EMPLOYMENT TRIBUNALS

Claimant: Vibhor Yadav

Respondent: Wembley Cricket Club

Heard at: Watford (by CVP) **On:** 10 August 2021

Before: Employment Judge Shastri-Hurst

Representation
Claimant: In person
Respondent: Mr G Lee (solicitor)

JUDGMENT

1. The respondent's application for a strike out order is rejected.

2. The respondent's application for a deposit order is successful in part, as against the following claims:

   2.1 Claim for arrears of pay (basic salary) for the period September to December 2019;

   2.2 Claim for pay for holiday accrued but untaken during any period following 8 September 2019;

   2.3 Claim for notice pay for the period of January to March 2020;

   2.4 Automatic dismissal due to protected disclosures (s103A **Employment Rights Act 1996** "ERA");

   2.5 Detriment due to protected disclosures (s47B ERA);

   2.6 Harassment (s26 **Equality Act 2010** "EqA").

3. The Employment Judge considers that the claims listed at paragraph 2 above have little reasonable prospects of success. The claimant is ordered to pay a deposit of £125 not later than 21 days from the date this Order is sent to the parties as a condition of being permitted to continue with *each* of the six above-named allegations (i.e. £750 in total if the claimant chooses to pursue all six allegations). The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit. See accompanying Deposit Order for further information.

REASONS

INTRODUCTION

1. The claimant worked for the respondent from 18 April 2019 to 8 September 2019 under a fixed term contract as Club Coach, and latterly Director of Cricket. There are live issues between the parties as to the employment status of the claimant, and also whether there was any ongoing employment/contractual relationship between the parties after 8 September 2019. There was a period of negotiation over autumn/winter of 2019 as to the terms of a possible renewed fixed term contract for the following cricket season. The claimant was formally informed that his services to the respondent would not be renewed by letter of 23 February 2020.

2. Following a period of early conciliation from 31 March 2020 to 22 April 2020, the claimant presented a claim form to the Tribunal on 4 June 2020. By way of that claim form, the claimant brought claims of:

    2.1. Automatic unfair dismissal due to protected disclosures under s103A ERA;

    2.2. Detriment due to protected disclosures under s47B ERA;

    2.3. A claim of sex discrimination, clarified today to be harassment under s26 EqA;

    2.4. Various pay claims.

3. By correspondence dated 12 December 2020, the parties were informed that the respondent had failed to enter a response within the time limit set by rule 16 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules"). The correspondence advised that a hearing was listed for 8 February 2021 in order to determine remedy. By application of 28 January 2021, the respondent applied for an extension within which to file a response, on the basis that the claim form was never received by the respondent; a copy was only obtained by the respondent upon it chasing the tribunal following receipt of the 12 December 2020 correspondence. An ET3 dated 3 February 2021 was filed shortly thereafter.

4. It appears that the respondent's application and ET3 were not picked up immediately by the tribunal: on 4 February 2021, the tribunal sent correspondence, including a default judgment made by Employment Judge Lewis of the same date.

5. On 4 February, the respondent emailed the tribunal again, pointing out its application of 28 January 2021 and asking for a setting aside of the default judgment, and the remedy hearing listed for 8 February 2021 to be converted to a preliminary hearing. This is the course of action that the tribunal adopted, hearing the respondent's application on 8 February 2021, consequently revoking the judgment and accepting the response. On that occasion, the matter was listed for an open preliminary hearing in order to consider the issues of strike out and deposit order, as well as any case management

orders that may be appropriate (set out more fully below). Employment Judge Wyeth on 8 February 2021 also directed that the claimant could provide further and better particulars, in response to which the respondent could provide an amended response.

6. Following the provision of further and better particulars and an amended response, by letter of 26 March 2021 the respondent re-stated its intention to apply to strike out at the up-coming preliminary hearing, setting out its grounds for doing so, as follows:

> "The claimant has:
> 1. Failed to set out the grounds of any alleged reasonable belief that the alleged information set out at paragraphs 13.1.1 to 13.1.3 of the Case Management Summary (CMS) in respect of his whistleblowing detriment tend to show that a criminal offence had been committed or the health and safety of any individual had been put at risk;
> 2. Failed to justify any premise for claiming unfair dismissal [pertaining to his alleged dismissal for making protected disclosures] whilst engaged as a worker;
> 3. Failed to set out any premise for any alleged detriment suffered by him against a context where the Respondent did not know nor could be reasonably expected to know about the identity of any complainant due to the anonymous nature of its Whistleblowing Policy, as referenced in paragraph 15 of the Grounds of Resistance;
> 4. Failed to set out the alleged premise for a claim of direct sex discrimination in his ET1 Form despite the Employment Tribunal referencing this claim within section 16 of the CMS.

