EMPLOYMENT TRIBUNALS

Claimant: Dr C Moloney

Respondents: (1) Rochdale Borough Council
(2) The Governing Body of Oulder Hill Community School

Heard at: Manchester (remote preliminary hearing via CVP)

On: 3 September 2021 (and subsequently in chambers)

Before: Judge Brian Doyle

Representation
Claimant: In person
Respondent: Ms L Quigley, counsel

RESERVED JUDGMENT

The application to amend the claim to include a complaint (whether expanded or not) under section 47B of the Employment Rights Act 1996 is refused. In any event, that complaint has not been presented in time within the terms of section 48 of the Employment Rights Act 1996. Accordingly, the Tribunal has no jurisdiction to hear that complaint. It has no reasonable prospect of success, therefore, and it is struck out. The claim is otherwise dismissed.

REASONS

1. This is a preliminary hearing to consider: (1) The respondents' application for a strike out order or deposit order in relation to the claimant's claim; (2) The claimant's application to amend the claim, so far as may be required; and (3) The finalisation of the list of issues. That this was the agenda for this hearing was confirmed with me by the parties at the outset of the hearing.

2. The hearing was conducted as a remote public hearing via the Cloud Video Platform (CVP).

3. I was not invited to hear evidence by either party. At the conclusion of the submissions by Ms Quigley (for the respondents) and Dr Moloney (on her own behalf), I reserved my decision. I wished to give careful attention to the history of the matter and to the documents that had been placed before me. I did not consider that I could do justice to the issues before me by delivering an *ex tempore* judgment.

4. I had before me at the hearing an electronic file of documents (the hearing bundle) comprising 399 pages plus an index of 2 pages, provided in advance, and which I had read as part of my preparation. References to that file appear in square brackets below. That file had been produced by the respondents because of a case management order to that effect made by Employment Judge Ainscough on 14 June 2021. The judge's order (which was not reproduced in that file) made no requirement of the claimant to prepare a file, although there was in principle no reason to prevent her from preparing such a file.

5. In addition, I had the following documents provided to me by the claimant on the day: (1) Letters from a consultant dermatologist dated 30 June 2021, 27 July 2021 and 11 August 2021 regarding the claimant; (2) The claimant's annotated response in red ink to the respondents' response to the claimant's further particulars (123 pages); (3) The claimant's latest case management agenda; and (4) A letter dated 1 October 2020 from the 2nd respondent concerning the conversion of the school to academy status under an association with Star Academies.

6. As this was a remote hearing, I did not have the hard copy case file available to me. I have subsequently been provided with a copy of Judge Ainscough's order from the case file as I had not been able to access it from the electronic case file maintained on the Employment Tribunal's Employment Case Management (ECM) system.

7. I began to consider my decision on the afternoon of 3 September 2021 and over the course of the weekend of 4-5 September 2021.

8. On 3 September 2021 and on 6 September 2021 the claimant emailed my hearing clerk in terms that gave me cause to reflect upon whether I should ask to see a lever arch file of documents to which the claimant had referred at the hearing and which she said she had sent to the Tribunal and to the respondent. I did not have a copy of that file, although I was uncertain whether it would contain material that was relevant to the limited issues that I had to decide at this preliminary hearing.

9. I made inquiries as to the claimant's file, but those inquiries did not reveal that the file was being held by the Tribunal administration. Accordingly, on 6 September 2021, I gave an instruction that the parties were to be written to in relation to the claimant's file with a view to asking the claimant to provide a copy (ideally electronically, if possible) within 14 days. I set a "BF Date" (a date by which the Tribunal administration was to refer the case back to me) in accordance with the usual practice. Unfortunately, my instruction was not

acted upon, with the result that the parties were not written to and a BF Date was not set on the system.

10. By chance, when checking whether I had any work outstanding, I noted that there had been no referral to me in this case since my instruction of 6 September 2021. On 14 November 2021 I emailed the Tribunal administration to check the position. As I did not get a timely reply, I chased the matter. On 19 November 2021 I was advised that my instruction of 6 September 2021 had not been acted upon and that the case file was marked as "judgment awaited", although this status had not been flagged to me, as would be usual when a judgment was outstanding. I gave a fresh instruction.

11. On 22 November 2022 my fresh instruction was acted upon, which led to an understandably frustrated response from the claimant. With the assistance of the Regional Employment Judge, however, efforts were made to trace the claimant's file and it was located. That file was provided to me on 24 November 2021. I have now been able to consider it. I gave fresh consideration to my decision on 25 and 27 November 2021, from which this judgment and reasons now result.

The history of these proceedings

12. Acas early conciliation commenced on 20 June 2019 and ended on 24 June 2019. The claimant named the prospective respondent as Rochdale Metropolitan Council only [1]. No issue has arisen from that.

13. The claimant's ET1 claim form was presented on 24 July 2019 [2-25]. The claim as originally presented named as respondents (1) Rochdale Metropolitan Council and (2) The Governing Body of Oulder Hill Community School. The correct title of the 1st respondent is in fact Rochdale Borough Council, but nothing hangs upon that.

14. Even though the claimant had an early conciliation certificate in respect of the 1st respondent, she did not provide an early conciliation certificate number for either respondent, indicating instead that her employer had already been in touch with Acas. In section 15 of the form, she explained the difficulty that she had had in entering her early conciliation certificate number. Again, nothing hangs on that.

15. The claimant is Dr Catherine Moloney. The original ET1 claim form identifies the claimant as a Teacher of English employed between 1 September 2014 and 11 June 2019. The Tribunal understands Dr Moloney is a law graduate and qualified barrister (although now non-practising), with a PhD degree in English and a graduate teaching qualification.

16. In section 8.1 of the form the claimant indicated that she was complaining of unfair dismissal (including constructive dismissal). She stated that: "It is my contention that I was forced to leave my employment due to making disclosures re Health and Safety but there are issues of time." For the background and details of her claim, at section 8.2 she referred to an

attachment (an .rtf file) [14-25]. I have read that document with appropriate care.

17. Although there was no indication in section 8 of the ET1 claim form that the claimant intended to bring a discrimination complaint, in section 9.1 she implied that she was claiming discrimination and that by way of remedy she sought compensation and a recommendation. Section 9.2 set out in broad terms her expectations as to a potential remedy in compensation. In section 12 she indicates that she does not have a disability.

18. The original particulars of the claimant's claim are set out in some detail over 11 substantive pages [14-25]. As I indicated above, I have read that document with appropriate care. The particulars taken a narrative form of the kind that is not at all unusual when a claimant is a litigant in person and has not had the benefit of professional assistance in "pleading" the case. The Employment Appeal Tribunal discouraged the use of a narrative style of "pleadings" in *C v D* (HHJ Tucker, 17 September 2019), but I make no criticism of the claimant for setting out her original claim in the way that she did.

19. The Tribunal administration acknowledged receipt of the claim on 12 August 2019 and gave notice of it to the respondents [26-27]. That notice referred to the ET1 containing a long narrative statement. It asked the claimant – if she were raising a claim of anything other than unfair dismissal – to set out the statutory basis of her claim with full details of incidents/actions and individuals she relies upon by 26 August 2019. The respondents were invited to present a response to the claim by 9 September 2019.

