches of the GDPR and that unqualified staff were being provided for the EHCP Co-Ordinator role even if the specific type of wrongdoing provided for by section 43B ERA 1996 was not spelt out.

50. In the claim form, it was stated under the heading "Introduction" at para. 4:

> **"The disclosure tended to show a criminal offence had been committed, is being committed or is likely to be committed (s.43B(l)(a) ERA."**

51. In the same section at para. 6, the claimant referred to:

> **"Breach of Personal Data (GDPR)."**

52. In the record of the preliminary hearing for case management before EJ Downs on 18 February 2019, it was stated at para. A3:

> **"The claimant concedes that the tribunal does not have the jurisdiction to determine claims under GDPR or the Data Protection Act. However, he asserts that breaches of data/information law form the background to his claim."**

53. The third respondent argued that this made it clear that breach of data protection rights was not a form of wrongdoing that the claimant asserted his disclosure tended to show. However, in the letter of 5 July 2018, the claimant stated:

> **"I raised my concerns that how this could even have come about and that the only way someone could have this information is because my timesheet states exactly what the EHCP Co-ordinator had said to me. I stated that this must be a**

breach of my data and under GDPR laws this is extremely concerning that my data being leaked can cause so much distress at work."

54. This makes it clear that alleged breach of GDPR was not just a matter of background.

55. In his additional information, the claimant stated of his letter of 5 July 2018:

"The Disclosure was specifically, …

c. That C's data had been leaked to third partied, which was causing detriment to him by employees of R3."

56. It also appears that EJ Martin accepted that this was a type of wrongdoing that the claimant contended he made a disclosure about. At para. 10 she stated:

"The third matter I was taken to, was in relation to 'DATA PROTECTION BREACH' (GDPR)'. Here the claimant says he raised concerns about how people could have information about his pay. And says that it must be a breach of his data but does not give any further information."

57. The third respondent also contends that placing employees into posts for which they were not qualified was not a type of wrongdoing asserted by the claimant, and that his appeal involves a "reimaging" of the claim. In the claim form, the claimant states, under the heading "Public Interest", that:

"agency workers, who are not qualified to be in positions of trust, dealing with SEN Children, are being placed into these positions"

58. In his additional information, the claimant stated of his letter of 5 July 2018:

"The Disclosure was specifically, …

d. That unqualified agency workers were being placed into positions of trust."

59. It also appears that EJ Martin accepted that this was one of the types of wrongdoing that the claimant was relying upon:

"He goes on to say that "People are covering a job they are not qualified for, in a position of trust to vulnerable service users".

60. It is close to self-evident that, if there is an assertion that unqualified staff are dealing with issues about children with Special Educational Needs, it is at least arguable that an assertion of wrongdoing is being made that falls within section 43B ERA 1996. Such an allegation does not necessarily have to specify the specific legal provision that it is contended would be breached by such conduct: see the analysis of Linden J in **Twist DX Ltd and Others v 1) Dr Niall Armes 2) Mrs Helen Kent-Armes** UKEAT/0030/20/JOJ.

Reasonable belief that information tends to show a breach of a legal obligation

61. I have found it difficult to follow EJ Martin's reasoning in this regard. As the claimant no longer relies on the contention that his disclosures tended to show fraud, I will limit consideration to the contentions in respect of data protection and unqualified staff.

62. It is not clear to me whether EJ Martin considered that the claimant did not have reasonable prospects of establishing that he had a reasonable belief that the information he disclosed about his pay information being given to colleagues tended to show a breach of legal obligations in respect of data protection. At para. 18, after referring to the claimant contending that "his data protection rights have been compromised", EJ Martin states "he is making assumptions and speculating but not providing information that tends to show a criminal offence has been committed". I have considered whether, on a fair reading, EJ Martin concluded that the claimant had no reasonable prospects of establishing that he had a reasonable belief that the information he disclosed tended to show wrongdoing. If that was her conclusion, the analysis was insufficient to support it. There is no analysis of whether the claimant would be able to establish he held such a belief in wrongdoing in respect of data protection and, if so, whether he had reasonable prospects of establishing that such a belief was reasonable. EJ Martin focussed on the issue of public interest.

