EMPLOYMENT TRIBUNALS

Claimant: Dr Mary Dell

Respondent: Dr McManus & Partners (t/a Weavers Medical)

HEARD AT: Bury St Edmunds: 24 August 2021

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Mr Ishfaq Ahmed (Counsel)

For the Respondent: Ms Suhayla Bewley (Counsel)

RESERVED JUDGMENT

1. The claims that:
   (a) the reason or principle reason for the claimant's dismissal was that she made a protected disclosure, and therefore that her dismissal was unfair for the purposes of s.103A of the Employment Rights Act 1996 ("ERA");
   (b) she was subjected to detriments on grounds that she made a protected disclosure, in contravention of section 47B of ERA;
   (c) she was subjected to detriments because she had done a protected act within the meaning of section 27 of the Equality Act 2010 ("EqA); and
   (d) she was directly discriminated against on grounds of her race (i.e. because she was "white British") within the meaning of s.13 EqA

   are all dismissed as having no reasonable prospects of success under r.37(1)(a) of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

2. The respondent's application to strike out the claim of wrongful dismissal, or for a deposit order in respect of that claim, is refused.

REASONS

BACKGROUND

1. The claimant is white British. She is a registered medical GP. She was employed by the respondent from 1 November 2019 as a salaried GP, with a contract providing for a three month notice period.

2. From at least about 2016, the claimant was also engaged at the University of Leicester Medical School ("the University") to undertake teaching and tutoring of University medical students.

3. On about 20 February 2020, a student complained to the University about an incident which occurred during a teaching session led by the claimant on 18 February 2020. The allegation centred on use by the claimant of what has been described as the "N" word (i.e. a racially offensive word).

4. On the same date, the claimant orally disclosed to two individuals at the respondent that she had used the "N" word in the course of a University teaching session ("the Disclosure"). She also said she was not a racist.

5. The claimant was then off from work at the respondent until late March 2020.

6. On 28 April 2020, following a disciplinary hearing at the University, the University gave the claimant the opportunity to resign to avoid the prospect of a finding against her, which opportunity she took.

7. On 29 April 2020, the respondent suspended the claimant from her role as a salaried GP on grounds of "use of racist language in a teaching session with medical students". The suspension letter records that the claimant had informed the respondent the previous day that she had been "found guilty in the disciplinary hearing [at the University] and… given the option of summary dismissal or tendering your resignation". He explains that "although the incident did not occur at the practise, what happened during the teaching event will have a direct impact on your role as a GP". She was also instructed not to discuss "this sensitive matter" with any of her colleagues.

8. On 22 May 2020, the claimant was informed that further allegations had been made that she had "repeated this inappropriate language within the workplace".

9. The allegations of repetition appear in various statements apparently given to the respondent on 5 May 2020 by various staff members. The claimant is said to have used the "N" word in recounting what had happened at the University (whilst emphasising at all times that she was not a racist). She is also alleged to have told a colleague "about some black students she had taught and [she] mentioned a type of colour and a box of chocolates".

10. The claimant alleges she was given no proper opportunity to explain the context in which her remark was made, or to tell the respondent about other relevant facts. She asserts that for the various other reasons set out at paragraphs 22-24 of the particulars of claim attached to the ET1, the respondent's process was unfair and inapt in the lead-up to and following her summary dismissal on 5 June 2020 ("the detriments").

11. In the particulars of claim, the claimant relies on the Disclosure as both a protected act within the meaning of s.27 EqA and a protected disclosure within the meaning of s.43A ERA. She asserts that the Disclosure:
    a. for s.27(2)(c) EqA purposes constituted "any other thing for the purposes of or in connection with this Act"; and/or
    b. for s.43A ERA purposes tended to show a breach by "a person" (i.e. herself) of a legal obligation she owed to the University not to act in a manner inconsistent with the University's [non-specified] "duty to promote equality and diversity".

12. She asserts the detriments were caused in whole or in part by the Disclosure, in breach of s.27(1) EqA and/or s.47B ERA, and/or that they constituted less favourable treatment on grounds of her race (i.e. white British) for s.13 EqA purposes. She asserts that her dismissal was automatically unfair for s. 103A ERA purposes -she does not have sufficient continuity of service to claim 'ordinary' unfair dismissal from the respondent- and/or that the dismissal amounted to an act of direct race discrimination for s.13 EqA purposes.

13. The particulars of claim assert that she was treated less favourably than "others of a different race in materially similar circumstances" would have been treated. As she further explains in the List of Issues, she relies on a hypothetical comparator "who is not white British and who has disclosed to her employer her own potential misconduct and/or her failure to comply with the relevant equality and diversity obligation".

14. Liability is denied. The respondent's case is that (amongst other things) having used the "N" word at the University, the claimant again used the "N" word (in full) in front

of the respondent's own employees, and that she breached the instruction set out in the suspension letter not to talk about case or approach colleagues about it. The respondent also disputes that the Disclosure amounts to a protected act or a protected disclosure.

15. The respondent thereafter applied under r.37 or r.39 of Sch. 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to strike out the claim or secure deposit orders in relation to the various allegations made, for the reasons set out in Ms Bewley's 18 June 2021 written submissions. On 14 July 2021, that application was listed for hearing on 24 August 2021. The claimant by Mr Beever of counsel made a written response on 10 August 2021, to which Ms Bewley gave a written reply on 23 August 2021.

HEARING

16. Today was a remote hearing on the papers, which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing. The documents to which I was referred were those contained in a 165 page bundle which the respondent had prepared for this hearing, as well as a 41 page bundle from the claimant.

17. Both counsel gave oral submissions, speaking to written arguments (drafted by Ms Bewley and, for the claimant, by Mr Beever) which I read. They also took me to the relevant passages in the various authorities contained in the two bundles.

18. The claimant was present, but no request was made for her to give or submit any evidence. Instead, I was referred to various passages within the ET1 and ET3, with both counsel proceeding on the basis that the claimant's case should for present purposes be taken at its highest, as set out within her pleadings.

19. Mr Ahmed clarified that the claimant's case was that the *Disclosure itself* -as opposed to the fact of her having used the "N" word at the University- was the principle reason for her dismissal, and/or a material part of the reason for the alleged detriments/less favourable treatment. He confirmed that the claimant's protected characteristic was "white British", and that her comparator was -as set out in the List of Issues- someone "who was not white British but who had disclosed to her employer her own failure to comply with an equality and diversity obligation".