20. By separate notice, also dated 12 August 2019, the Tribunal set the matter down for a case management hearing on 11 November 2019 by way of a preliminary hearing [28-29].

21. The respondents presented their separate responses to the claim on form ET3 [40-46 and 47-53]. Although those responses are not dated, no issue is taken with the respondents' compliance with the procedural requirements of them. Joint grounds of response were also presented [54-61]. Rochdale Borough Council Legal Services acted as legal representative for both respondents.

22. The grounds of response addressed a claim of unfair dismissal only. The respondents had not received confirmation that the claimant wished to pursue any other complaints. The respondents allude to various "historic and tangential matters" in the claim [54]. They refer to alleged communications between the claimant and her trade union and sought further information as to those communications [54-55]. The joint grounds of response described the background to the claimant's employment [55-60] and finally addressed the complaint of unfair dismissal [60-61].

23. Although not required to, the claimant responded to the respondents' joint grounds of response [62-72]. She also provided in tabular form a Schedule of Claims [73-76 and [77]. She also provided further particulars of protected disclosures [78-105]. This latter document mixes narrative, pleading and

evidence (including the incorporation of email evidence) in a way that is understandable when originating from a litigant in person, but which is not always helpful to a respondent attempting to respond to a claim or to the Tribunal in the early stages of its case management of the claim.

24. The upshot of this, particularly from the tabular Schedule of Claims, is that the claimant identified her complaints as being: (1) various unlawful detriments for making various protected disclosures (sections 43B and 47B Employment Rights Act 1996); (2) automatic unfair dismissal by reference to the making of protected disclosures (section 103A Employment Rights Act 1996); (3) disability discrimination (section 15 Equality Act 2010); and (4) failures to make reasonable adjustments (sections 20-21 Equality Act 2010).

25. In many respects, some of those complaints are overlapping to some degree or extent. They date from May 2015, continue into 2016-2018, and culminate with the claimant's use of the grievance procedure, concluding with the claimant's "dismissal" in May 2019 and an unsuccessful appeal against dismissal in June 2019.

26. What appears to me from the selection of materials provided to the Tribunal for the present preliminary hearing is that the claimant tends to litigate her claim in combative correspondence with the respondents' legal representatives, perhaps betraying a natural frustration with the litigation process, but surprising in someone who is a qualified barrister and who has herself worked in employment law advice and litigation. While again that might be understandable in a litigant in person, such an approach serves only to obscure the essential elements of the claim rather than reveal or illuminate them. It also risks the claim growing uncontrollably without reference to matters such as time limitation or the formal requirements of amendment. An example of such correspondence from 18 March 2020 appears in the electronic bundle at [106-109].

27. For completeness, and to ensure that the claimant's position is fully understood, I also refer here to her correspondence with the Tribunal in October 2019 regarding her health, in which she also refers to parallel proceedings arising from her employment (including personal injury litigation) and her concerns about the respondents' conduct of the Tribunal proceedings [110].

28. Although a copy of the HMCTS case file for this claim is not available to me as part of a remote hearing – and there is no reason why it should be – I can see from the material before me that on 8 November 2019 the then Regional Employment Judge for the Northwest region, Judge Parkin, referred to "[e]xtensive recent correspondence in this matter from the claimant". Judge Parkin intimated that there was no need to copy the Tribunal into the claimant's correspondence with the respondents or the documents disclosed between the parties. Judge Parkin postponed the case management hearing listed for 11 November 2019 in the light of the claimant's health revelation.

29. On 22 November 2019 the respondents applied under rules 37 and 39 for a strike out order (or alternatively, a deposit order) in relation to the claimant's complaint of unfair dismissal [113]. As a result, a public preliminary hearing was listed for 18 February 2020 [114-115].

30. In turn, the claimant wrote to the Tribunal on 14 January 2020 and 23 January 2020 seeking a postponement of the preliminary hearing. That was refused by Judge Parkin on 27 January 2020 [116-117] in terms that speak for themselves.

31. On 18 February 2020 the claimant set out her written response to the respondents' application for a strike out order [118-121].

32. On 18 February 2020, in a judgment signed on 19 February 2020 and sent to the parties on 25 February 2020, Employment Judge Feeney struck out the complaint of unfair dismissal as having no reasonable prospect of success, but she noted that the claimant's public interest disclosure claim was unaffected by the judgment and continues. The claimant had not attended the preliminary hearing and she was not represented at it. See [124-125]. It appears that her non-attendance at the appointed time was inadvertent.

33. Judge Feeney also case managed the claim at the preliminary hearing on 18 February 2020. Her Case Management Summary and Orders appear at [126-130]. Judge Feeney makes reference to the "pleadings" at paragraphs (2)-(9) [126-127]. Judge Feeney required the claimant to provide further particulars of her protected disclosure claim and of her discrimination claim (with an application to amend) by 3 March 2020.

34. The claimant then corresponded with the Tribunal on 25 February 2020 [131-132]. She took issue with the Tribunal's management of her case, but she undertook to comply with its Orders.

35. On 11 March 2020, Judge Feeney treated that correspondence as potentially an application to reconsider her judgment of 18 February 2020 and indicated what the judge required of the claimant, if so [133]. An application for reconsideration did not in fact result and Judge Feeney's strike out of the unfair dismissal complaint stands.

36. What appears to be the claimant's draft particulars of a disability discrimination claim appear at [134-137].

37. Further to Judge Feeney's Orders, the respondents set out their position on 18 March 2020 in two letters dated 17 March 2020 [138-144]. They opposed any amendment of the claim to include a complaint of disability discrimination. In separate tabular form, the respondents also set out in a schedule their understanding of the claimant's claim regarding protected disclosures and they sought further information relating to (a) the disclosures and (b) the detriments alleged or relied upon [145-158].

38. That appears to have led to the claimant annotating the respondents' tabular schedule in red, referring the respondents to previous communications as part of the legal proceedings and/or to specific pieces of documentary evidence disclosed or sought [145-158].

39. Separately, on 18 March 2020, the claimant emailed the Tribunal (seemingly without copying the respondents) [159-162]. That email took issue with various aspects of the Tribunal's management of the case and with the respondents' communications with her.

40. It is pertinent to note that from about this time the Tribunal's ability to conduct normal judicial business began to be adversely affected by the Covid-19/Coronavirus pandemic. That might explain the gap in the history of these proceedings (as it appears to me) between 18 March 2020 and 4 May 2020.

41. On 4 May 2020, Judge Feeney made further case management orders [163-165]. Among other things, the claimant was required to complete a Scott Schedule (the template for which was provided by the judge) by 29 May 2020 and the respondents were required to provide any information as a result by 26 June 2020. A preliminary hearing was listed for 18 September 2020 to consider: (a) whether the claimant should be allowed to amend her claim; (b) what the issues are; and (c) to make orders for a final hearing [208-214].

42. The claimant replied to the Tribunal on the same date and referred to (understandably) difficult personal and family circumstances [166-177]. Unfortunately, appended to her email were earlier communications with the Tribunal or between the parties.

43. More substantive correspondence between the claimant and the Tribunal then resulted on 18 May 2020 [178-179, 185]. Again, unfortunately, that correspondence largely addresses the claimant's discontent with the conduct of the Tribunal and of the respondents. Nevertheless, the claimant had completed the Scott Schedule by hand [180-184].