7. The open preliminary hearing was due to take place on 11 June 2021: for reasons unknown to me and irrelevant to the issues I have to consider, that hearing was postponed and relisted for 10 August 2021.

THE HEARING

8. This hearing was listed for one day. The hearing was entirely remote, held via CVP: this having been the decision of Employment Judge Wyeth on 8 February 2021, having heard representations from both parties and noting that both parties had attended that preliminary hearing by CVP without issue.

9. At one point today, the claimant lost connection, however everyone else paused proceedings and the claimant was able to re-join almost instantly. I recapped the two questions and answers of evidence that he had missed, and we then continued without issue. I am satisfied that the hearing was fair.

10. The Claimant represented himself. The Respondent was represented by Mr Lee. I had the benefit of a bundle of 183 pages, as well as statements from the Claimant, Mr Omer Ayaz (supporting the claimant) and Mr Vinoj Srinivasan, Chairman of the respondent.

11. I heard oral evidence from the Claimant and Mr Srinivasan. As referenced above, the claimant had provided a witness statement from Mr Ayaz, however Mr Lee did not have any cross-examination for him, and Mr Ayaz (although he joined briefly at the beginning of the hearing) could not attend the full hearing due to work commitments. I confirmed to the claimant that I would take into account Mr Ayaz's evidence, to the extent it was relevant to the matters before me. I also heard submissions from Mr Lee and the Claimant.

THE CLAIMS

12. At the beginning of the hearing, I took time to ensure that I understood the detail of the claimant's claims clearly, in order that I could accurately deal with the applications before me. I initially went through my understanding of the claimant's claims with him, and then confirmed that the respondent's understanding was the same. On undertaking this exercise, the claims crystallised further and required some minor changes to the list of issues set out in Employment Judge Wyeth's order of 8 February 2021.

13. I have set out the issues as I now understand them to be within the Case Management Summary attached to this Judgment and Reasons.

14. The points of clarification are set out immediately below.

Pay claims

15. In his claim form, the claimant had ticked the box to state that he was claiming notice pay, holiday pay, arrears of pay and other payments. In box 9.2, the claimant set out the sums he claims, including pay from September 2019 to March 2020, which he breaks down into a basic salary between September and December 2019, and then three months' notice pay.

16. Following the preliminary hearing in February 2021, the list of issues recorded at that stage only made reference (in terms of pay claims) to a claim under the **Working Time Regulations 1998** ("WTR") for accrued but untaken holiday pay. The order of Employment Judge Wyeth at paragraph 2.1 permitted the claimant to file and serve further and better particulars of any claims that he feels have been omitted from the Employment Judge's list of issues as recorded in the case management summary.

17. The claimant duly provided further and better particulars, including the line:

> "...unfair dismissal due to non-payment of salary owed from September 2019 until the date of dismissal via a WhatsApp message received on 3rd of January 2020."

18. On reading the papers, I therefore understood the claimant's pay claims to be:

    18.1. Holiday pay;
    18.2. Notice pay;
    18.3. Arrears of pay between September 2019 and December 2019.

19. The claimant confirmed that my understanding of his pay claims was correct.

20. Initially Mr Lee for the respondent objected to this interpretation of the pleadings and further and better particulars. However, on exploration of his objection, it transpired that he in fact was stating that the arrears of pay claim had no or little reasonable prospect of success, rather than arguing that the arrears of pay claim did not appear in the pleadings (and therefore would require an amendment application).

21. I therefore proceeded on the basis that the above three pay claims were live, and before me to consider at the hearing.

Sex discrimination

22. Also, in the claimant's further and better particulars, he stated:

> "...unfair dismissal because I chose to support Women's Cricket whereas Mr Malcolm Simmons and the committee were not in favour of welcoming women although they have a registered women's section."