20. Mr Ahmed told me that ‘means’ were not an issue for the purposes of any deposit order.

MATERIAL LAW

General principles

21. The following general principles were common ground in the parties’ submissions, or at least were not contentious:

Strike out

a. The test of 'no reasonable prospect of success' is a high hurdle to pass, with the stress on 'no'. It is not enough to show that a claim will possibly fail or is likely to fail: **Balls v Downham Market High School and College** [2011] IRLR 217, at [para 6]. However, it is a lower threshold than being utterly hopeless or bound to fail: **Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting** [2002] IRLR 288, at [para 46].

b. 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”. **Anyanwu v South Bank Students' Union** [2001] IRLR 305 [para 24, per Lord Styne].

c. However, where there are no reasonable prospects of success, it remains appropriate for a discrimination claim to be struck out and inappropriate for it to continue to take up the tribunal's resources. See **Anyanwu** [para 39, per Lord Hope].

d. To similar effect, in **Community Law Clinic Solicitors Ltd v Methuen** [2012] EWCA Civ 571, the Court of Appeal quoted with approval Moses LJ's dicta at the permission stage that [see para 6]:
“It would be quite wrong as a matter of principle… that claimants should be allowed to pursue hopeless cases merely because there are many discrimination cases which are sensitive to the facts, and the whole area requires sensitivity, delicacy and therefore caution before access is deprived to the tribunals on an interlocutory basis”.

e. More recently, see **Chandok v. Tirkey** [2015] ICR 527, per Langstaff J: "there may still be occasions when a [discrimination] claim can properly be struck out – where, for instance, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in **Madarassy v Nomura International plc** [2007] IRLR 246 CA): '... only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'"

Deposit order

f. The making of a deposit order requires a lower threshold to be passed- as Harvey puts it, "a lesser degree of certainty of failure" is needed. See further **Hemdan v Ishmail** [2017] IRLR 228, where the essential purpose of such an order -to discourage the pursuit of claims with little prosect of success- is discussed.

g. When determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. **Van Rensburg v Royal Borough of Kingston-upon-Thames** UKEAT/0095/07.

h. The above strike out/deposit order principles also apply to 'whistleblowing' claims.

Two stage test for discrimination

i. As explained in **Madarassy**, there is a two stage approach to the process of fact-finding in the context of a discrimination claim. At the first stage, it is for the claimant to prove a prima face case of discrimination. If that is done, the burden shifts to the respondent to prove that they did not commit an act of unlawful discrimination

j. Simply to show that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof. See **Bahl v Law Society** [2003] IRLR 640, EAT per Elias J at [100], approved by the Court of Appeal at [2004] IRLR 799.

k. Conversely, in establishing what is required in order for the burden of proof to shift, the claimant is not required to provide any positive evidence that the difference in treatment was based on race. See **Griffiths-Henry v Network Rail Infrastructure Ltd** [2006] IRLR 865, EAT at [18]).

Protected acts and separability

l. Detriment must be 'because of' the protected act. In principle, there can be cases where an employer dismisses an employee in response to a protected act but can say that the reason for dismissal was not the act but some feature of it which can properly be treated as separable. E.g. see **Martin v Devonshires Solicitors** [2011] ICR 352, However, such cases will be rare. Otherwise, one descends "a slippery slope towards neutering the concept of victimisation". **Woodhouse v West North West Homes Leeds Ltd** [2013] IRLR 773. Similar principles apply to protected disclosures. See for example **Panayiotou v Chief Constable Kerrigan** [2014] IRLR 500.

Whistleblowing

m. Underhill LJ in **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837 sets out (at paras 35- 37) what constitutes 'public interest'. The question is one to be answered by the tribunal "on a consideration of all the circumstances of the particular case". Reference to the following factors may also be "a useful tool":
    i. the numbers in the group whose interests the disclosure served;
    ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
    iii. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
    iv. the identity of the alleged wrongdoer- 'the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest'.
n. In **Chesterton**, Underhill LJ explains in the context of the requirement for 'reasonable belief' (para 29) that 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."

SUBMISSIONS

Was the Disclosure a protected disclosure?

22. Ms Bewley submitted that the Disclosure could not be a protected disclosure within the meaning of ERA. She accepted that theoretically, it must in exceptional cases be possible to 'self-report' by way of a protected disclosure. She gave the useful example of an employee reporting a fraud in the business, in which that employee had been complicit. But she submitted that in the instant case, the claimant's self-reporting did not fall within that exceptional category. She submitted that it would be, to use the words from **Bolton School v. Evans** [2007] IRLR, "highly artificial" to seek to portray the claimant's self-report as a protected disclosure. It would also go against the spirit of the provisions to afford protection to the 'wrongdoer'.

23. Mr Ahmed reminded me that, following **Hibbins v. Hesters Way Neighbourhood Project** [2009] ICR 319, the identification of the 'wrongdoer' as "a person" expands the legislative grasp to include all legal persons without being limited to the employer. Indeed, as was held in that case, "there is no limitation whatsoever on the people or the entities whose wrongdoings can be subject to qualified to disclosures".

24. He also relied on **Hibbins** to support the submission that ERA has to be construed in the light of its aim of "encouraging responsible whistleblowing"; thus, following **Croke v Hydro Aluminium Worcester Ltd** [2007] ICR 1303, its provisions "should be construed so far as one possibly can to provide protection rather than deny it.'

25. As he submitted, another stated part of the rationale in **Hibbins** is that it is to be presumed that the legislature does not intend "absurd results" (such as the inability of an employee to be protected for blowing the whistle on wrongdoing by a client or customer of the employer).

26. Ms Bewley submitted in response that it would be an 'absurd result' if the claimant could somehow be given a 'get out of gaol' free card for having reported her own misconduct to her employer. Thus, as measured against the absurdity of that result, the Disclosure cannot have been protected.

27. Ms Bewley also referred me to **Page v. Lord Chancellor** [2021] IRLR 377, and in particular to paragraph 21 and 36. She said that, by analogy, the Disclosure was incapable of constituting a protected disclosure -or a protected act. It was simply a statement of 'what the claimant had done'.

28. Ms Bewley further submitted that there was in any event no reasonable prospect of the claimant being able to establish that she reasonably believed the Disclosure was in the public interest (the 'belief' test being set out at paras 27-30 of **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837). At its highest, she said, all the Disclosure did was reveal the claimant's own 'breach of legal obligation' on one occasion. Even if subjectively the claimant believed the Disclosure was in the public interest, objectively viewed (taking the individual characteristics of the claimant into account) surely there was no reasonable basis for such belief.

29. She also observed that there is nothing within the particulars of claim which seeks to set out the basis for reasonable belief in public interest. No evidence had been produced. The only explanation is contained within a list of issues, in which it is said that the claimant "relies on the public interest in disclosing to her own employer, a GP surgery, the existence of a complaint made about her conduct specifically of equality and discrimination". This, she said, was wholly unconvincing.