44. That did not appear to satisfy the respondents. On 11 June 2020 the respondents applied under rule 38 for an Unless Order in respect of the claimant's provision of further and better particulars [186-188]. They also asked for the preliminary hearing of 18 September 2020 to be relisted. The essence of the application was that (i) the handwritten annotations to the Scott Schedule did not meet the requirements of Judge Feeney; (ii) that the claimant providing the respondents with three lever arch files of documents, without more, did not serve to particularise her claim; and (iii) the parties were at an impasse.

45. The claimant then took issue with that correspondence and opposed the application for an Unless Order [189-190].

46. On 25 June 2020 the claimant engaged directly with the respondents [191-197] in a way that reproduces a long email thread; takes issue with the respondents and their quest for further particulars; but takes the

particularisation of the claim no further forward. In further correspondence on 26 and 29 June 2020 the claimant refers to a family bereavement [198-199]. It can be gleaned from these communications that the claimant felt unable to assist the respondents or the Tribunal further.

47. On 10 July 2020 Regional Employment Judge Franey (who had succeeded Judge Parkin as Regional Employment Judge for the Northwest upon the latter's retirement) converted the preliminary hearing listed for 18 September 2020 into an in-person hearing [200].

48. On 14 July 2020 the respondents asked Judge Franey to clarify the position as to its request for an Unless Order [201-204]. See also the claimant's email of the same date [205]. A medical report regarding the claimant's health, dated 14 July 2020, also appears at [206-207].

49. For one reason or another, that passage of correspondence led to the postponement on 30 July 2020 of the preliminary hearing listed for 18 September 2020 [215]. On 25 August 2020 it was relisted for 17 December 2020 [216-219]. The claimant prepared an agenda for that hearing in a narrative style [220]. Her concerns were largely to do with documents and witnesses, but also the medium by which materials were to be provided.

50. That preliminary hearing did take place on 17 December 2020 before Employment Judge Johnson by telephone. The claimant attended in person and, as previously, the respondents were represented by Ms L Quigley (counsel). Judge Johnson's Case Management Summary and Orders appear at [225-235] and were sent to the parties on 27 January 2021.

51. As a result of Judge Johnson's case management, the final hearing was listed for 10 days commencing on 13 June 2022 [238-239]. The judge set a provisional hearing timetable. He listed a further telephone hearing for case management purposes on 14 June 2021 [236-237]. He set out the claims being brought. He recorded that the claim of ordinary unfair dismissal had been struck out (section 98). The claimant confirmed that she did not rely upon an unfair dismissal by reason of making protected disclosures (section 103A). Her claim thus relied only on section 47B (detriments for making protected disclosures) and that was the only claim that would be heard at the final hearing. She also confirmed that she did not wish to apply to amend her claim to include complaints of disability discrimination.

52. As Judge Johnson recorded it: "The claim is essentially about Dr Moloney's alleged treatment by the respondent following two protected disclosures which she made in 2015, but she says she repeated on numerous occasions until she commenced a lengthy period of sickness absence in November 2017 following a series of detriments, with the absence ultimately leading to her dismissal in 2019."

53. Judge Johnson then defined the issues between the parties which potentially fell to be determined at final hearing, but subject to clarification and finalisation. A "framework of issues" was identified and set out with some obvious care and

particularity at paragraph (12) of the Case Management Summary at [227-230]. Judge Johnson identified issues under the following headings: (1) Time limits/limitation; (2) Was there a protected disclosure? (3) Did detriments take place? (4) Is there a connection between the protected disclosures and the detriments identified? and (5) Remedy.

54. Judge Johnson then made Orders for further information and an amended response by reference to the framework of issues.

55. The claimant's purported compliance with Judge Johnson's Order for further information to be provided by her by reference to the framework of issues resulted sometime in January 2021. It appears at [240-287] – that is, some 48 pages. As before, the further information is in narrative form. It reads more like a witness statement than further information, but that is not unusual when a litigant in person is the author of further particulars, although surprising given the claimant's legal background. It is not paginated nor are there paragraph numbers, although it is otherwise relatively easy to follow.

56. Sometime in February 2021 the respondents responded to the claimant's further particulars [288-380] – that is, some 93 pages and 501 numbered paragraphs. The respondents' position was that: (a) it was unclear in places what was being relied upon as a disclosure and what was being relied upon as a detriment; (b) the respondents were unable easily to identify which school pupils were being referred to by initials (although accepting the need to safeguard their identities); (c) they had not identified all the emails referred to in the particulars; (d) the claim had been expanded via the further particulars, giving rise to a need for permission to amend and/or further time limit questions; (e) all complaints prior to 21 March 2019 were prima facie out of time; and (f) there were no alleged detriments from the commencement of sick leave on 28 November 2018 until the claimant's dismissal.

57. The electronic file reveals further correspondence between the parties and with the Tribunal in March, April and May 2021, with which I am not immediately concerned for the purposes of this preliminary hearing. I note in particular Judge Johnson's correspondence dated 14 May 2021 [392-394].

This preliminary hearing

58. The matter comes before me because of the preliminary hearing conducted by Employment Judge Ainscough on 14 June 2021. This preliminary hearing is to consider: (1) the respondents' application for a strike out order or deposit order; (2) the claimant's application to amend the claim, if any, so far as required; and (3) the finalisation of the list of issues.

59. Judge Ainscough's case management order is not in the electronic file of documents provided to me for this hearing, but I have been provided with a copy of it while considering my reserved decision. It was signed by the judge on 16 June 2021 and sent to the parties on 9 July 2021. The claimant was not in attendance at that hearing, but the judge's Order is most helpful in explaining why, and in setting out the claimant's concerns about documents.

Respondents' submissions

60. The respondents' position is that the claimant's claim has evolved and expanded, and to the extent that it has done so, requires permission to amend. In any event, whether amended or not, the claim is out of time and the respondents seek a strike order on that basis.

61. Ms Quigley began by reminding me of Judge Ainscough's order of 14 June 2021. She took me through the history of the proceedings. The last act of which the claimant could make a timely complaint would be dated 21 March 2019. She was absent from work from November 2017 onwards.

62. The claim now comprises a complaint about public interest disclosure detriments only. Ms Quigley considered that the alleged disclosures are set out in the original ET1 in the third and fourth paragraphs at [14]; the third and fourth paragraphs at [15]; and the third paragraph at [17]. *(I interject here to record my agreement with that analysis).*

63. The alleged detriments are set out in the original ET1 in the second and last paragraphs at [14]; the second paragraph at [15]; the second and third paragraphs at [16]; the second, third and fourth paragraphs at [17]; the second and bottom paragraphs at [18]; the second paragraph at [19]; and the second paragraph at [22]. *(I interject here to record my agreement with that analysis).*

64. In Ms Quigley's submission, there is no allegation within the ET1 that post-dates 27 November 2017. Everything subsequent to that is an expansion of the original claim. Nothing is in time. It was reasonably practicable to present a timely claim. The claim is out of time.