63. In respect of unqualified staff, as far as I can ascertain from the reasons, EJ Martin did not conclude that the claimant had no reasonable prospects of establishing that he had a reasonable belief that the information he disclosed tended to show wrongdoing. Her focus appears to have been on the contention that there was no disclosure of information.

Reasonable belief that the disclosure was made in the public interest

64. The core of the reasoning of EJ Martin was that the disclosure was not in the public interest. At para. 19, she held:

> **"19. Having considered the parts on an individual basis, I stood back and considered the letter as a whole. My role is to establish whether the claimant has a reasonable prospect of showing that this letter is a qualifying disclosure warranting the protection of the legislation. There is no other information that a full tribunal would have. The letter speaks for itself. The claimant has had the opportunity to explain his position and the respondents have provided me with full submissions. I find that there is no reasonable prospect of the claimant showing that his letter of 5 July 2018 is a qualifying disclosure. My educated impression of this letter is that it is self-serving and does not disclose matters that are in the public interest. I consider that there is no reasonable prospect of the claimant convincing a tribunal otherwise at a full hearing. There is no further information that is relevant."**

65. EJ Martin stated that there was no information other than the letter of 5 July 2018 that the tribunal would have at the final hearing. That is the basis of ground 3 of the appeal. The Claimant's pleading made it clear that he contended that there were a number of conversations, meetings and email exchanges that led up to the disclosure in the letter of 5 July 2018. EJ Martin based her understanding of the Claimant's case on her questioning of him about the letter, and failed to consider the pleadings and other documents in which he set out his claim, in order to ascertain what he was asserting, taking his case at its highest. Striking out the claim without more detailed analysis was an error of law.

66. More importantly, EJ Martin misconstrued the law in respect of "public interest". This is the basis of ground 4(f) of the grounds of appeal. At para. 5.4 she directed as to what had been decided in **Chesterton**:

> **"*Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979 which held that the statutory test of the reasonable view of public interest is to be applied as a matter of educated impression."**

67. EJ Martin misunderstood what Underhill LJ stated in **Chesterton**. The "matter of educated impression" is as to what constitutes a matter of public interest; not whether the claimant in fact believed that the disclosure was in the public interest, or whether that belief was reasonable. EJ Martin simply did not consider whether the claimant had an arguable case that he held a belief that the disclosure was made in the public interest, and that the belief was reasonable. That is the most fundamental error of law in the decision.

68. EJ Martin founded her determination on her conclusion that the letter was "self-serving", and so could not be in the public interest. That analysis was also incorrect, as the motive of a person for making a disclosure is not the issue; the question is whether, whatever the motive for making the disclosure, the claimant believed that it was made in the public interest, and whether that belief was reasonable. EJ Martin misapplied the reasoning in **Chesterton**, as asserted in ground 4(f) of the Notice of Appeal, by focusing on the claimant's motive for making the disclosure.

69. In respect of the alleged disclosure about breach of GDPR, EJ Martin stated at para. 18:

> **"This is not in the public interest as the concern raised only relates to him."**

70. EJ Martin failed to consider the Claimant's contention that this was not a one-off occurrence. In the letter of 5 July 2018, the claimant had stated:

> **"I raised concern; that Lynn, who had known about my role for the past 6 months, would suddenly out of the blue, ring up Adecco and then want to know about my job title. Both Adrian and Lisa confirmed that this happens a lot and that they have about 5 cases going on at the moment. This ls extremely concerning if staff of Adecco are giving out personal information and data to third parties without the[ir] knowledge and if true especially In light of the GDPR law that became enforceable since May 25th 2018."**

71. Furthermore, the fact that the Claimant's disclosure was principally, or even totally, about his own treatment, would not necessarily prevent him reasonably believing it was in the public interest, if he considered he was bringing to light a matter of more general importance about data protection; this is a matter I considered in some detail in **Mr A Dobbie v Paula Felton t/a Feltons Solicitors** UKEAT/0130/20/OO. I shall not repeat that analysis here, as all that was necessary for EJ Martin to consider was whether it was at least reasonably arguable that there could be a disclosure that the claimant reasonably believed to be in the public interest.