30. Mr Ahmed (correctly) submitted that reasonable *belief* in public interest, rather than the *fact* of public interest, was the key for s.43B ERA purposes. He also argued that reasonable belief -both subjective and objective- could only be assessed upon hearing the evidence.

31. He suggested that because the claimant in her role as a GP would interact with members of the public, it was in the public interest for the respondent to be aware of the claimant's actions, so that it could assess the broader impact they might have for members of the public visiting the GP surgery.

Disclosure and causation

32. Ms Bewley observed (and Mr Ahmed accepted) it was not suggested that, but for the claimant telling the respondent, the respondent would not have found out what had happened at the University at about the same time in any event.

33. She took me to **Bolton School**. The employers in that case successfully argued that even if Mr. Evans had made a protected disclosure, the reason for his dismissal was not the making of the disclosure but his misconduct in hacking into the school's new computer system. The Court of Appeal held that the ERA protects disclosures,

but not other conduct by the employee, even if connected in some way to that disclosure. By analogy, she said, it was surely inevitable that the tribunal would find the matters about which the respondent took issue were caused (amongst other things) by the claimant's admitted use of the "N" word, and not in any way that fact of that admission- even if the claimant's admission was a protected disclosure.

34. Such rationale would, she submitted, apply all the more so in relation to the s.103A ERA claim- there was no chance the tribunal would find that the principal reason for the dismissal was the proscribed one.

35. She adopted the extreme example given by me of an employee who reports to his employer the fact that he has shot a fellow worker. It would surely be the fact of the shooting, and not the fact of the self-reporting, which would cause (amongst other things) the employee to be dismissed. For the employee to be able to say that because he reported the shooting he must be exempt from retribution would be absurd.

36. Mr Ahmed sensibly accepted that the tribunal may find that the Disclosure was not of itself the operative cause of any detriment. But he submitted that these were factual questions which the tribunal could only properly answer at a final hearing having heard the evidence. (He did not identify any factual dispute which might specifically make a difference.)

37. He also argued, relying on **Romanowska v Aspirations Care Ltd** UKEAT/0015/14, that where the reason for dismissal is the central dispute between the parties, "it will be very rare indeed that that dispute can be resolved without hearing from the parties who actually made the decision".

Was the Disclosure a protected act?

38. Ms Bewley submitted that, for reasons similar to those set out above in relation to protected disclosures, the claimant's self-reporting of her own wrongdoing could not amount to a protected act. She suggested that otherwise, the result would be absurd. The purpose of section 27 EqA was not to provide a 'get out of gaol free' card to someone who, by their own admission, had themselves contravened EqA. Indeed, that would be entirely contrary to the anti-discriminatory intent of EqA.

39. Mr Ahmed submitted that reference to "another person" in s.27(2)(d) EqA was broad enough to include the individual doing the protected act. Alternatively, the wording of s.27(2)(c) EqA was sufficiently broad to encompass such a person.

40. Mr Ahmed did not identify precisely how use of the "N" word was said to be a contravention of EqA -though one can plainly envisage many circumstances where it obviously would be.

41. Mr Ahmed conceded that an individual who e.g. revealed to their employer that they had rejected a job applicant on grounds of race would not attract protection under either section 27 EqA or s.47B ERA. Nor, he also conceded, could the individual referred to at paragraph 35 above expect to have that protection, when he told his employer of his crime. Nevertheless, he submitted that "the simple fact of disclosure of wrongdoing" could not take an employee out of the protection of EqA or ERA.

Causation and protected act

42. The parties made similar submissions regarding causation and the Disclosure as a protected act as they had when addressing causation and an alleged protected disclosure. In essence, Ms Bewley submitted that a claim founded on an assertion of detrimental treatment caused by the self-reporting of use of the "N" word, as opposed to the fact of its use, was wholly unrealistic. Mr Ahmed repeated that the matter was fact-specific.

Direct race discrimination

43. Ms Bewley submitted that there was nothing before the tribunal to suggest even a prima face case of direct race discrimination.

44. Mr Ahmed suggested that a prima face case could be made up by way of inference, given the treatment meted out to the claimant in the form of the detriments and her dismissal, the fact that the reasons for dismissal were not discussed with her. He also relied on the fact that the purported reason for suspension on 29 April 2020 (use of "N' word at the University) was not the same as the purported reason for dismissal on 5 June 2020 as articulated in the respondent's solicitors' letter dated 2 July 2020 (i.e. use of "N" word whilst at work at the respondent).

45. Further to this, he took me to **Base Childrenswear Ltd v Otshudi** [2020] IRLR 118, where he submitted it was found that the employer had given an "untruthful" response when discrimination was alleged, and that was sufficient for the tribunal to find there was a prima face case.

46. He also clarified in answer to questions I put to him that it was the claimant's case that, had she been (for example) white French, or Asian British, she would not have

been less favourably treated in the ways pleaded. He did not go into any further detail as to why this was said to be so. (As I have said, the claimant's pleadings make no mention of an appropriate comparator, beyond saying that "others of a different race in materially similar circumstances" would not have been so treated.)

47. Ms Bewley submitted that taking the detriments at face value, they still amounted to no more than 'unreasonable' or 'unfair' behaviour, and could not -for the reasons set out above- amount to a prima facie case of race discrimination. On the contrary, the undisputed fact that the claimant had used the "N" word at the University was the obvious 'reason why' the disciplinary process was instigated. The fact that 'other things' happened thereafter explained the fact that additional issues were articulated at the time of dismissal. There was absolutely nothing before the tribunal to suggest that an individual who was not white British would have been treated differently in any material way.

48. I referred counsel to paragraph 46 of the judgment of Mummery LJ in **Redfearn v, Serco** [2006] IRLR 623, where it was held:
"… It is a non-sequitur to argue that [Mr Redfearn] was dismissed 'on racial grounds' because the circumstances leading up to his dismissal included a relevant racial consideration, such as the race of fellow employees and customers and the policies of the BNP on racial matters. Mr Redfearn was no more dismissed 'on racial grounds' than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer. Any other result would be incompatible with the purpose of the 1976 Act to promote equal treatment of persons irrespective of race by making it unlawful to discriminate against a person on the grounds of race".

49. In response, Mr Ahmed pointed out that Mr Redfearn only lost his case after a detailed consideration by the tribunal of the facts at a final hearing.

Wrongful dismissal

50. Ms Bewley conceded that this was "the strongest of the claims", but that it was still "inherently weak".

51. In questioning from me, she accepted that there might be rare contexts in which use of the "N" word would not be blameworthy, or at least not amount in itself to a repudiatory breach. But she suggested that this was not such a case. She asserted that there was no context put forward -either in the pleadings or in any statement- which might 'explain away' matters.