65. Ms Quigley then took me to the claimant's schedule of claims at [73-76]. The final row in [73] is new and is not to be found in the original ET1. The first row at [74] is said to be completely new. The reference to 5.12.2018 at [75] is new and out of time. The remaining three rows relate to disability discrimination and section 103A, which are no longer pursued. The reference to the grievance is wholly new and is out of time.

66. Counsel reminded me that there had been no application to amend before Judge Feeney. See further [134-137] and the respondents' objections at [139].

67. Ms Quigley then took me to the claimant's document at [78-105] – her further particulars of protected disclosures. It comprises a narrative plus a "cut and paste" of various emails. The claimant provided three lever arch files to the respondents, supposedly in compliance with the earlier case management order to particularise her claim or provide further information of it. Effectively the claimant was telling the respondents to "go figure it out." The respondents were unable to make sense of the claimant's case by that means. The claimant thereby confused the position and failed to comply with the case management order. It is for the claimant to put her case, as required.

68. As a result, the respondents asked for further information. The Scott Schedule took matters no further forward [180-185]. If anything, the Scott Schedule contained new allegations, including disability discrimination allegations which were not subsequently pursued.

69. Counsel then took me to Judge Johnson's summary and orders of 17 December 2020 [225, 226 paragraph 6, 227 paragraph 9, 228(iii), 229]. The alleged detriments were identified at [229ix]. Of these, (a) some were in the original ET1, but not all; (b) was not new; (c) was "quasi-new" as the claimant had not suggested this fully; (d) to (h) were completely new; (i) was not new; and (j) was new, but the only one potentially in time.

70. Ms Quigley referred to the respondents' grounds of response at [60 paragraph 57]. The claimant was dismissed on 1 May 2019; her grounds of appeal were dated 6 May 2019; further grounds were advanced on 13 May 2019; the appeal was heard on 11 July 2019; and it was rejected on 23 July 2019.

71. Counsel cross-referred to Judge Johnson's order at paragraph 3.1 at [231]. Further particulars of disclosures and detriments were then provided by the claimant at [240ff]. This took a narrative form. There were no references to disclosures or detriments. The document is akin to a witness statement and did not comply with the previous order. The respondents had to do their best with that material and try to discern what was background and what was substance. See the respondents' document in response [288-380]. Paragraph 9 at [289] exemplifies the claimant's inconsistency between documents.

72. Ms Quigley submitted that the claimant's next document confuses matter and expands things further. She sent it with volumes of evidence (and a USB stick) and expected the respondents to do the work that she should have done. That was a mammoth task, even though all of this was out of time in any event.

73. Counsel then took me – rather laboriously, but necessarily, it must be said – through each of the claimant's further particulars from [290] onwards identifying what allegations as to disclosures and as to detriments is said to be new and what is accepted as not. I have not reproduced those submissions here, but I have noted them in my note of the proceedings, and there are said to be a remarkable number of new allegations.

74. Suffice it to say that Ms Quigley's submission is that the claimant's particularisation of her claim at various times has gone significantly beyond what she alleged in her original ET1. The allegations are all out of time. It was reasonably practicable to have brought her full case in time. It is for the claimant to bring evidence as whether it was not reasonably practicable to do so. The claim as now particularised is a vastly different claim from that which was originally presented in the ET1. It raises many new matters, requiring many more witnesses and documentary evidence to deal with and a wider inquiry to defend. The events relate largely to the period 2015-2017. We are now 4 years on. The respondents have difficulty in uncovering the evidence that is required. Many documents are no longer retained because of GDPR. Memories of potential witnesses have also faded, and they are no longer able

to recall events as alleged. This causes prejudice to the respondents. And all these matters are out of time. The claimant has expanded her claim to raise almost all complaints she ever had during her employment without regard to the parameters of a public interest disclosure claim.

75. In summary, Ms Quigley invited me to strike out the claim on the basis of the Tribunal having no jurisdiction. If there is an application to amend the claim, then applying the *Selkent* test, these are new matters, which cause prejudice to the respondents.

Claimant's submissions

76. Before the claimant began her submissions, I ensured that the parties let me have (via my hearing clerk) any documents that were outstanding. I did not have the claimant's lever arch file at that point, but it has since been supplied, as I have explained. I also explained to her what she needed to address in her submissions to deal with the preliminary issues raised by Ms Quigley.

77. The claimant explained that her P45 was issued on 11 June 2019 and that she submitted her ET1 on 24 July 2019. She accepted the respondents' counsel's point as to time limits, but the claimant asserted that reference back from the dismissal should be made in respect of the previous detriments of which she complains. What she experienced was because of having made disclosures in relation to the respondents' failure to provide a safe working environment, and in relation to the health and safety of herself, other employees, and students. In her ET1 she tried to avoid prolixity and tried to avoid referring to people by name.

78. Instead, she referred to detrimental matters such as bullying, breaches of confidentiality, being made to teach students she was not qualified to teach and so on. She also referred to disclosures concerning sexual harassment and specifically child protection and safeguarding. She contended that the core reason for her dismissal was the substance of the disclosures she had made as to a failure to provide an appropriate working environment and matters such as safeguarding and child protection. She submitted that she had reported these matters to management at all levels, from the Head Teacher and below. She also reported these matters to her trade union. She did so because she feared being penalised. She was also concerned that evidence might otherwise be concealed.

79. Her primary contention was that there was a failure to investigate her concerns about reprisals, consisting of bullying, being subjected to disadvantage, being micro-managed, subjected to false allegations and character assassination. She cited as an example the fact that her pay appeal became protracted over a period of 8 months and then turned into a capability hearing. In respect of coaching, she was required to have as her coach a person alleged to have bullied her. She regarded that as a significant detriment.

80. The claimant submitted that she made representations as to stress she was under to managers at all levels, including the Head Teacher and the Deputy

Head Teacher. She asserts that those representations were largely ignored. Then during the health management process in relation to her absence on long-term sick leave, the Head Teacher failed to respond to her or to engage with her. She engaged with the Head Teacher in detailed correspondence, but he did not reply or address her concerns.

81. At this point in the claimant's submissions, she finished what she wanted to say and invited me to ask her questions. I did so as I was concerned that her submissions had not really addressed the preliminary issues I needed to decide. I explained to the claimant that nevertheless I could not act as her advocate or make her case for her, and that I would have to take care not to do so when asking questions of her.

82. The claimant accepted that some of the instances of which she complains go back several years. Nevertheless, her position seems to me to be that these are all part of a piece or thread that culminates in her dismissal, and her dismissal was informed by the disclosures she had made. That dismissal related cumulatively to what had gone before.

83. The claimant confirmed that she had taken a PhD degree in English. She had also undertaken a PGCE and qualified as a teacher in 2000. She had been called to the Bar in 2005 and she worked for Peninsula Business Services until 2009, specialising in Employment Law and Commercial Law. She then returned to teaching, having taken a further course to permit her to do so. However, she did not regard herself as an expert in Employment Law or Employment Tribunal litigation, and she referred also to the fact that her experience was now somewhat distant.

84. I reminded the claimant of the task that I had in deciding whether an amendment of her claim was necessary; and, if so, whether an amendment should be permitted; and whether her claim, amended or not, had been presented in time and could be allowed to proceed. I explained that the difficulty that I had was that in her relatively short submissions she had merely presented an account of what her claim was about. I am not today concerned with the substance or merits of that claim. I am determining whether that claim may be permitted to proceed to a final hearing and, if so, upon what basis. I was concerned that I needed to be referred to material that assisted me in that task.

