EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104549/2020

Preliminary Hearing held in person at the Dundee Tribunal on 12 April 2021

Employment Judge A Kemp

Mr J Sinclair	**Claimant** **In person**
Carolina House Trust	**Respondent** **Represented by:** **Mr I Maclean** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The amendment by the claimant providing further particulars of the claims he makes is allowed.

2. The respondent's application for strike out is refused.

3. The respondent's application for a deposit is refused.

REASONS

Introduction

1. This was a Preliminary Hearing for the purposes of addressing arguments as to amendment. The claimant had not received notice of it, but had been contacted by the Tribunal on 9 April 2021 and was able to make arrangements to attend. He had been sent a bundle of documents for the purposes of the hearing on that same afternoon. Mr Maclean for the respondent apologised for that being done late. After a discussion as to how to proceed it was agreed that I would hear from Mr Maclean for all matters, and then from the claimant to the extent that he felt able to. As it transpired the claimant was able to respond, and I have been able to issue this Judgment. I have dealt with case management matters by separate Note.

2. A Preliminary Hearing was held on 4 November 2020, following which a document was tendered by the claimant. A second Preliminary Hearing was held on 9 December 2020, after which the present hearing was fixed. At the second Preliminary Hearing the document referred to was not accepted as being compliant with orders issued by the Judge, and the orders were made of new. The claimant then tendered a document which was an application to amend. The respondent has argued that that amendment should not be allowed, that the claim should be struck out, that a deposit order should be granted, and that expenses should be awarded. The first three of those matters were addressed during submission, and the fourth was reserved by the respondent for consideration in due course.

Respondent’s submission

3. The following is a basic summary of the submission made by the respondent. The claimant had made an application to amend, and referred to an email string. It did not disclose what was a qualifying or protected disclosure. There was no provision of information. It was an exchange of views about how to respond to the Covid-19 pandemic, when how to do so was not clear. Taking matters at its highest there was a suggestion in

relation to health and safety, but without specifics. There was suggestion of a criminal offence but nowhere in the email trail is that set out. There was an allegation of concealment but that could not have been known at the time of the emails. There had been no disclosure within the statutory terms, and therefore there could be no claim. The requirements of the Orders had not been met. Permission to add the particulars should not be given, the claim should be struck out, and alternatively a deposit order should be granted. No authority was cited in the submission, and after the claimant's reply Mr Maclean did not wish to make any further submission.

Claimant's submission

4. The following is again a basic summary of the submission made by the claimant. He had been employed by the respondent in a managerial position for 18 months and no formal performance management or other process had taken place. He had raised matters of safety in relation to the pandemic. His partner, and two daughters, had health conditions. He had held telephone discussions with his manager, which included asserting to her that he did not physically require to attend the building to undertake his role. There was a significant level of stress within the staff about the numbers being in the building. One of those being cared for had raised his own attendance with him, as a safety matter, and he had told his manager about that by telephone. In relation to the basis of his belief that the disclosures were in the public interest he contended that he was moving across three local authority boundaries when attending work, that he had to stop on occasion to buy provisions for the premises of the respondent, and that there was a risk to his health and that of others, either at the premises or his own home, by that. He said that the detriments were the institution of performance management processes, a requirement when he appealed that time over lunch be repaid, and a reference that he considered not appropriate. In answer to an enquiry from me he said that his net income was just over £2,000 per month, he had as dependants his partner and his two daughters, that his rent was £850 per month, council tax £150 per month, fuel costs £180 per month, food of £400 per month, and travel costs of £200 - £300 per month. He has no assets or savings.

The law

(i) Amendment

5. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to an amendment requiring permission from the Tribunal to be received falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> "**29 Case management orders**
>
> The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order…."

6. Rule 29 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

> "**2 Overriding objective**
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> 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—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (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."

7. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require to be borne in mind when addressing earlier case law.

8. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. In that case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it was refused on appeal to the EAT. The EAT stated the following:

> "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
>
> What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant;
>
> *"(a) The nature of the amendment*
>
> Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
>
> *(b) The applicability of time limits*
>
> If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time

limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

9. In ***Harvey on Industrial Relations and Employment Law*** Division PI, paragraph 311, it is noted that distinctions are drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought, of which ***Selkent*** is an example.

10. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be appropriate). ***Pruzhanskaya v International Trade & Exhibitors (JV) Ltd UKEAT/0046/18*** falls within the first category. The claimant had brought a claim for unfair dismissal in time and subsequently applied to amend his claim to include an allegation that he had been dismissed for making a protected disclosure. The employment tribunal had rejected this application on the basis that it would entail the introduction of 'a substantial

new issue which plainly is brought considerably out of time' and would cause prejudice to the respondent employer. An appeal was allowed on the basis that an application to amend an existing complaint of unfair dismissal to allege the new reason, which would be automatically unfair, did not involve bringing a new complaint outside the time limit. For the claimant to amend his claim to include the argument that his dismissal was unfair automatically on that basis was not to bring a new claim as it 'is simply a form of unfair dismissal'.

11. The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

12. The present case is in the first category. It seeks to add new matters of fact, as pleading, to a case already pleaded without adding any new cause of action. These categories are not however strictly separated, and case law on amendment for other categories may provide helpful guidance. Ultimately, the decision on whether or not to allow an amendment is one for the exercise of discretion, having regard to all the circumstances but in particular to the hardship and injustice suffered by either party.

13. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action and therefore in the third category, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

14. In order to determine whether the amendment amounts to a wholly new claim and in the third of the categories set out above it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v***

Bryant [1999] ICR 123). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment

> "was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time".

15. The provision in the 1996 Act as to time-limits in respect of a claim for dismissal is found in section 111(2)(b), and is a test of reasonable practicability, with commencement of the claim (by early conciliation in the first instance) required within three months of the effective date of termination. The test for a claim as to detriment is found in section 48(3) and is essentially the same, with commencement of the claim required within three months of the detriment.

(ii) Strike out

16. Rule 37 provides as follows:

> "**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. 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).

18. 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."

19. 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."

20. 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."

21. 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)."

22. 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.

23. 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."

24. 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."

25. Very recently in ***Cox v Addecco UKEAT/039/19*** the EAT held that in the particular circumstances of a litigant in person before striking out the claim there may be a need to consider matters beyond the pleadings.

(iii) Deposit

26. Rule 39 provides as follows:

> "39 **Deposit orders**

Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospects of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument….."

27. Rule 84 provides that consideration of the person's financial circumstances is also required.

28. The EAT has considered the issue of deposit orders in ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14,*** and ***Tree v South East Coastal Services Ambulance NHS Trust UKEAT/0043/17***. In the latter case the EAT summarised the law as follows:

"[19] This potential outcome led Simler J, in ***Hemdan v Ishmail [2017] ICR 486 EAT***, to characterise a Deposit Order as being 'rather like a sword of Damocles hanging over the paying party' (para 10). She then went on to observe that 'Such orders have the potential to restrict rights of access to a fair trial' (para 16). See, to similar effect, ***Sharma v New College Nottingham UKEAT/0287/11*** para 21, where The Honourable Mr Justice Wilkie referred to a Deposit Order being 'potentially fatal' and thus comparable to a Strike-out Order.

[20] Where there is, thus, a risk that the making of a Deposit Order will result in the striking out of a claim, I can see that similar considerations will arise in the ET's exercise of its judicial discretion as for the making of a Strike-out Order under r 37(1), specifically, as to whether such an Order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have been the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike-out cases but potentially of relevance in respect of Deposit Orders for the reasons I have already referenced; see the well-known injunctions against the making out of Strike-out Orders in discrimination cases, as laid down, for example, in ***Anyanwu v***

South Bank Students' Union [2001] IRLR 305 HL per Lord Steyn at para 24 and per Lord Hope at para 37.

[21] In making these points, however, I bear in mind - as will an ET exercising its discretion in this regard - that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated by the express requirement - see r 39(2) - that the ET shall 'make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit'. An ET will, thus, need to show that it has taken into account the party's ability to pay and a Deposit Order should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all; see ***Hemdan*** at para 11.

[22] Although an ET will thus wish to proceed with caution before making a Deposit Order, it can be a legitimate course where it enables the ET to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage, thus avoiding unnecessary wasted time and resource on the part of the parties and, of course, by the ET itself.

[23] Moreover, the broader scope for a Deposit Order - as compared to the striking out of a claim - gives the ET a wide discretion not restricted to considering purely legal questions: it is entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see ***Wright*** at para 34."

Discussion

(i) Amendment

29. There is no formal Rule as to amendment, still less any formal classification between a change to the pleadings which provides further particulars of a claim already pled, and one that falls to be considered as an amendment. I consider however that where there are new allegations of fact, as there are here, that does amount to an amendment. Whether or not to allow it is a matter for discretion. In exercising that discretion regard is had to the terms of the overriding objective, in particular the interests of

justice. I take into account that the claimant is represented by a friend who is not legally qualified.