52. Mr Ahmed submitted that one of the claimant's key complaints was that she had not been given sufficient opportunity to put into context her use of the "N" word (though he did not seek fully to explain that context). In contrast, she had, according to para 26(d) of the particulars of claim, been given at least some such opportunity by the University to explain herself (though no detail about this was given to me). The University had apparently found she had been "open, honest and consistent in acknowledging that she had used an offensive word of a racist nature" and that she "immediately recognised her mistake and demonstrated full understanding and insight amongst other findings". At the final hearing, he said, she might be able to persuade the tribunal that her single use of that word at the University did not in context amount to a breach, still less a fundamental breach, of her contract of service with the respondent.

53. He also pointed out that -as the dismissal letter makes clear- the claimant had apparently been dismissed by the respondent for reasons other than just her use of the "N" word at the University. The facts on which these other reasons were founded were either in dispute or needed to be put into context as part of evidence at a final hearing, before it could be assessed as to whether or not they amounted to a repudiatory breach on the part of the claimant.

54. He submitted that, if the wrongful dismissal claim had to be determined at a final hearing, there would be limited time and cost saved by striking out other allegations in the claim. This was because the wrongful dismissal claim would need to address most of the factual matters at issue in any event.

DISCUSSION

Wrongful dismissal

55. I accept that, depending on the circumstances, the mere use of the "N" word whilst at the University (or, later, whilst at the respondent) may have not constituted a breach, or at least a repudiatory breach, of the claimant's employment contract with the respondent. The context is crucial. And it is the claimant's case that the respondent did not take the necessary care to look into that context. I cannot determine that issue at this stage.

56. I also accept for present purposes the points Mr Ahmed makes as set out at paragraph 52 above.

57. The wrongful dismissal must focus on whether or not there was a repudiatory breach, rather than on 'fairness'. I suspect it may well be that a repudiatory breach can be made out, by reason of one or more of the matters set out in the 2 July 2020 letter. The claimant's wrongful dismissal case has some obvious potential weaknesses. However, I do not think the wrongful dismissal claim can at this stage be said to have no reasonable prospect of success.

58. Albeit with some hesitation, for similar reasons I also decline to make a deposit order as regards the wrongful dismissal claim.

Whistleblowing claims

59. I am prepared to accept for present purposes that 'self-reporting' *could* in an appropriate (rare) case amount to a protected disclosure, given the apparent breadth of the word "person" in s.43B ERA. Self-reporting could accord with the statutory intent behind the PIDA provisions in ERA. I therefore give the claimant the benefit of any doubt in that respect.

60. However, for the reasons given by Ms Bewley, I think it is highly unlikely the requisite (at least, objective element of) 'belief in public interest' element can be made out on the facts, assuming the Disclosure could otherwise be 'protected'.

61. In any event, I do not consider there is a reasonable prospect of the tribunal finding that her *reporting* of her use of the "N" word -as opposed to the *fact* of her use of it- caused her any detriment for s.47B ERA purposes- still less, that her reporting was the primary reason (or any part of the reason) for her dismissal. Although Mr Ahmed did his best to persuade me otherwise, any assertion to the contrary is in my judgement wholly unrealistic.

62. The 'absurdity' to which Ms Bewley refers in the 'shooting' example at para 35 above arises not necessarily from describing the culprit's self-report as a protected disclosure (though that might have its own issues). Rather, it arises from the suggestion that the report, as opposed to the crime itself, caused his dismissal. The two matters are surely causally distinct. By analogy, see **Bolton School** (para 21, per Buxton LJ). There, the protected disclosure was "the means whereby the headmaster found out about the misconduct". But but the question under ERA "was not how the employer found out about the misconduct, but why he disciplined the employee". Here, the answer to that question under ERA is: the respondent disciplined the claimant because, as she admitted, she had used the "N" word.

63. I therefore consider this is an exceptional case where striking out of both the s.47B & 103A ERA claims at this interim stage is appropriate. Even though the tribunal may have to determine the wrongful dismissal claim in any event, some time and resource will nevertheless be saved by striking those claims out now.

Victimisation claim

64. The victimisation claim ought in my judgment to be rejected for similar reasons as having no reasonable prospect of success.

65. Again, I am prepared to accept for present purposes that 'self-reporting' may in an appropriate case constitute a protected act, and that the Disclosure could theoretically constitute "an allegation" of the type for which s.27(2)(d) EqA caters. (I make this finding with some hesitation, given -to use the wording from **Redfearn**- that it may be a "non-sequitur" to give s.27 EqA protection in principle to someone self-reporting their use of racially offensive language.)

66. However, for similar reasons to those given at paras 56-58 above, I do not think the claimant has a reasonable prospect of successfully arguing that the Disclosure itself caused her any detriment.

67. Take, for example, the hypothetical case of an employee accused of racist conduct towards a work colleague, who in the course of a disciplinary meeting confesses to that conduct. Irrespective of whether or not that confession was a protected act- I have noted Mr Ahmed's concessions set out at para 37 above as regards a similar scenario- it would (in the absence of some highly unusual feature in the evidence) surely be the conduct, and not in any way the confession itself, which would be the cause of any consequential disciplinary action. The confession may 'tip off' the employer; it would provide the employer with (further) grounds for belief in misconduct. But to assert that it therefore *caused* the disciplinary action is surely wholly unrealistic.

Direct race discrimination claim

68. I do not consider that there is any realistic prospect of the claimant passing 'stage 1' by showing a prima facie case from which the tribunal could legitimately move to consider stage 2.

69. The simple fact that the respondent did not -on the claimant's case- follow 'due process', or a 'fair procedure', cannot of itself assist her -see para 21(j) above. I

accept Ms Bewley's submissions on point as set out at para 49 above. Nothing was adduced before me which even began to suggest that, had the claimant not been "white British"- e.g. had (as per para 46 above) she been white French, or Asian British- she might have been treated differently in any material way.

70. The claimant has been legally represented throughout. She has had the chance to put forward her case in its best light. Mr Ahmed has done his best to persuade me of that case. Despite this, I cannot see how the direct discrimination case she seeks to advance can possibly have a reasonable prospect of success.

71. Again, then, this is an exceptional case where disposal of each of the EqA claims at an interim stage is appropriate.

72. **To conclude**: it follows that all but the wrongful dismissal claim is struck out as having no reasonable prospect of success.

73. I asked the parties to write to the tribunal with dates to avoid for a 5 day hearing, before a full tribunal. In the light of my decision, 3 days -before a judge sitting alone- ought to suffice. I have made a separate case management order in this respect, and as regards the parties' agreement of appropriate directions.