85. The claimant explained that she had been granted legal assistance by her trade union to bring a personal injury claim. She gave the impression that she was not entirely content with the assistance she had received. Nevertheless, she accepted that she had advice and assistance from her trade union. Her suggestion was that at some point the question of a constructive dismissal arose, but no such claim was made at that point. She also consulted Citizens Advice before proceeding with her public interest disclosure claim.

86. I asked the claimant whether her trade union had advised her about time limits. The claimant said that at the time she was suffering from PTSD very badly. She was not advised about time limits until it was rather too late. She had also

sought some advice from Citizens Advice “a while ago”. She asked in about public interest disclosure. It seems that she received an explanation in general terms as to what that involved.

87. I noted that there was nothing in the hearing bundle that pointed to when the claimant was receiving advice or assistance. She agreed. The claimant said that the respondents were given details of her involvement with the trade union during her employment and after her employment ended.

88. I asked the claimant whether I had evidence before me as to her PTSD. The claimant said that there was such medical evidence, but it was not in the hearing bundle. The implication was that she had sent such evidence to the respondents; that it was not in the hearing bundle that they had prepared; but that such evidence was in the claimant’s bundle (which the claimant referred to on screen). The claimant confirmed in answer to my inquiries of her that she had been diagnosed with Post Traumatic Stress Disorder in May 2017. Prior to that she had been diagnosed as suffering from stress. She had been treated for PTSD and had one round of Cognitive Behaviour Therapy (CBT), which had been interrupted by the Covid-19 pandemic. This CBT had been very helpful, but she remained under the care of her GP.

89. I asked the claimant whether it was her position that it was not reasonably practicable for her to have acted sooner in respect of bringing employment tribunal proceedings because she was suffering from PTSD. The claimant said that that was not the sole factor. It was a factor. There was also considerable confusion with her trade union and that did not help matters.

90. I put it to the claimant that her claim seems to have grown exponentially at every point in case management when she had been asked by the Tribunal to identify what the claim is about. The claimant accepted the criticism made of her of prolixity. She referred to her Schedule of Claims, in which she answered all the questions that had been put to her by the respondents. She referred to her difficulties arising from “litigation neurosis coupled with PTSD.” She pointed out that she had reduced the number of claims and she tried to particularise them as concisely as possible. The claimant referred me to her Schedule of Claims.

91. I asked the claimant to explain why her claim had grown over time rather than emerging fully formed from the original ET1. The claimant suggested that it had developed over time because, as she has had medical treatment, she has been able to talk about her complaints, and discuss them, and articulate them. Whereas when she submitted her ET1 she was at a very early stage of recovery. CBT treatment is extremely intense and not particularly pleasant, but it has helped her to articulate matters that she had not felt able to speak about or even put in writing before. It has been very difficult. She agreed that she did appreciate what Judge Feeney, Judge Johnson and Judge Ainscough had been requiring of her. The claimant again referred to her lever arch file of materials upon which she wished to rely. She agreed that it is possible she may have misunderstood what was required was for her to set out the essentials of her legal complaints and not to provide the evidence upon which

those complaints relied. She referred to her difficulties as a litigant in person. She referred also to her difficulties in communications with the respondents' legal representatives.

92. The claimant referred to her case management agenda. She raised the question of the correct identity of the respondent school now that it had become part of Star Academies. I explained that that was a matter that may need to be resolved if the claim proceeded, but on the face of it, it did not seem that the TUPE regulations applied as the transfer to the Academy occurred some considerable time after her employment had ended for quite separate reasons. It is possible that potential legal liability for her claim had transferred to the Academy by some other means, but that was by no means obvious. That was a matter for future consideration rather than now.

93. The claimant also referred to her communications with her trade union representative, who she understood to be an employee of the respondents. Her argument might be that disclosure to that representative also effected disclosure to the respondents. I indicated that that might be a matter that should be explored at the final hearing if the claim proceeded further.

94. The claimant submitted that all the matters she has now raised in the further particulars of her claim are not new matters but are within the ET1. The ET1 does not go into detail and does not name names.

95. I checked with the claimant whether the three letters from a consultant dermatologist were relevant to the issues I was deciding today. She confirmed that she did not rely upon that medical evidence in this hearing.

96. The claimant ended her submissions by stating that she took all the points that have been made and that she understood that there was a time limitation issue. She sees her dismissal as the end product of a cumulative series of detriments and that the time issue can be explained in that way.

Respondents' reply

97. Ms Quigley reminded the Tribunal that this is not a dismissal claim under section 103A; it is a detriment claim under section 47B. The claimant is not a typical litigant in person. She has been a professional employment law adviser. She would have been aware of the time limits. A plea of ignorance is not available to her. She also had trade union assistance. If her trade union were negligent in not advising her as to the time limits, then that is not an excuse, because she has a potential remedy against the trade union. The claimant understands the relevant law. She intended to bring a public interest disclosure claim.

98. There is no evidence that the claimant is adversely affected by PTSD. She has been clearly capable of conducting this litigation and communicating with the Tribunal and the respondents. The whole period needs to be explained.

The claimant's bundle

99. As I did not have a copy of the claimant's bundle at the preliminary hearing, and it took a considerable time for the tribunal administration to find that bundle and to provide it to me, I have taken additional care to read that bundle and to understand what reliance the claim places upon its contents.

100. Broadly, the claimant's bundle contains the following: (1) A covering letter with the Schedule of Claims document. (2) An 18 page document summarising the evidence in the bundle in 9 categories and providing responses to a request for information about the disclosures (albeit many responses just refer to a section in the bundle). (3) Some *inter partes* emails – about 10-15 pages. (4) Documents in the lever arch file in 9 tabs matching the 9 categories above. The contents of this section are largely original documentary evidence.

101. From the claimant's bundle I glean the following.

102. The bulk of the claimant's file is made up of original evidence that may or may not be relevant if this matter proceeds to a final hearing. That evidence is set out in nine separate tabbed sections, as I have noted above. That evidence comprises a total of 423 pages. In very large part that evidence is not presently relevant to the preliminary issues that I have to determine at the present preliminary hearing. However, I have combed through that evidence to ensure that I have not missed anything that might be relevant to the preliminary questions. From that process, I have identified the following points that appear to have some present relevance.

103. The evidence dates from 2015. It is immediately apparent that the claimant had a growing number of concerns arising from the discharge of her duties as a teacher in the respondents' school. As early as May 2015 she was reporting ill health consequences of obvious stress resulting from those concerns. Nevertheless, at least at that time, she was able to set out her concerns in some detail in regular communications with the appropriate colleagues within the school.