23. The sex discrimination claim had originally been noted by Employment Judge Wyeth as a direct discrimination claim. However, the claimant has been consistent throughout, that the causal factor in his treatment (in relation to the sex discrimination claim) was that he was supporting women's cricket, not that he was a man.

24. It therefore seemed to me that the correct label for this claim was in fact harassment. Mr Lee accepted this label as being more accurate (whilst quite appropriately maintaining his position on the lack of prospects of such a claim).

25. The above points of clarification have been included within the revised list of issues contained within the Case Management Summary.

26. The claims arising from alleged protected disclosures, set out in Employment Judge Wyeth's order at paragraphs 13-15, did not need any clarification.

ISSUES

27. The issues for me to determine today were set out by Employment Judge Wyeth in the case management summary of 8 February 2021, at [39], and are as follows:

    27.1. Whether any or all of the complaints should be struck out under Rule 37 of the Rules) on the basis that all or any of the complaints have no reasonable prospect of success; and/or,

    27.2. Whether a deposit or deposits should be ordered to be paid by the claimant in accordance with Rule 29 of the Rules on the basis that all or any of the complaints have little reasonable prospect of success;

    27.3. Any further case management matters which then arise, if any.

LAW

Strike out

28. The Respondent applies to strike out the Claimant's claims under two grounds found within r37(1) of the Rules. R37 provides as follows:

> "37(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim 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 has been scandalous, unreasonable or vexatious."

29. Generally, this power to strike out should only be used in rare circumstances – **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**. It is understood that, as a general rule of thumb, claims should not be struck out where there is a dispute of facts that go to the core of the claim – **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603**.

30. I am also assisted by the case of **Balls v Downham Market High School and College [2011] IRLR 217**, in which Lady Smith held:

> "When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

31. For discrimination claims, the starting point regarding case-law is **Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL**. Here, the House of Lords emphasised that discrimination claims are often fact-sensitive and require close examination of the evidence at a full merits hearing.

32. Mitting J in **Mecharov v Citibank NA [2016] ICR 1121 EAT** provided the following guidance at paragraph 14:

> "…the approach that should be taken in a strike out application in a discrimination case is as follows:
> (1) Only in the clearest case should a discrimination claim be struck out;
> (2) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> (3) The claimant's case must ordinarily be taken at its highest;
> (4) If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and,
> (5) A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

33. Only in exceptional circumstances will a claim with contested facts be struck out – **Ezsias**. However, there are some caveats to the general approach of caution towards strike out applications. For example, when:

33.1. "It is instantly demonstrable that the central facts in the claim are untrue" – **Tayside**;

33.2. "There is no real substance to the factual assertions the claimant makes, particularly in light of contradictory contemporaneous documentary evidence" – **ED & F Man Liquid Products v Patel [2003] EWCA Civ 472**;

33.3. There are no reasonable prospects of the facts needed to find liability being established. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence – **Ahir v British Airways plc [2017] EWCA Civ 1392 CA**.

34. When considering an application to strike out, a claimant's claim must be taken at its highest, as it is set out in the ET1, "unless contradicted by plainly inconsistent documents" – **Ukegheson v London Borough of Haringey [2015] ICR 1285**. It is important to take into account that a claim form entered by a litigant in person may not put that claimant's case at its best as had it been properly pleaded – **Hasan v Tesco Stores Ltd UKEAT/0098/16.** The best course of action in such a scenario is to establish exactly what the claimant's claim is, and, if still in doubt about prospects, make a deposit order – **Mbiusa v Cygnet Healthcare Ltd UKEAT/0119/18**.

Deposit order

35. The Tribunal has the power to make deposit orders against any specific allegations or arguments that it considers has little reasonable prospect of success under r39 of the 2013 Rules:

> "39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim…has little reasonable prospect 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.
>
> 39(2) The Tribunal 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.

36. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for the making of the deposit order.

37. The purpose of such an order is not to restrict disproportionately access to justice, hence any order made must be for an amount that is affordable by a party, and can be realistically complied with – **Hemdan v Ishmail and anor [2017] IRLR 228**.

38. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – **Adams v Kingdon Services Group Ltd EAT/0235/18**.