30. The matters referred to in ***Selkent*** provide a structure to consideration of the dispute. The first is the nature of the amendment. The original pleading was not as clear as what was required, as discussed in the first Preliminary Hearing. The claimant's first attempt did not succeed, as explained in the second Preliminary Hearing. What the claimant then produced was also far from perfect. He did not set out in detail what disclosure was made, when, and on each occasion why it was protected, particularly why there was a reasonable belief in the disclosure being in the public interest. The claimant did however expand on that in the hearing before me, as recorded above.

31. To use the phrase in ***Bryant*** the further particulars expanded on the original pleadings. They did so in the context of claims already pleaded. The heading of the paper apart attached to the Claim Form was in relation to a "public interest disclosure". It referred to matters that led up to his dismissal, including as to performance management. There was a reference to dismissal, but also to at least some of what are referred to now, and in terms, as detriments. There were in some instances new allegations, or averments to use the term from Scottish practice, but they were very closely connected with the original allegations from the Claim Form. They would involve very substantially similar areas of enquiry, using the term in ***Abercrombie.***

32. The later authority of ***Pruzhanskaya*** involved the introduction by amendment of facts not pled originally, particularly in relation to protected disclosures, and doing so was allowed as it fell within the overall cause of action of unfair dismissal, even where it was automatically so. The present case is more simple, remaining within the framework of what was termed a public interest disclosure originally pled in the Claim Form. In so far as there is the addition of a claim as to detriment to that of automatically unfair dismissal, that is a separate cause of action to that under section 103A but it is I consider effectively putting a different legal label on facts partly already pled, as the Claim Form paper apart referred for example to performance management. The label had been a fact relied on for section

103A, and is changed to being that together with a detriment under section 47B. What is also now referred to, being in relation to time and a reference, are very closely related to the basic details within the claim form paper apart. Whilst the respondent is correct to note that there was a failure to follow the full scheme of the Act in relation to what is pled as being a protected disclosure, the claimant is a litigant in person, he supplemented the written application orally, and in light of ***Cox*** it may be appropriate to look beyond the terms strictly pled for the purposes of a strike out application. I consider that similar matters arise when deciding whether or not to allow amendment. These factors, and the authorities referred to, in my judgment favour the granting of the application.

33. The second is time-limits, a point of particular relevance if adding a new cause of action, not present in this case in relation to a section 103A claim and to a more limited extent in relation to the section 47B claim. Adding a new legal label to basic facts pled is not a matter of a new claim in this context. In so far as new matters as to time and reference are concerned it is certainly true that they are not specifically pled. They do however come within the same overall argument as to detriment for having made a protected disclosure. Precisely when and in what circumstances the detriments, if they are that, took place, and whether or not they continued thereafter, is not clearly set out. There is an argument that they are taken out of time. The point on time-limits is therefore present, but to a less than complete extent. There is a clear causal link between what was originally pled, and what is now pled, such that this is not the case of an entirely new cause of action, on different facts, being pursued for the first time outwith the jurisdictional time-limits entirely. The absence of a substantial issue over time-limits means that this is not a factor that strongly favours refusing the application.

34. The third is in relation to the timing and manner of the application. It was made not early in the process, but not unduly late, with dates for a Final Hearing not yet fixed, but likely to be for the late autumn at the earliest, and that remains the position at the time of this Judgment. The claimant is acting for himself. That also favours the granting of the application in my judgment.

35. I consider that the degree of hardship and injustice to the respondent by the addition of such allegations not set out specifically in the Claim Form but falling within the overall ambit of the cause of action originally pled is limited, and substantially outweighed by the hardship and injustice that there would be to the claimant of refusing him permission to rely on the matters he seeks to.

36. It is true that further allegations will require additional investigation. It is also true that the case as pled is not full, as set out above. The extent of enquiry however is not likely to be unduly burdensome, it covers periods of time referred to in the Claim Form, and is likely to involve speaking to the same witnesses. The hardship and injustice on the respondent is therefore in my judgment limited.

37. If the amendment were to be refused I consider that the hardship on the claimant would be greater. It would deprive him the opportunity of arguing matters that may be important at the least for the determination of his claim. The fact that the further particulars are an expansion of the original pleadings, with a clear and material causal link between them, is I consider a powerful factor in holding that the amendment should be permitted.

38. Taking all of these matters into account, I consider that it is in accordance with the overriding objective to allow the particulars to be received as an amendment to the Claim Form.