104. It is the claimant's case that she was diagnosed with PTSD in May 2017. The documentary evidence points to her being signed off work, initially for a week, due to the side effects of that condition. It is not in dispute that she did not return to work after 27 November 2017. Despite that, it does appear from the documentary evidence that she remained capable of writing long and detailed emails to the school's management and other colleagues setting out or repeating the concerns that she had previously raised over the preceding two years. One such example is an email of 6 December 2017 in which the claimant sets out in some detail the concerns that she had previously raised, and she does so in a document of some 17 pages. A further example is a letter dated 26 May 2018, which is a shorter document of some 2 pages, but which refers to her health-related absence and provides details of assaults, bullying and (impliedly poor) workplace practices. In respect of her occupational health, the claimant records that she was undergoing intensive CBT-based treatment on referral by her GP. She was thereby taking issue with whether it would

assist her recovery by being required to attend for additional assessment by the respondents' occupational health provider.

105. In August 2018 there is a further exchange between the claimant and the school's Head Teacher in which the claimant sets out in a letter of some 7 pages the concerns that she has dating from 2015 and the detriments that she believes that she suffered as a result.

106. What appears from the documentary evidence is that, at least before her lengthy period of sick leave commencing on 28 November 2017, the claimant was perfectly capable of setting out her position at length and in some detail in regular exchanges by email or by letter with colleagues or management. It is also clear that in some instances the claimant was involving her trade union representative. The documentation also points to several occasions when the claimant had short periods of sick leave, which may or may not have been stress-related or associated with incidents of which she had raised concerns.

107. It is also noticeable that some of this evidence is not being presented in its raw form. The respondents and the Tribunal have an expectation that evidence in the form of documents should be presented as they originally appeared and not in some form of edited version.

108. Within the bundle is a selection of documents that relate to another teacher with whom the claimant seeks to compare her treatment. This material, which dates from 2019, may or may not be of assistance if this matter proceeds to a final hearing, but it casts no light on the answers to the preliminary questions that this Tribunal must determine. What may be apparent from this material, however, was that the claimant could involve herself in another colleague's case at this time.

109. Within the claimant's bundle, apart from the examples that I have referred to earlier and above, there is very little material that points to what actions, if any, the claimant was taking in relation to her concerns after November 2017 and before her appeal against her dismissal in June 2019. By the time of launching her appeal in June 2019 the documentation indicates that at that stage she was aware of the time limits that might apply for tribunal proceedings. There is a further reference at this stage to the claimant's condition of PTSD being aggravated by the stress caused by the dismissal and appeal, and that she was also being treated for parathyroidism, which she believed to be a possible side effect of her experiences.

110. A letter of 23 January 2019 from the claimant to the Head Teacher of the school takes issue with the alleged failure of the Head Teacher to contact the claimant's GP as requested. There is reference there to aggravation of the claimant's symptoms of PTSD. The suggestion is that the school is in some way delaying or preventing the occupational health processes and in turn delaying or preventing her return to work. Certainly, by January 2019, the claimant can raise her concerns in writing with the Head Teacher and to set out her concerns with the health management process and to make allegations that the school was refusing to make reasonable adjustments for her.

111. What of the medical evidence, if any, in respect of the claimant's ability to make a timely application to the employment tribunal? The claimant's bundle contains a letter dated 14 June 2021 from her GP. That letter confirms that the claimant suffers from Post-Traumatic Stress Disorder which had developed in 2017 after issues with the respondents. The GP's correspondence at that date is concerned with the alleged delays in the tribunal process and the detrimental effect that this is said to be having on the claimant's mental health and her PTSD. There is a reference at that time to problems with headaches, visual disturbances, poor sleep, reduced appetite and flashbacks. The claimant is said also to have low mood, to have difficulty reading for long periods and to be experiencing visual problems.

112. Earlier medical evidence is dated 14 July 2020 from the claimant's GP. This confirms that the claimant had attended the practice on several occasions over the previous 3 years with a variety of symptoms. This commenced in April 2017 when the claimant first presented with symptoms that were consistent with PTSD, anxiety, and low mood. The symptoms which suggested PTSD included flashbacks, difficulties with sleep and concentration. She also had poor appetite. The patient was initially treated with medication in the form of antidepressants and was also referred to counselling. The GP records that since 2017 the claimant has had ongoing symptoms of PTSD, anxiety, and depression. She has needed to be seen at the GP practice on a regular basis and has required continuing medication and treatment, including counselling and cognitive behavioural therapy. The GP records that the claimant has not fully recovered from her symptoms, and she has been affected by the workload involved in reviewing paperwork and proceeding with the dispute with her former employer. As at 1 July 2020, the GP records that the claimant was struggling with symptoms including poor sleep, loss of appetite, stress and low mood, and had also started to exhibit some features of worsening traumatic stress disorder. These symptoms had been exacerbated by recent family bereavements and the fact that she is the main source of support and care for her mother since her father's admission to hospital. The GP writes in support of the claimant who at that time did not feel up to attending a preliminary hearing in the Tribunal due to her mental health symptoms.

113. Within the claimant's bundle is a 4 page witness statement dated 25 June 2021 from the claimant's mother. I recognise and understand the frustrations and concerns that are expressed within that witness statement, which is in very large part concerned with the claimant's experience of the tribunal process and her dealings with the respondents' legal representatives. While I note the content of that witness statement, I am afraid that it takes me no further in providing an answer to the preliminary questions that fall to be determined at the present hearing.

114. The impression created by the bundle of documents presented by the claimant is that, voluminous although this documentation is, it is nevertheless selective. There is little or nothing covering the period November 2017 (or at least January 2018) up to June 2019 when the claimant begins an appeal against her dismissal. It is important to note that at this stage and at this

preliminary hearing the Tribunal was not expecting the claimant to produce the substantive evidence that might be used in support of her complaints that she brings in her claim. The Tribunal's focus now is upon why the claim was not presented to the Tribunal in a timelier fashion and without need of amendment. There is nothing in the bundle that I can see, for example, that relates to the process that led to the claimant's dismissal by reason of capability, although there is some selective correspondence concerning her referral to occupational health.

Relevant legal principles

115. As the claim now stands, it is a claim only capable of being pursued under Part V of the Employment Rights Act 1996 (protection from suffering detriment in employment). It is a complaint under section 47B (protected disclosures), cross-referencing the ingredients of a protected disclosure in sections 43A to 43L. The Tribunal's jurisdiction is to be found in section 48(1A).

116. Section 48(3) provides that an employment tribunal shall not consider a complaint under section 48(1A) unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

117. Section 48(4) provides that for the purposes of section 48(3), (a) where an act extends over a period, the "date of the act" means the last day of that period, and (b) a deliberate failure to act shall be treated as done when it was decided on. In the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when it does an act inconsistent with doing the failed act or, if it has done no such inconsistent act, when the period expires within which it might reasonably have been expected to do the failed act if it was to be done.

118. Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of section 48(3)(a).

119. Rule 37 of the Employment Tribunals Rules of Procedure 2013 deals with the Tribunal's power to strike out a claim. So far as may be relevant to the present claim, 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 the grounds that it is has no reasonable prospect of success. This aspect of the rule is apt to cover a situation where the Tribunal has no jurisdiction to determine the claim and/or where the claim is time-barred.

120. Rule 39, alternatively, provides that 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 the claimant to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

121. So far as an amendment of a claim is concerned, the Tribunal has obtained assistance from the commentaries in *IDS Employment Law Handbook: Volume 5: Employment Tribunal Practice and Procedure* Chapter 8 and *Harvey on Industrial Relations and Employment Law* Division PI Section I(5).