Employment Judge Michell

4 September 2021

Sent to the parties on:

19 October 2021

For the Tribunal:

R Bonali

EMPLOYMENT TRIBUNALS

Claimant: Dr Mary Dell

Respondent: Dr McManus & Partners (t/a Weavers Medical)

HEARD AT: Bury St Edmunds: 24 August 2021

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Mr Ishfaq Ahmed (Counsel)

For the Respondent: Ms Suhayla Bewley (Counsel)

RESERVED JUDGMENT

1. The claims that:
   (a) the reason or principle reason for the claimant's dismissal was that she made a protected disclosure, and therefore that her dismissal was unfair for the purposes of s.103A of the Employment Rights Act 1996 ("ERA");
   (b) she was subjected to detriments on grounds that she made a protected disclosure, in contravention of section 47B of ERA;
   (c) she was subjected to detriments because she had done a protected act within the meaning of section 27 of the Equality Act 2010 ("EqA); and
   (d) she was directly discriminated against on grounds of her race (i.e. because she was "white British") within the meaning of s.13 EqA

   are all dismissed as having no reasonable prospects of success under r.37(1)(a) of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

2. The respondent's application to strike out the claim of wrongful dismissal, or for a deposit order in respect of that claim, is refused.

REASONS

BACKGROUND

1. The claimant is white British. She is a registered medical GP. She was employed by the respondent from 1 November 2019 as a salaried GP, with a contract providing for a three month notice period.

2. From at least about 2016, the claimant was also engaged at the University of Leicester Medical School ("the University") to undertake teaching and tutoring of University medical students.

3. On about 20 February 2020, a student complained to the University about an incident which occurred during a teaching session led by the claimant on 18 February 2020. The allegation centred on use by the claimant of what has been described as the "N" word (i.e. a racially offensive word).

4. On the same date, the claimant orally disclosed to two individuals at the respondent that she had used the "N" word in the course of a University teaching session ("the Disclosure"). She also said she was not a racist.

5. The claimant was then off from work at the respondent until late March 2020.

6. On 28 April 2020, following a disciplinary hearing at the University, the University gave the claimant the opportunity to resign to avoid the prospect of a finding against her, which opportunity she took.

7. On 29 April 2020, the respondent suspended the claimant from her role as a salaried GP on grounds of "use of racist language in a teaching session with medical students". The suspension letter records that the claimant had informed the respondent the previous day that she had been "found guilty in the disciplinary hearing [at the University] and… given the option of summary dismissal or tendering your resignation". He explains that "although the incident did not occur at the practise, what happened during the teaching event will have a direct impact on your role as a GP". She was also instructed not to discuss "this sensitive matter" with any of her colleagues.

8. On 22 May 2020, the claimant was informed that further allegations had been made that she had "repeated this inappropriate language within the workplace".

9. The allegations of repetition appear in various statements apparently given to the respondent on 5 May 2020 by various staff members. The claimant is said to have used the "N" word in recounting what had happened at the University (whilst emphasising at all times that she was not a racist). She is also alleged to have told a colleague "about some black students she had taught and [she] mentioned a type of colour and a box of chocolates".

10. The claimant alleges she was given no proper opportunity to explain the context in which her remark was made, or to tell the respondent about other relevant facts. She asserts that for the various other reasons set out at paragraphs 22-24 of the particulars of claim attached to the ET1, the respondent's process was unfair and inapt in the lead-up to and following her summary dismissal on 5 June 2020 ("the detriments").

11. In the particulars of claim, the claimant relies on the Disclosure as both a protected act within the meaning of s.27 EqA and a protected disclosure within the meaning of s.43A ERA. She asserts that the Disclosure:
    a. for s.27(2)(c) EqA purposes constituted "any other thing for the purposes of or in connection with this Act"; and/or
    b. for s.43A ERA purposes tended to show a breach by "a person" (i.e. herself) of a legal obligation she owed to the University not to act in a manner inconsistent with the University's [non-specified] "duty to promote equality and diversity".

12. She asserts the detriments were caused in whole or in part by the Disclosure, in breach of s.27(1) EqA and/or s.47B ERA, and/or that they constituted less favourable treatment on grounds of her race (i.e. white British) for s.13 EqA purposes. She asserts that her dismissal was automatically unfair for s. 103A ERA purposes -she does not have sufficient continuity of service to claim 'ordinary' unfair dismissal from the respondent- and/or that the dismissal amounted to an act of direct race discrimination for s.13 EqA purposes.

13. The particulars of claim assert that she was treated less favourably than "others of a different race in materially similar circumstances" would have been treated. As she further explains in the List of Issues, she relies on a hypothetical comparator "who is not white British and who has disclosed to her employer her own potential misconduct and/or her failure to comply with the relevant equality and diversity obligation".

14. Liability is denied. The respondent's case is that (amongst other things) having used the "N" word at the University, the claimant again used the "N" word (in full) in front

of the respondent's own employees, and that she breached the instruction set out in the suspension letter not to talk about case or approach colleagues about it. The respondent also disputes that the Disclosure amounts to a protected act or a protected disclosure.

15. The respondent thereafter applied under r.37 or r.39 of Sch. 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to strike out the claim or secure deposit orders in relation to the various allegations made, for the reasons set out in Ms Bewley's 18 June 2021 written submissions. On 14 July 2021, that application was listed for hearing on 24 August 2021. The claimant by Mr Beever of counsel made a written response on 10 August 2021, to which Ms Bewley gave a written reply on 23 August 2021.

HEARING

16. Today was a remote hearing on the papers, which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing. The documents to which I was referred were those contained in a 165 page bundle which the respondent had prepared for this hearing, as well as a 41 page bundle from the claimant.

17. Both counsel gave oral submissions, speaking to written arguments (drafted by Ms Bewley and, for the claimant, by Mr Beever) which I read. They also took me to the relevant passages in the various authorities contained in the two bundles.

18. The claimant was present, but no request was made for her to give or submit any evidence. Instead, I was referred to various passages within the ET1 and ET3, with both counsel proceeding on the basis that the claimant's case should for present purposes be taken at its highest, as set out within her pleadings.

19. Mr Ahmed clarified that the claimant's case was that the *Disclosure itself* -as opposed to the fact of her having used the "N" word at the University- was the principle reason for her dismissal, and/or a material part of the reason for the alleged detriments/less favourable treatment. He confirmed that the claimant's protected characteristic was "white British", and that her comparator was -as set out in the List of Issues- someone "who was not white British but who had disclosed to her employer her own failure to comply with an equality and diversity obligation".