FINDINGS OF FACT

39. I have only made findings of fact so far as they are relevant to the applications before me. Where I have not covered certain facts, it is because they are not relevant to the issues I have set out above.

40. I have heard only limited evidence on certain matters, and remind myself that it is not for me at this stage to conduct a mini trial. I also remind myself that, at this stage, I must take the claimant's claim at its highest. I have had sight of some documentation, although there may well be further documentation that comes to light in the due course of standard disclosure.

41. My findings, below, will therefore inevitably be incomplete. It will be for the tribunal of the full merits hearing to make full findings on what actually occurred between the two parties throughout the relevant chronology. Any findings set out below are therefore not binding on the tribunal dealing with the full merits hearing.

Working relationship

42. By agreement dated 17 April 2019, the claimant entered into a fixed term contract with the respondent, for a period commencing on 18 April 2019, and ending on 8 September 2019 – [106]. The agreement required the claimant to "*give [his] whole time and attention...to performing the Duties outlined...*".

43. The claimant's remuneration for this position was to be £6000 to be paid weekly in arrears (clause 5.3 [107]). A period of one month's notice was required to be given by either party, and the respondent reserved its right to summarily terminate the agreement should the claimant be guilty of any act(s) of gross misconduct.

44. The agreement ends with clause 16 which provides:

> "Should the Club wish to re-engage the Coach for any subsequent season/s, the Club will direct any such offer to World Sports Xchange Limited [*being the claimant's agent at the time*] in the first instance to undertake further negotiations."

45. This is the only written agreement between the parties.

46. The claimant continued to work with the Club between September and December 2019. However, there is a dispute of fact between the parties as to whether this was voluntary work or work for which the claimant was to be remunerated.

47. The claimant's case is that at the stage at which the fixed term agreement was coming to an end (September 2019), there was a verbal agreement between the parties that the claimant would continue working for the respondent between the months of September and December 2019. This, it is alleged by the claimant, was to allow for ongoing negotiations regarding a new written agreement for the following summer season. The claimant alleges that he was to be remunerated at the same rate of pay as under his fixed term contract.

48. Mr Srinivasan disputed this evidence, and told me that the Club would never formally engage a coach for the winter season, but if necessary would pay for one off, ad hoc sessions. It is the respondent's case that any work the claimant did following 8 September 2019 was on a voluntary basis.

49. Mr Lee highlighted a text exchange between the claimant and others, at [92]. The message exchange took place on WhatsApp, in a group called "DoC Time". The members of the group that are visible in the bundle are "Dimple", "Kamil", "Renu", "Vibhor DOC of Cricket". The specific message to which Mr Lee drew my, and the claimant's, attention was sent by the claimant and reads as follows:

> "Also just to let you know for professional and technical purposes, I'm not actually employed by the club since 7th September so I have [*sic*] providing my services on a voluntary basis. I'm not Director of Cricket as we speak so for any cricket related matters it is best you speak to the chairman in position Vinoj or other committee members ..."

50. The claimant in cross-examination stated that the WhatsApp group does not include any member of the committee, but was a group made for some female players. He also stated that the message may not be relevant to the respondent, but that it related to a women's cricket club that he had formed and was training.

51. Given the reference to "Vinoj" who was (and remains) the Chairman of the respondent, it appears more likely than not that this message relates to the respondent club, rather than another club and that the claimant was discussing his arrangements with the respondent. However, in the list of recipients of this message that are visible, I cannot see the name of any committee members of the respondent. There is also no date on the message (although it is clearly post-7 September 2019).

52. There remains therefore a dispute of fact between the two parties on the evidence before me, in relation to the nature of the working relationship between them following the ending of the fixed term contract.

Whistleblowing – protected disclosures

53. I note that the respondent's position on the claimant's alleged protected disclosures is that he has not set out any grounds for his "reasonable belief" that the words he alleges he communicated to the respondent tended to show either that a criminal offence had been, was being or was likely to be committed, or that the health and safety of an individual had been, was being, or was likely to be endangered, as is required by s43B ERA – [47A].