122. The Tribunal's power to allow an amendment of the claim derives from its general case management powers in rules 2, 29 and 41. The discretion is a broad one to allow an amendment at any stage of the proceedings, but it is exercised in accordance with the overriding objective. The core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

123. In a detriment claim it is necessary for a claimant to set out the specific acts complained of. The Tribunal at final hearing can only adjudicate upon specific complaints. A general description of the complaint will not suffice. The complaint must be particularised. The respondent is entitled to know the claim it has to meet. See *Ali v Office for National Statistics* [2005] IRLR 201 CA.

124. The general principles for considering an application to amend a claim at any stage derive originally from *Chapman v Goonvean & Rostowrack China Clay Co Ltd [1973] ICR 50 NIRC*. In exercising its discretionary power to amend, the Tribunal should seek to do justice between the parties having regard to the circumstances of the case.

125. In *Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 NIRC*, the general procedure in considering amendments is described. The key principle is that, in exercising its discretion, the Tribunal must have regard to all the circumstances and, in particular, to any injustice or hardship which would result from the amendment or a refusal to make it. This test has been approved in subsequent cases, not least in *Selkent Bus Co Ltd v Moore [1996] ICR 836 EAT* and *Ali v Office of National Statistics [2005] IRLR 201 CA*. See also *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209 CA and most recently *Vaughan v Modality Partnership* (2020) EAT/0147/20.

126. The *Selkent* principles require a careful balancing of all the relevant factors. Regard is to be had to the interests of justice. Regard is also to be had to the relative hardship that would be caused to the claimant if the amendment is refused and to the respondent if the amendment is allowed. Account is to be taken of the nature of the amendment, of the applicability of time limits, and of the manner and timing of the application to amend.

127. Turning to the nature of the proposed amendments in the present case, the application is not aimed at the correction of small mistakes. We are dealing here with either a fresh labelling of facts already pleaded or new factual allegations that change the basis of the existing claim. As it was put in *Abercrombie*, the Tribunal's focus is not on questions of formal classification, but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old. *The greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely*

it is that it will be permitted. An amendment that would require the respondent to undertake new and substantially different lines of enquiry does not mean that the amendment should be refused. It will weigh in the balance against it. It may be conclusive depending on the other factors involved.

128. If a new complaint is being added by amendment, then the applicability of any time limit arises for consideration (and whether time may be extended). This is only relevant where the proposed amendment raises a new cause of action (whether or not it arises out of the same facts as the original claim). However, if it arises, the Tribunal must determine the time bar issue as part of the application to amend. It cannot defer the question to be decided at the final hearing.

129. However, some doubt on previous orthodoxy has been cast by the decision in *Galilee v Commissioner of Police of the Metropolis [2018] ICR 634. The EAT* held that it is not always necessary to determine time points as part of the amendment application. It also held that granting an amendment does not automatically deprive the respondent of any limitation arguments it might have in relation to the new claims. In its view, a Tribunal can decide to allow an amendment subject to limitation points. This might be the most appropriate route in cases where the new claims are said to form part of a continuing act with the original claim (which is otherwise in time). The EAT also held that amendments to pleadings that introduce new claims or causes of action take effect for the purpose of limitation at the time permission is given to amend. There is no backdating of any new claim added to the time when the original proceedings were commenced. See also: *Potter v North Cumbria Acute Hospitals NHS Trust [2009] IRLR 900 EAT* and *Prest v Mouchel Business Services Ltd [2011] ICR 1345 EAT.*

Discussion and conclusion

130. This has been a relatively difficult judicial decision to consider and to reach, quite apart from the delays that have occurred and which I have explained above. I apologise to the parties for those delays.

131. The claim illustrates the perils of setting out complaints in a narrative form, which is then compounded by a narrative response to an application for further and better particulars and/or additional information. In addition, while in professional hands a Scott Schedule can be a useful tool of case management, litigants in person (even one who has legal qualifications) are often ill-equipped to be able to use a Scott Schedule as a carefully sharpened tool rather than a blunt instrument. This claim has undoubtedly suffered from the outset from the claimant's inability to identify her complaints and their essential ingredients succinctly and with clarity. Instead, despite the best efforts of three other judges in the conduct of case management, the complaint of detriment has simply swelled and grown uncontrollably.

132. It is not difficult to empathise with the claimant's concerns at the alleged treatment of her by the respondents. If she were to establish the fact of the making of the disclosures that she alleges she made, and that she suffered

detrimental treatment, and that those disclosures informed that detrimental treatment, she may have a meritorious case at final hearing. However, I cannot allow my empathy for the claimant to inform my decision on whether the complaints are in time and/or whether the claim may be amended – save where any such empathy is to be properly reflected in balancing justice and hardship.

133. I have kept in mind that the claim as a whole straddles four periods of time: (i) the period prior to the claimant commencing sick leave on 28 November 2017; (ii) the period while on sick leave; (iii) the particular period in 2019 that concerns the decision to dismiss her, including the claimant's appeal; (iv) and the period from July 2019, when the claimant presented her ET1, to date.

134. I start by reminding myself that there is no longer any cause of action before the Tribunal, whether by amended or unamended claim, of unfair dismissal. That appeared to be the only complaint that was being made in the original ET1. However, the claimant accepted that the respondents' reason for her dismissal was capability and because of the respondents' management of her lengthy absence. Either because of the claimant's acceptance that an unfair dismissal complaint had no reasonable prospect of success and/or because of Judge Feeney's judgment striking out the unfair dismissal complaint, there is no longer an unfair dismissal complaint before the Tribunal, whether in reliance on section 98 of the Employment Rights Act 1996 (an ordinary unfair dismissal) or section 103A (an automatic unfair dismissal by reason of making public interest disclosures).

135. An earlier suggestion that the claimant might pursue an amended claim by introducing complaints of disability discrimination contrary to sections 15 and 20-21 of the Equality Act 2010 has gone nowhere. The claimant has not sought to amend the claim to introduce a disability discrimination complaint. At an earlier stage of the proceedings, she conceded that such a complaint was not being advanced.

136. That leaves only the possibility of a detriment complaint relying upon the public interest disclosure provisions. That is a complaint under section 47B of the Employment Rights Act 1996. Such a complaint is not *obviously* present in the original ET1, despite the background and context to the claimant's dismissal provided by the narrative pleading of her case. But even to the extent that such a complaint might be discerned from the original ET1, it refers to matters that pre-date the claimant's commencement of a lengthy period of sick leave in November 2017. The claimant has sought to expand the allegations that might form the basis of any such complaint.

137. I am not free to ignore the earlier case management decisions of Judge Feeney, Judge Johnson and Judge Ainscough. I must work with them. The significant case management decision is that made by Judge Johnson on 17 December 2020 in relation to the section 47B complaint.

138. As Judge Johnson records, this complaint is essentially about Dr Moloney's alleged treatment by the respondents following two protected disclosures

which she made in 2015, but which she says she repeated on numerous occasions until she commenced a lengthy period of sickness absence in November 2017 following a series of detriments, with the absence ultimately leading to her dismissal in 2019. The question then was whether all the claimant's complaints in that regard were presented within the time limits set out in section 48(3)(a) & (b) of the Employment Rights Act 1996. Dealing with this issue may involve consideration of subsidiary issues, including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; and whether it was not reasonably practicable for a complaint to be presented within the primary time limit.