20. Mr Ahmed told me that ‘means’ were not an issue for the purposes of any deposit order.

MATERIAL LAW

General principles

21. The following general principles were common ground in the parties’ submissions, or at least were not contentious:

Strike out

a. The test of 'no reasonable prospect of success' is a high hurdle to pass, with the stress on 'no'. It is not enough to show that a claim will possibly fail or is likely to fail: **Balls v Downham Market High School and College** [2011] IRLR 217, at [para 6]. However, it is a lower threshold than being utterly hopeless or bound to fail: **Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting** [2002] IRLR 288, at [para 46].

b. 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”. **Anyanwu v South Bank Students' Union** [2001] IRLR 305 [para 24, per Lord Styne].

c. However, where there are no reasonable prospects of success, it remains appropriate for a discrimination claim to be struck out and inappropriate for it to continue to take up the tribunal's resources. See **Anyanwu** [para 39, per Lord Hope].

d. To similar effect, in **Community Law Clinic Solicitors Ltd v Methuen** [2012] EWCA Civ 571, the Court of Appeal quoted with approval Moses LJ's dicta at the permission stage that [see para 6]:
“It would be quite wrong as a matter of principle… that claimants should be allowed to pursue hopeless cases merely because there are many discrimination cases which are sensitive to the facts, and the whole area requires sensitivity, delicacy and therefore caution before access is deprived to the tribunals on an interlocutory basis”.

e. More recently, see **Chandok v. Tirkey** [2015] ICR 527, per Langstaff J: "there may still be occasions when a [discrimination] claim can properly be struck out – where, for instance, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in **Madarassy v Nomura International plc** [2007] IRLR 246 CA): '... only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'"

Deposit order

f. The making of a deposit order requires a lower threshold to be passed- as Harvey puts it, "a lesser degree of certainty of failure" is needed. See further **Hemdan v Ishmail** [2017] IRLR 228, where the essential purpose of such an order -to discourage the pursuit of claims with little prosect of success- is discussed.

g. When determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. **Van Rensburg v Royal Borough of Kingston-upon-Thames** UKEAT/0095/07.

h. The above strike out/deposit order principles also apply to 'whistleblowing' claims.

Two stage test for discrimination

i. As explained in **Madarassy**, there is a two stage approach to the process of fact-finding in the context of a discrimination claim. At the first stage, it is for the claimant to prove a prima face case of discrimination. If that is done, the burden shifts to the respondent to prove that they did not commit an act of unlawful discrimination

j. Simply to show that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof. See **Bahl v Law Society** [2003] IRLR 640, EAT per Elias J at [100], approved by the Court of Appeal at [2004] IRLR 799.

k. Conversely, in establishing what is required in order for the burden of proof to shift, the claimant is not required to provide any positive evidence that the difference in treatment was based on race. See **Griffiths-Henry v Network Rail Infrastructure Ltd** [2006] IRLR 865, EAT at [18]).

Protected acts and separability

l. Detriment must be 'because of' the protected act. In principle, there can be cases where an employer dismisses an employee in response to a protected act but can say that the reason for dismissal was not the act but some feature of it which can properly be treated as separable. E.g. see **Martin v Devonshires Solicitors** [2011] ICR 352, However, such cases will be rare. Otherwise, one descends "a slippery slope towards neutering the concept of victimisation". **Woodhouse v West North West Homes Leeds Ltd** [2013] IRLR 773. Similar principles apply to protected disclosures. See for example **Panayiotou v Chief Constable Kerrigan** [2014] IRLR 500.

Whistleblowing

m. Underhill LJ in **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837 sets out (at paras 35- 37) what constitutes 'public interest'. The question is one to be answered by the tribunal "on a consideration of all the circumstances of the particular case". Reference to the following factors may also be "a useful tool":
    i. the numbers in the group whose interests the disclosure served;
    ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
    iii. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
    iv. the identity of the alleged wrongdoer- 'the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest'.
n. In **Chesterton**, Underhill LJ explains in the context of the requirement for 'reasonable belief' (para 29) that 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."

SUBMISSIONS

Was the Disclosure a protected disclosure?

22. Ms Bewley submitted that the Disclosure could not be a protected disclosure within the meaning of ERA. She accepted that theoretically, it must in exceptional cases be possible to 'self-report' by way of a protected disclosure. She gave the useful example of an employee reporting a fraud in the business, in which that employee had been complicit. But she submitted that in the instant case, the claimant's self-reporting did not fall within that exceptional category. She submitted that it would be, to use the words from **Bolton School v. Evans** [2007] IRLR, "highly artificial" to seek to portray the claimant's self-report as a protected disclosure. It would also go against the spirit of the provisions to afford protection to the 'wrongdoer'.

23. Mr Ahmed reminded me that, following **Hibbins v. Hesters Way Neighbourhood Project** [2009] ICR 319, the identification of the 'wrongdoer' as "a person" expands the legislative grasp to include all legal persons without being limited to the employer. Indeed, as was held in that case, "there is no limitation whatsoever on the people or the entities whose wrongdoings can be subject to qualified to disclosures".

24. He also relied on **Hibbins** to support the submission that ERA has to be construed in the light of its aim of "encouraging responsible whistleblowing"; thus, following **Croke v Hydro Aluminium Worcester Ltd** [2007] ICR 1303, its provisions "should be construed so far as one possibly can to provide protection rather than deny it.'

25. As he submitted, another stated part of the rationale in **Hibbins** is that it is to be presumed that the legislature does not intend "absurd results" (such as the inability of an employee to be protected for blowing the whistle on wrongdoing by a client or customer of the employer).

26. Ms Bewley submitted in response that it would be an 'absurd result' if the claimant could somehow be given a 'get out of gaol' free card for having reported her own misconduct to her employer. Thus, as measured against the absurdity of that result, the Disclosure cannot have been protected.

27. Ms Bewley also referred me to **Page v. Lord Chancellor** [2021] IRLR 377, and in particular to paragraph 21 and 36. She said that, by analogy, the Disclosure was incapable of constituting a protected disclosure -or a protected act. It was simply a statement of 'what the claimant had done'.

28. Ms Bewley further submitted that there was in any event no reasonable prospect of the claimant being able to establish that she reasonably believed the Disclosure was in the public interest (the 'belief' test being set out at paras 27-30 of **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837). At its highest, she said, all the Disclosure did was reveal the claimant's own 'breach of legal obligation' on one occasion. Even if subjectively the claimant believed the Disclosure was in the public interest, objectively viewed (taking the individual characteristics of the claimant into account) surely there was no reasonable basis for such belief.

29. She also observed that there is nothing within the particulars of claim which seeks to set out the basis for reasonable belief in public interest. No evidence had been produced. The only explanation is contained within a list of issues, in which it is said that the claimant "relies on the public interest in disclosing to her own employer, a GP surgery, the existence of a complaint made about her conduct specifically of equality and discrimination". This, she said, was wholly unconvincing.