54. The alleged protected disclosures are set out at paragraph 13.1 of Employment Judge Wyeth's order – [42]:

    54.1. Senior members of the respondent had expose themselves to a junior member;

    54.2. A senior member had threatened violence against a junior member with his cricket bat; and

    54.3. The 3rd eleven team played an unregistered player who was aged 14 without proper protective equipment.

55. It appears from the evidence I have heard and seen today that these three issues were raised to the respondent's attention, although the identity of the person who raised them is not agreed.

Whistleblowing – causal link

56. The respondent asserts that the claimant has no reasonable prospects of demonstrating the necessary causal link between any protected disclosures and the termination/non-renewal of his arrangement with the respondent (whether that be by way of dismissal at law, or detriment).

57. At the outset, I note that, in relation to the dismissal claim, the claimant did not have two years' service, and therefore the burden is on him to demonstrate that the reason (or principal reason) for dismissal was any protected disclosures.

58. The respondent relies primarily on two points regarding its submission on causal link:

    58.1. The decision makers were not aware of the identity of the whistleblower, given the anonymous nature of the respondent's Whistleblowing Policy; and

    58.2. The reason that the claimant's agreement was terminated/not renewed was because the respondent and he could not agree on the remuneration package that the claimant sought in order to agree to renew the agreement. The respondent asserts that this reason is clear on the documentation.

Knowledge

59. It is the claimant's case that he spoke to various members of the committee about his disclosures, including Mr Srinivasan and Mr Simmons (Vice-Chair).

60. Mr Srinivasan told me today that he had no knowledge of protected disclosures being raised by the claimant, although he was aware that the protected disclosures had been raised by someone. Mr Srinivasan conducted an investigation into the alleged protected disclosures, given that they raised safe-guarding issues. As part of that investigation, he spoke to the claimant in his position of Coach, in order to see whether the claimant was aware of any information around the alleged protected disclosures.

61. I have not heard evidence from Mr Simmons as to whether he was aware of the protected disclosures or not, and, if so, whether he knew the claimant had made the disclosures. This is not a criticism of the respondent at all, and is entirely as expected, given that I must not conduct a mini trial at this preliminary stage.

62. The issue as to whether the alleged perpetrators had knowledge that the claimant had made protected disclosures is therefore not one that I am able to resolve today in line with the legal framework within which I must operate.

Reason for termination/non-renewal

63. Although the ultimate decision not to re-engage the claimant was down to Mr Srinivasan, it was a decision he discussed with his vice-chairmen and other members of the committee. He also informed me that the primary reason for not re-engaging the claimant was that he was asking for more than the respondent was willing or able to give him in terms of remuneration. Another factor was that the claimant informed him that he (the claimant) wanted "*absolute power of decision making when it comes to cricket section*" – [62]. This led Mr Srinivasan and his fellow members of the committee to have misgivings about re-engaging the claimant. I have in the bundle the letter of 23 February 2020, in which the decision not to renew the claimant's contract

is officially communicated to him – [85a]. I find it unlikely that Mr Srinivasan's oral evidence will change at a full merits hearing.

64. I also note the lengthy text discussion captured within [57-67] that is accepted as being a contemporaneous and accurate copy of text conversations between the claimant and Mr Srinivasan. The content of those exchanges, over several days, supports the respondent's position that the claimant was seeking more remuneration than the respondent was willing or able to give, and that to some extent there was, in autumn 2019, a breakdown in the working relationship. This is also mirrored in the text conversations between the claimant and his agent – [69-71].

65. The texts between the claimant and Mr Srinivasan also demonstrate that the claimant intended to seek grants that would be awarded in December 2019, on the basis that this would give the respondent more money, which ultimately could lead to a higher salary for him. Consequently, the claimant wished to hold off any firm decision-making until the outcome of those grant applications was known.

66. I also have a mind to the letter from the claimant's agent, Robert Humphries, addressed to "*To whom it may concern*". This letter is dated 26 March 2021, and therefore appears to have been obtained deliberately as evidence for the purposes of the litigation. It is therefore not strictly contemporaneous to the events with which the litigation is concerned. The contents of that letter demonstrate that Mr Humphries' view was that the claimant was seeking a placement elsewhere and that, in the end, the claimant did not wish to renew his contract with the respondent.

Sex discrimination

67. The respondent's position on the harassment claim is that the claimant has no reasonable prospects of demonstrating that the termination/non-renewal of his agreement was related to sex. It was put to the claimant in cross-examination that he had no evidence to suggest that this causative connection was present. In response, the claimant pointed me to the text exchange at [99-101] between him and Mr Simmons.