Disclosure to a person such as to make it a protected disclosure

72. EJ Martin needed to consider whether it was reasonably arguable that any qualifying disclosure was protected because it was arguably made to:

(1) The claimant's employer within the meaning of section 230 ERA 1996; see section 43C(1)(a) ERA 1996;

(2) The claimant's employer within the wider sense provided for by section 43K ERA 1996; or

(3) So far as the disclosure was about "conduct of a person other than his employer" or "any other matter for which a person other than his employer has legal responsibility", that person; section 43C(1)(b) ERA 1996.

73. EJ Martin did not really grapple with these matters. The only reference was at para. 20:

> **"I have also considered whether the claimant made his disclosure to a relevant person. This is provided for in s43c. This provides that a disclosure must be made to the workers employer (at the time of this disclosure the claimant was employed**

> **by the second respondent and the disclosure was made to employees of the first respondent) or to the person with legal responsibility for the matters. The claimant alleges all three respondents have legal responsibility. There is little reasonable prospect of the claimant showing he made the disclosure to a relevant person as defined by the Act. The Claimant's claims of whistleblowing are therefore struck out as having no reasonable prospect of success."**

74. EJ Martin recognised that the claimant contended that the disclosure was made to a person, or possibly persons, who had legal responsibility, but did not analyse this point any further to determine whether it was arguable that any qualifying disclosure was rendered a protected disclosure pursuant to section 43C(1)(b). While EJ Martin referred to the disclosure being made to employees of the first respondent, there was no consideration of whether any disclosure was passed on to other of the respondents. That was, in part, the importance of the failure to take account of the discussions and communications that formed the background that it is alleged, by ground 3 of the Notice of Appeal, was not taken into account. It is at least arguable that if a disclosure is made to one person and then passed on to another, who is such a person as would make a qualifying disclosure a protected disclosure if it was made to that person directly, that indirect disclosure is sufficient for the protection to apply, particularly if the context is such that the matter is under discussion with both parties, so that it would be anticipated that any disclosure would be passed on.

75. EJ Martin failed to consider the claimant's argument that he was employed by both the first respondent and the second respondent. It was clear from the Order made at the preliminary hearing for case management before EJ Downs on 18 February 2019 that the claimant was seeking to advance this argument. The first respondent has focussed much of their skeleton argument on the contention that such an argument was bound to fail. However, it simply was not considered by EJ Martin, which is an error in law as contended at ground 1 of the Notice of Appeal. Whether there might be anything in the argument is a matter for determination by the employment tribunal on remission, once the issues have been properly identified.

76. EJ Martin also failed to consider the possibility that the claimant was a worker within the extended meaning of section 43K ERA 1996. This point was specifically raised by the claimant at para. 7 of his additional information. At para. 17 of its skeleton argument, the first respondent contends that the claimant could not be a worker because the extended definition in section 43K(1) applies only to "an individual who is not a worker as defined by section 230(3)". I consider it clear from the context of this provision that this is a reference to being a worker for the purpose of section 230(3), pursuant to a contract with the person it is alleged comes within the extended definition provided for by section 43K, rather than having such a contract with anyone. The protection is designed to protect agency workers who will often have a contract with a person other than the end user, who may be the person to whom a protected disclosure is made and who, as a result, subjects the worker to detriment. The point was considered by Simler J in **McTigue v University Hospital Bristol NHS Foundation Trust** [2016] ICR 1155, as part of her concise guidance as to the correct analysis of section 43K ERA 1996, at para. 38:

> **"In conclusion, in the hope that it will assist tribunals dealing with these issues, it seems to me that, in determining whether an individual is a worker within section 43K(1)(a), the following questions should be addressed.**
>
> **(a) For whom does or did the individual work?**
>
> **(b) Is the individual a worker as defined by section 230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on section 43K in relation to that person. However, the fact that the individual is a section 230(3) worker in relation to one person does not prevent the individual from relying on section 43K in relation to another person, the respondent, for whom the individual also works.**
>
> **(c) If the individual is not a section 230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?**
>
> **(d) If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within section 43K(1)(a).**
>
> **(e) If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them? If any of these is satisfied, the individual does fall within the subsection.**
>
> **(f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.**

(g) There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.