30. Mr Ahmed (correctly) submitted that reasonable *belief* in public interest, rather than the *fact* of public interest, was the key for s.43B ERA purposes. He also argued that reasonable belief -both subjective and objective- could only be assessed upon hearing the evidence.

31. He suggested that because the claimant in her role as a GP would interact with members of the public, it was in the public interest for the respondent to be aware of the claimant's actions, so that it could assess the broader impact they might have for members of the public visiting the GP surgery.

Disclosure and causation

32. Ms Bewley observed (and Mr Ahmed accepted) it was not suggested that, but for the claimant telling the respondent, the respondent would not have found out what had happened at the University at about the same time in any event.

33. She took me to **Bolton School**. The employers in that case successfully argued that even if Mr. Evans had made a protected disclosure, the reason for his dismissal was not the making of the disclosure but his misconduct in hacking into the school's new computer system. The Court of Appeal held that the ERA protects disclosures,

but not other conduct by the employee, even if connected in some way to that disclosure. By analogy, she said, it was surely inevitable that the tribunal would find the matters about which the respondent took issue were caused (amongst other things) by the claimant's admitted use of the "N" word, and not in any way that fact of that admission- even if the claimant's admission was a protected disclosure.

34. Such rationale would, she submitted, apply all the more so in relation to the s.103A ERA claim- there was no chance the tribunal would find that the principal reason for the dismissal was the proscribed one.

35. She adopted the extreme example given by me of an employee who reports to his employer the fact that he has shot a fellow worker. It would surely be the fact of the shooting, and not the fact of the self-reporting, which would cause (amongst other things) the employee to be dismissed. For the employee to be able to say that because he reported the shooting he must be exempt from retribution would be absurd.

36. Mr Ahmed sensibly accepted that the tribunal may find that the Disclosure was not of itself the operative cause of any detriment. But he submitted that these were factual questions which the tribunal could only properly answer at a final hearing having heard the evidence. (He did not identify any factual dispute which might specifically make a difference.)

37. He also argued, relying on **Romanowska v Aspirations Care Ltd** UKEAT/0015/14, that where the reason for dismissal is the central dispute between the parties, "it will be very rare indeed that that dispute can be resolved without hearing from the parties who actually made the decision".

Was the Disclosure a protected act?

38. Ms Bewley submitted that, for reasons similar to those set out above in relation to protected disclosures, the claimant's self-reporting of her own wrongdoing could not amount to a protected act. She suggested that otherwise, the result would be absurd. The purpose of section 27 EqA was not to provide a 'get out of gaol free' card to someone who, by their own admission, had themselves contravened EqA. Indeed, that would be entirely contrary to the anti-discriminatory intent of EqA.

39. Mr Ahmed submitted that reference to "another person" in s.27(2)(d) EqA was broad enough to include the individual doing the protected act. Alternatively, the wording of s.27(2)(c) EqA was sufficiently broad to encompass such a person.

40. Mr Ahmed did not identify precisely how use of the "N" word was said to be a contravention of EqA -though one can plainly envisage many circumstances where it obviously would be.

41. Mr Ahmed conceded that an individual who e.g. revealed to their employer that they had rejected a job applicant on grounds of race would not attract protection under either section 27 EqA or s.47B ERA. Nor, he also conceded, could the individual referred to at paragraph 35 above expect to have that protection, when he told his employer of his crime. Nevertheless, he submitted that "the simple fact of disclosure of wrongdoing" could not take an employee out of the protection of EqA or ERA.

Causation and protected act

42. The parties made similar submissions regarding causation and the Disclosure as a protected act as they had when addressing causation and an alleged protected disclosure. In essence, Ms Bewley submitted that a claim founded on an assertion of detrimental treatment caused by the self-reporting of use of the "N" word, as opposed to the fact of its use, was wholly unrealistic. Mr Ahmed repeated that the matter was fact-specific.

Direct race discrimination

43. Ms Bewley submitted that there was nothing before the tribunal to suggest even a prima face case of direct race discrimination.

44. Mr Ahmed suggested that a prima face case could be made up by way of inference, given the treatment meted out to the claimant in the form of the detriments and her dismissal, the fact that the reasons for dismissal were not discussed with her. He also relied on the fact that the purported reason for suspension on 29 April 2020 (use of "N' word at the University) was not the same as the purported reason for dismissal on 5 June 2020 as articulated in the respondent's solicitors' letter dated 2 July 2020 (i.e. use of "N" word whilst at work at the respondent).

45. Further to this, he took me to **Base Childrenswear Ltd v Otshudi** [2020] IRLR 118, where he submitted it was found that the employer had given an "untruthful" response when discrimination was alleged, and that was sufficient for the tribunal to find there was a prima face case.

46. He also clarified in answer to questions I put to him that it was the claimant's case that, had she been (for example) white French, or Asian British, she would not have

been less favourably treated in the ways pleaded. He did not go into any further detail as to why this was said to be so. (As I have said, the claimant's pleadings make no mention of an appropriate comparator, beyond saying that "others of a different race in materially similar circumstances" would not have been so treated.)

47. Ms Bewley submitted that taking the detriments at face value, they still amounted to no more than 'unreasonable' or 'unfair' behaviour, and could not -for the reasons set out above- amount to a prima facie case of race discrimination. On the contrary, the undisputed fact that the claimant had used the "N" word at the University was the obvious 'reason why' the disciplinary process was instigated. The fact that 'other things' happened thereafter explained the fact that additional issues were articulated at the time of dismissal. There was absolutely nothing before the tribunal to suggest that an individual who was not white British would have been treated differently in any material way.

48. I referred counsel to paragraph 46 of the judgment of Mummery LJ in **Redfearn v, Serco** [2006] IRLR 623, where it was held:
"… It is a non-sequitur to argue that [Mr Redfearn] was dismissed 'on racial grounds' because the circumstances leading up to his dismissal included a relevant racial consideration, such as the race of fellow employees and customers and the policies of the BNP on racial matters. Mr Redfearn was no more dismissed 'on racial grounds' than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer. Any other result would be incompatible with the purpose of the 1976 Act to promote equal treatment of persons irrespective of race by making it unlawful to discriminate against a person on the grounds of race".

49. In response, Mr Ahmed pointed out that Mr Redfearn only lost his case after a detailed consideration by the tribunal of the facts at a final hearing.

Wrongful dismissal

50. Ms Bewley conceded that this was "the strongest of the claims", but that it was still "inherently weak".

51. In questioning from me, she accepted that there might be rare contexts in which use of the "N" word would not be blameworthy, or at least not amount in itself to a repudiatory breach. But she suggested that this was not such a case. She asserted that there was no context put forward -either in the pleadings or in any statement- which might 'explain away' matters.