68. On a date unknown, Mr Simmons sent to the claimant the following text message – [101]:

> " ...If we have to go through this ladies [*sic*] thing to achieve that end then I'm all for it. Apart from that I'm not interested in women's cricket but happy for them to enjoy it as part of our club. My focus is the men's team and always will be. ..."

69. This was followed by another text from Mr Simmons to the claimant – [101]:

> I've seen the email now from the ladies. What have you got involved in here fella?!

70. This is the evidence to which the claimant points in support of his case of harassment.

The claimant's means

71. The claimant has found part-time work since he left the Respondent, for which he estimates he receives between £750 and £1000 (net) each month.

This is his only source of income. The claimant lives with his parents, and contributes to the household in the estimated amount of £200-£250 each month. He does not own any property, neither does he have any dependents. He does not have any outstanding loans or credit card debts.

72. Taking into account the claimant's estimated monthly outgoings (food, travel and so on) he estimates he has around £200 - £250 left as disposable income at the end of each month.

73. The claimant informed me he has savings of approximately £5000.

CONCLUSIONS

Pay claims

74. In light of the Claimant's evidence as to the existence of a verbal agreement for him to be remunerated for work done between September and December 2019, and taking the claimant's case at its highest, I cannot find that he has no reasonable prospects of demonstrating that such an agreement existed.

75. I do however find that, given the (apparently) contemporaneous nature and clear wording of his WhatsApp message at [92], the claimant has little reasonable prospects of succeeding with this argument.

76. On that basis, it follows that the claimant's pay claims relating to the period after 8 September 2019 have little reasonable prospect of success, as the claimant has little prospects of demonstrating that there was a contract in place that entitled him to remuneration/employment/work over the course of period following 8 September 2019.

77. I therefore find the following pay claims to have little reasonable prospects of success:

    77.1. Claim for arrears of pay (basic salary) for the period September to December 2019;

    77.2. Claim for pay for holiday accrued but untaken during any period following 8 September 2019;

    77.3. Claim for notice pay for the period of January to March 2020;

78. I will therefore attach a deposit order to these pay claims.

79. The respondent has accepted that the claimant is due some holiday pay for the period of 18 April to 8 September 2019. This part of the claimant's holiday pay claim therefore proceeds without a deposit order.

Whistleblowing – reasonable belief

80. The issue of reasonable belief requires the application of a test that is in part subjective and in part objective. This requires evidence from the claimant as to his state of mind at the time of making his alleged protected disclosures, as well as the possibility of evidence from the respondent that undermines the alleged reasonable belief.

81. There is nothing before me that would enable me to find at this stage that the claimant has no reasonable prospects of proving the central facts he relies upon to demonstrate reasonable belief, that there is no real substance to his assertion of reasonable belief, or that his case is contradicted by inconsistent documentation.

82. Further, given the partly subjective nature of this aspect of the claim, and the lack of evidence at this stage to counter C's alleged reasonable belief, I do not find that this aspect of his claim has little reasonable prospects of success.

Whistleblowing – causal link

Knowledge

83. It is necessary for the person alleged to have decided to terminate/not renew the claimant's contract to have been aware of the protected disclosures. Without such knowledge, there is no possibility of the alleged protected disclosures being the reason for any treatment by the alleged perpetrator.

84. Again, I remind myself of the need (at this stage) to take the claimant's claim at its highest. Where there is a dispute of fact, such as whether certain individuals knew that the claimant had made protected disclosures, that is a matter best left to the tribunal of the full merits hearing to determine, having heard complete evidence on the point. Mr Lee made the point to the claimant in cross-examination that the claimant has no evidence of the conversation(s) he says he had with Mr Srinivasan, and/or the two vice-chairs. However, evidently the claimant's oral evidence is just that – evidence which a tribunal will be entitled to weigh against all other evidence on this point, at a full merits hearing: it is only at that point that a tribunal will be in a position to assess whether the claimant's evidence on this issue of knowledge is sufficiently credible.

85. Although I note that the Whistleblowing Policy does allow for anonymity, this does not rule out the possibility of discussions having taken place outside of the remit of that policy.