(ii) Strike out

39. The second application was for strike out. That was in many ways the principal matter for decision. The position taken by the respondent was entirely understandable. The claimant's pleadings have been less clear than they might have been. What he did not set out clearly either in the Claim Form or the Further Particulars was precisely what disclosure was made, in particular what was said, why that was protected, and in particular why it was made in the reasonable belief that it was in the public interest. He did however expand on that somewhat limited pleading in submission as set out above, and I consider that it is in accordance with the interests of justice to consider that material too (as explained in ***Cox***).

Whilst the application was made on the basis of no reasonable prospects of success there was also a suggestion of a failure to comply with the terms of Orders. I have considered that further. There was an attempt to comply with the Order, and I take into account that the claimant is acting for himself. When considered supplemented in oral submission there was not I consider a failure to comply with an order under Rule 37.

40. The argument as to no reasonable prospects of success was at the least a statable one. Mr Maclean's submission that there was a failure to provide information in the emails founded on has material weight behind it. His argument that there was no protected disclosure pled in the further particulars also has material weight behind it. The terms of the statute are however reasonably wide and under section 43B(1) "any disclosure of information" may be founded on for the first part of the test as to what is a qualifying disclosure. But there must be some disclosure of information, mere allegation is not sufficient - ***Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38.*** The claimant claims that he told his manager that there were, to summarise what he claims, risks if he attended work in person in light of the pandemic, that a recipient of the services had expressed concern about him doing so, other staff had concerns over the numbers attending, and that if he were not able to work from home the health of others was liable to be affected whether recipients of services, other staff, or members of his own family, including himself. Not all of these details were in his written particulars, and were provided in oral submission.

41. I consider that there is just enough detail of what may be said to be information alleged to have been given by the claimant to the respondent that he may meet that aspect of the test. The question of his reasonable belief is one which again he may be able to meet, dependent on the evidence.

42. It is not clear that any disclosure was reasonably regarded as being in the public interest for that same sub-section. But I consider that looking at matters in the round there is a basis set out either in the Claim Form, Further Particulars provided in writing, or the oral submission, that might meet the statutory test. That is so particularly as the allegation involves

the claimed response of a recipient of the service, and that others beyond the claimant himself, particularly such recipients of service and other staff, may have suffered serious adverse health effects, and in the context of a pandemic that led to a very substantial number of deaths it is, I consider, arguable that such a belief, if that is proved, was reasonably held. The law in this area was reviewed in ***Chesterton Global Ltd v Nurmohamed [2017] IRLR 837,*** and just because the claimant's own contract of employment is affected does not mean that it is an issue not in the public interest, although the more particular to the claimant an issue is the more it may be difficult so to find.

43. Whether these matters are all proved or not depends on the evidence. The matters that require proof include the reason for either a detriment, or dismissal. The respondent alleges that the decisions were not taken because of any disclosure. This claim is far from one with good prospects of success. They may be thought to be limited, but they are not so low as is appropriate to describe as no reasonable prospects. In any event, as the authorities make clear, strike out must be proportionate. In all the circumstances, even with the limitation of pleading, I do not consider that doing so is proportionate in this case. It is true that the claimant had two changes to plead his case, and did not do so as fully as he could have such that he supplemented that orally at what was a third change, but I make allowance for him being a litigant in person, and the nature of the claims being made with a public interest in them being heard and determined.

44. In all the circumstances I do not consider it in accordance with the overriding objective to strike out the claim, and I refuse that application.

(iii) Deposit

45. The third application was for a deposit order. The test for that is lower than for strike out, and was made entirely understandably from the respondent's perspective. I consider however that this is not an appropriate case to make such an order. If the claimant proves all that he has referred to, as recorded above, it is possible that he may succeed with his claim. The possibility may not be very high but that does not mean that

it may properly be held that there are little reasonable prospects of success. A great deal depends on the evidence both on what was said to the respondents in telephone conversations, or by email, and then what they did, and why. Inferences may or may not be drawn from the primary facts once found. I also took into account that the claimant's income is almost entirely taken up with commitments, and that if I did make a deposit order there was a clear possibility that he would not be able to afford to make the payment, such that his claim would end for that reason, a matter referred to in the authority set out above. That was not of itself a reason not to make a deposit order in an appropriate case, but this case was not I concluded one where it was merited.

46. I do not consider that the application for deposit order meets the statutory test in light of the overriding objective, and I refuse that application.

Conclusion

47. I accordingly allow the amendment, and refuse the applications for strike out and deposit order.

48. For the avoidance of any doubt the claimant should not assume from this Judgment that that means that he is likely to succeed with the claim. There are many matters that must be proved by him in order for that to happen, and all of them are disputed by the respondent.

Employment Judge:	**Alexander Kemp**
Date of Judgment:	**21 April 2021**
Date sent to parties:	**22 April 2021**