(h) In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

(i) If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within section 43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under section 43K(2)(a)."

Outcome

77. For the reasons set out above, I consider that the employment judge erred in law as asserted in the grounds of appeal. The employment judge was in a difficult situation because the claims and issues had not been properly identified before the preliminary hearing to consider strike out or deposit order. She made her position more difficult by failing to properly identify the claims and issues before considering strike out, and requiring the claimant, as a litigant in person, to explain his claim orally, and limiting her consideration of documentation to the letter of 5 July 2018, without considering the background that the letter referred to, or the other detailed pleadings the claimant had submitted.

78. In those circumstances, the matter must be remitted. The claim will be remitted to be determined by a differently constituted employment tribunal because, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763:

(1) It is important to avoid further delay, and so it is not proportionate to await the availability of the same employment judge;

(2) The matter requires determining entirely afresh, so there would be no saving of cost or time in remitting it to the same employment tribunal;

(3) The errors in dealing with the application for strike out were fundamental.

79. Before any further consideration is given to strike out or making a deposit order, it is important that there is proper case management to clearly identify the claims and issues. The claimant has been represented by counsel at this hearing through the pro bono scheme, Advocate. He may be a litigant in person when the matter is remitted. If he is, the judge conducting the case management hearing and the respondents will need to take that into account. It is important that care is taken to analyse the pleadings to gain a fair understanding of the claim that the claimant is seeking to advance. This may require consideration of amendment (subject to the usual rules). Analysis of the claim will need to include consideration of:

(1) What information the claimant contends he disclosed. This will involve consideration of the events leading up to the claimant sending the letter on 5 July 2018, and may necessitate consideration of, whether properly analysed, there are prior disclosures (which may be an important issue in considering to whom disclosure was made);

(2) What wrongdoing the claimant contends he reasonably believed that information tended to show. The claimant is no longer pursuing an allegation of fraud, but he is alleging breaches of GDPR and the placement of unqualified staff (which allegation will need to be clarified with the claimant – having regard to the guidance of Linden J in **Twist DX**);

(3) On what basis the claimant contends that he reasonably believed that the disclosure was made in the public interest (this involves consideration of the basis on which the claimant contends he believed the disclosure was in the public interest and whether any such belief contended for was reasonable, as required on a proper analysis of **Chesterton**);

(4) To whom the claimant contends the disclosure (or possibly disclosures) were made, and on what basis is it contended that a disclosure to that person was made is a

protected disclosure; this will involve proper consideration of sections 43C(1)(a), 43C(1)(b) and 43K ERA 1996;

(5) What the claimant contends was done on the grounds of making the protected disclosure and/or does the claimant contend the reason, or principal reason, for dismissal was making the protected disclosure;

(6) By whom the claimant contends he was employed for the purposes of the claims in respect of matters other than protected disclosure detriment and dismissal.

80. I apologise for the delay in producing this judgment. I was aware that judgment was awaited in **Twist DX** and wished to read it before finalising my judgment. Having read it, I did not consider I required further submissions in respect of the appeal, as it does not alter my approach to consideration of the errors of law in the decision to strike out the claim, although I do consider it will be of significance on remission, when considering the level of specificity that is required when identifying the type of wrongdoing that is said to render a disclosure of information a qualifying disclosure. Since **Twist DX** was handed down, the further delay has been because of other pressure of work.

81. Once the issues are clarified the respondents may wish to consider whether seeking strike-out is a proportionate way forward.