86. I therefore cannot conclude that the claimant has no reasonable prospects of succeeding in demonstrating that the decision makers had knowledge that he had raised protected disclosures. Neither am I satisfied at this stage that the respondent has demonstrated that there are little reasonable prospects of it being shown that the alleged perpetrators had the requisite knowledge of the protected disclosures.

Reason for termination/non-renewal

87. In light of the evidence I have outlined above at paragraphs 63 – 66, I consider that the claimant will have an uphill struggle to satisfy a tribunal that the reason or principle reason for the termination/non-renewal of his agreement was due to any protected acts. However, and reminding myself of Lady Smith's words cited above, I am not satisfied that the claimant has *no* reasonable prospects of proving the necessary causal link required under both s103A ERA (automatic unfair dismissal) and s47B ERA (detriment). I

am however satisfied that the claimant has little reasonable prospect of establishing the necessary causative connection. This is particularly in light of the fact that the claimant does not have two years' service, and therefore bears the burden of proof in demonstrating the reason for termination in relation to the dismissal (s103A) claim.

88. I will therefore attach a deposit order to both the dismissal (s103A ERA) and the detriment (s47B) claims, given that the causal link required for both is that the protected disclosures must be the reason (or principle reason) for dismissal, and the reason for any detriment.

Sex discrimination – harassment

89. I remind myself of the burden of proof provision within the EqA, at s136. This provides that, if the claimant can show evidence from which the tribunal could decide (in the absence of any other explanation) that the respondent has discriminated, then it must uphold the claim. This means that the claimant bears the initial burden to show facts from which a tribunal may infer discrimination. If the claimant is successful at that stage, the burden shifts to the respondent to demonstrate the non-discriminatory reason for the alleged discriminatory conduct.

90. In light of the text message at [101] cited above, there is at least something from which a tribunal could possibly draw an inference that Mr Simmons was not keen on women's cricket, and therefore took against the claimant for his support of it. By no means do I suggest that this argument will succeed, however there is *something* that demonstrates Mr Simmons' arguably dim view of women's cricket, and his tone towards the claimant in regard to that topic.

91. I therefore cannot find that there are *no* reasonable prospects of the claimant demonstrating the requisite causal link for his s26 EqA claim, which is after all a much looser link than for other types of discrimination.

92. However, for the same reasons as set out under "Reason for termination/non-renewal" above, I do consider that the claimant has little reasonable prospects of demonstrating that the termination/non-renewal of his agreement was connected to sex, in that Mr Simmons took against the claimant due to the claimant's support of the female players at the respondent.

93. I will therefore attach a deposit order to the harassment claim.

Amount of deposit order

94. I make deposit orders against the following claims:

    94.1. Claim for arrears of pay (basic salary) for the period September to December 2019;
    94.2. Claim for pay for holiday accrued but untaken during any period following 8 September 2019;
    94.3. Claim for notice pay for the period of January to March 2020;
    94.4. Automatic dismissal due to protected disclosures (s103A ERA);
    94.5. Detriment due to protected disclosures (s47B ERA);

94.6. Harassment (s26 EqA).

95. The claim regarding outstanding holiday pay for holiday accrued but untaken during the course of the claimant's fixed term contract (April to September 2019) proceeds without any deposit order.

96. I take account of the claimant's evidence given regarding his means and summarised above. I also bear in mind the need to avoid making an order that is prohibitive of the claimant pursuing litigation, whilst also sending a sufficiently serious message to the claimant to consider his pursuing of claims that I have found have little reasonable prospects of success.

97. I therefore attach a figure of £125 to each of the above six claims. The claimant may pick and choose which claims he wishes to pursue. If he chooses to pay to pursue all the claims, the total figure payable will be £750. In light of the claimant's means, and the purpose (as set out above) of deposit orders, I am content that this figure represents a sum that is proportionate and reasonable. I am satisfied that this figure will not impede the claimant's access to justice, whilst encouraging him to think carefully as to whether he wishes to pursue each of these six claims.

98. I note that I will exclude myself from hearing the final hearing in this matter, having given the above opinion on prospects.

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Employment Judge Shastri-Hurst
Date: 2 September 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

17 November 2021

FOR THE TRIBUNAL OFFICE