52. Mr Ahmed submitted that one of the claimant's key complaints was that she had not been given sufficient opportunity to put into context her use of the "N" word (though he did not seek fully to explain that context). In contrast, she had, according to para 26(d) of the particulars of claim, been given at least some such opportunity by the University to explain herself (though no detail about this was given to me). The University had apparently found she had been "open, honest and consistent in acknowledging that she had used an offensive word of a racist nature" and that she "immediately recognised her mistake and demonstrated full understanding and insight amongst other findings". At the final hearing, he said, she might be able to persuade the tribunal that her single use of that word at the University did not in context amount to a breach, still less a fundamental breach, of her contract of service with the respondent.

53. He also pointed out that -as the dismissal letter makes clear- the claimant had apparently been dismissed by the respondent for reasons other than just her use of the "N" word at the University. The facts on which these other reasons were founded were either in dispute or needed to be put into context as part of evidence at a final hearing, before it could be assessed as to whether or not they amounted to a repudiatory breach on the part of the claimant.

54. He submitted that, if the wrongful dismissal claim had to be determined at a final hearing, there would be limited time and cost saved by striking out other allegations in the claim. This was because the wrongful dismissal claim would need to address most of the factual matters at issue in any event.

DISCUSSION

Wrongful dismissal

55. I accept that, depending on the circumstances, the mere use of the "N" word whilst at the University (or, later, whilst at the respondent) may have not constituted a breach, or at least a repudiatory breach, of the claimant's employment contract with the respondent. The context is crucial. And it is the claimant's case that the respondent did not take the necessary care to look into that context. I cannot determine that issue at this stage.

56. I also accept for present purposes the points Mr Ahmed makes as set out at paragraph 52 above.

57. The wrongful dismissal must focus on whether or not there was a repudiatory breach, rather than on 'fairness'. I suspect it may well be that a repudiatory breach can be made out, by reason of one or more of the matters set out in the 2 July 2020 letter. The claimant's wrongful dismissal case has some obvious potential weaknesses. However, I do not think the wrongful dismissal claim can at this stage be said to have no reasonable prospect of success.

58. Albeit with some hesitation, for similar reasons I also decline to make a deposit order as regards the wrongful dismissal claim.

Whistleblowing claims

59. I am prepared to accept for present purposes that 'self-reporting' *could* in an appropriate (rare) case amount to a protected disclosure, given the apparent breadth of the word "person" in s.43B ERA. Self-reporting could accord with the statutory intent behind the PIDA provisions in ERA. I therefore give the claimant the benefit of any doubt in that respect.

60. However, for the reasons given by Ms Bewley, I think it is highly unlikely the requisite (at least, objective element of) 'belief in public interest' element can be made out on the facts, assuming the Disclosure could otherwise be 'protected'.

61. In any event, I do not consider there is a reasonable prospect of the tribunal finding that her *reporting* of her use of the "N" word -as opposed to the *fact* of her use of it- caused her any detriment for s.47B ERA purposes- still less, that her reporting was the primary reason (or any part of the reason) for her dismissal. Although Mr Ahmed did his best to persuade me otherwise, any assertion to the contrary is in my judgement wholly unrealistic.

62. The 'absurdity' to which Ms Bewley refers in the 'shooting' example at para 35 above arises not necessarily from describing the culprit's self-report as a protected disclosure (though that might have its own issues). Rather, it arises from the suggestion that the report, as opposed to the crime itself, caused his dismissal. The two matters are surely causally distinct. By analogy, see **Bolton School** (para 21, per Buxton LJ). There, the protected disclosure was "the means whereby the headmaster found out about the misconduct". But but the question under ERA "was not how the employer found out about the misconduct, but why he disciplined the employee". Here, the answer to that question under ERA is: the respondent disciplined the claimant because, as she admitted, she had used the "N" word.

63. I therefore consider this is an exceptional case where striking out of both the s.47B & 103A ERA claims at this interim stage is appropriate. Even though the tribunal may have to determine the wrongful dismissal claim in any event, some time and resource will nevertheless be saved by striking those claims out now.

Victimisation claim

64. The victimisation claim ought in my judgment to be rejected for similar reasons as having no reasonable prospect of success.

65. Again, I am prepared to accept for present purposes that 'self-reporting' may in an appropriate case constitute a protected act, and that the Disclosure could theoretically constitute "an allegation" of the type for which s.27(2)(d) EqA caters. (I make this finding with some hesitation, given -to use the wording from **Redfearn**- that it may be a "non-sequitur" to give s.27 EqA protection in principle to someone self-reporting their use of racially offensive language.)

66. However, for similar reasons to those given at paras 56-58 above, I do not think the claimant has a reasonable prospect of successfully arguing that the Disclosure itself caused her any detriment.

67. Take, for example, the hypothetical case of an employee accused of racist conduct towards a work colleague, who in the course of a disciplinary meeting confesses to that conduct. Irrespective of whether or not that confession was a protected act- I have noted Mr Ahmed's concessions set out at para 37 above as regards a similar scenario- it would (in the absence of some highly unusual feature in the evidence) surely be the conduct, and not in any way the confession itself, which would be the cause of any consequential disciplinary action. The confession may 'tip off' the employer; it would provide the employer with (further) grounds for belief in misconduct. But to assert that it therefore *caused* the disciplinary action is surely wholly unrealistic.

Direct race discrimination claim

68. I do not consider that there is any realistic prospect of the claimant passing 'stage 1' by showing a prima facie case from which the tribunal could legitimately move to consider stage 2.

69. The simple fact that the respondent did not -on the claimant's case- follow 'due process', or a 'fair procedure', cannot of itself assist her -see para 21(j) above. I

accept Ms Bewley's submissions on point as set out at para 49 above. Nothing was adduced before me which even began to suggest that, had the claimant not been "white British"- e.g. had (as per para 46 above) she been white French, or Asian British- she might have been treated differently in any material way.

70. The claimant has been legally represented throughout. She has had the chance to put forward her case in its best light. Mr Ahmed has done his best to persuade me of that case. Despite this, I cannot see how the direct discrimination case she seeks to advance can possibly have a reasonable prospect of success.

71. Again, then, this is an exceptional case where disposal of each of the EqA claims at an interim stage is appropriate.

72. **To conclude**: it follows that all but the wrongful dismissal claim is struck out as having no reasonable prospect of success.

73. I asked the parties to write to the tribunal with dates to avoid for a 5 day hearing, before a full tribunal. In the light of my decision, 3 days -before a judge sitting alone- ought to suffice. I have made a separate case management order in this respect, and as regards the parties' agreement of appropriate directions.

Employment Judge Michell

4 September 2021

Sent to the parties on:

19 October 2021

For the Tribunal:

R Bonali