139. Judge Johnson further recorded that the alleged disclosures the claimant relied on are as follows: (a) On 7 May 2015, the claimant sent an email to her trade union representative at school (and the regional representative) informing them that the respondents had in place an unsafe working environment and/or an environment where bullying of staff took place; and (b) On 2 December 2015, the claimant sent an email to the second respondent's deputy head teacher, Ben Bramwell, informing him that an unsafe working environment existed at the school and/or that there was an environment where staff were bullied. Judge Johnson noted that the claimant will provide further details in further particulars described in his case management orders; and that she claims that in relation to both disclosure (a) and (b) she continued to make further disclosures containing this information on 15 to 20 occasions until she commenced long-term sickness absence in November 2017.

140. Judge Johnson then set out in very clear terms the alleged detriments upon which the claimant relied as follows.

141. (1) The claimant was bullied on approximately 8 or 9 occasions by the Head of English and Literacy – details of when they took place, what the detriments were and why if appropriate, they were detriments to be provided by the claimant – from 8 May 2015 until November 2017 when she commenced long-term sickness absence. (2) The claimant was allocated a disproportionate number of "bottom sets" on a date to be confirmed. (3) The claimant was allocated to alternative teaching provision without having the necessary skills or support from appropriately qualified staff (the claimant to provide details of when the allocation took place and when she sought support, who allocated the work and declined her request for support). (4) When (on a date to be confirmed) the claimant reported sexual harassment from a student at the school to her union representative and the second respondent's governing body, she was reprimanded by the Deputy Headteacher, who accused her of breaching student confidentiality. (5) The Acting Head of English spoke inappropriately to students about the claimant's performance on date(s) to be confirmed. (6) The Acting Head of English also sent emails to colleagues in the English Department at the school which suggested that the claimant was no longer a member of the Department in October 2017 and also harassed her while the claimant was absent on long-term sickness on a date(s) to be confirmed. The claimant says that she raised this matter with the Deputy Head Teacher. (7) The SENCO refused to give support to the claimant (on date to be specified by the claimant), involving work with children with complex needs

and made her feel responsible for this matter. (8) The SENCO also required the claimant (on a date to be specified by the claimant) to undertake extra meetings with teaching assistants. (9) The Head Teacher refused the claimant's yearly pay appraisal in November 2016 and when the claimant brought an appeal, during the summer 2017, he warned her of the possibility of a capability process. He also denied the claimant access to the second respondent governing body when she wished to complain about this matter. (10) The Head Teacher also failed to respond to the claimant's correspondence in August 2018 concerning a return to work from sick-leave and the change in working culture and to her grounds of appeal sent following her dismissal in May/June 2019.

142. Judge Johnson also recorded that Dr Moloney has produced medical evidence from her GP identifying symptoms relating to post-traumatic disorder, anxiety, and low mood. She confirmed that she was at that time able to participate in hearings without too much difficulty.

143. Judge Johnson was not thereby inviting the claimant to expand her claim, but rather to particularise it within the parameters that the judge had identified. As I have recounted above, Judge Johnson simply required further information of the claimant and an amended response from the respondents by reference to the framework of issues. Instead, sometime in January 2021 the claimant produced the document of 48 pages that appears at [240-287], which is in narrative form. It reads more like a witness statement than further information. In turn, that led to the respondents sometime in February 2021 responding in a 93 page document. Most pertinently, that response asserted that the claim had been expanded, giving rise to a need for permission to amend and/or further time limit questions; that all complaints prior to 21 March 2019 were prima facie out of time; and that there were no alleged detriments from the commencement of sick leave on 28 November 2018 until the claimant's dismissal.

144. The document headed "Schedule of Claims" is a document contained within the claimant's bundle for this preliminary hearing and upon which she relies. The origins of this document appear from the history of the proceedings above. It is a document to which the respondents have also contributed extensively. Having identified the incidents and the nature of the claims, the respondents seek information about the disclosures and about the detriments, to which the claimant then annotates her replies. It seems to represent her latest position regarding the complaints that she makes, but in tabular form rather than in narrative form. Ignoring those parts of the Schedule of Claims that refer to disability discrimination and automatic unfair dismissal (the former being no longer pursued, and the latter having been struck out), what are the unlawful detriments of which she complains?

145. The claimant's complaints in that regard are described as follows (I have placed the detriments appearing to me to arise in italics).

146. (1) Between May 2015 and 2018 her protected disclosures of malpractice and of health and safety breaches were *ignored*. (2) On 8 May 2015 she was

presented with *vexatious allegations* of being "over-personal" with students. (3) Between 2015 and 2017 she was *allocated an unusually high number of low ability and SEN students and an unmanageable timetable*. (4) Between 2015 and 2017 she was *subjected to excessive lesson observations* and was *repeatedly challenged regarding her capability* in informal meetings with management. (5) Between 2015 and 2017 incidents of assault and certain student's disruptive behaviour, aggression, violence, harassment and bullying of the claimant are *handled ineffectively* and *allowed to continue unchallenged*. (6) Between 2015 and 2017 there was an *inadequate response* to the claimant's work-related illnesses *contrary to the respondents'* health-related absence and wellbeing *policy*. (7) on 3 October 2016 the claimant was *refused pay progression*. (8) Between October 2016 and May 2017 the claimant's *appeal* of her performance/pay appraisal was *inexcusably delayed* (for 8 months or 17 months). (9) On 11 January 2017 it was *suggested* that the claimant may need to go on a *teacher development programme* (subsequently withdrawn). (10) Between 2016 and 2017 her *reports of being bullied were ignored*. (11) On 26 April 2017 the claimant was *told that her performance/pay appeal had been successful, but* on 4 May 2017 she *then received documents relating to her capability and performance*. (12) On 6 May 2017 the claimant's *complaint to the governors* regarding the handling of her performance/pay appeal and the inappropriateness of the capability bundle is *ignored*. (13) On 28 November 2017 the claimant's *report that she had been sexually harassed* at work by a teenage student *is ignored*. (14) From 5 December 2017 onwards the claimant was *absent with work-related stress and anxiety*. (15) On 10 May 2017 the claimant is *diagnosed with PTSD* as a result of work-related incidents. (16) From December 2017 onwards the claimant's sickness absence and ill health is *poorly managed contrary to the relevant policy* and her questions and concerns are *repeatedly ignored*. (17) Between 5 December 2018 and 12 January 2019, the claimant's *grievance is ignored* contrary to the relevant policy.

147. I turn then to consider whether (a) I should permit the claim to be amended to include a complaint of detriment under section 47B, whether in the terms identified by Judge Johnson in his framework of issues above or by reference to the claimant's document of January 2021 or otherwise and (b) whether the claim, whether amended or unamended, is in time.

148. There is considerable overlap between the two questions, but the essential point is this. Whether or not the original ET1 contained complaints of detriment by reason of having made public interest disclosures, any such complaints of detriment pre-date the claimant's commencement of sick leave in November 2017. The expansion of those complaints by means of the claimant's industry in purported compliance with Judge Johnson's requirement of her to provide further information about those complaints leaves that essential position unchanged.

149. I am prepared to assume for present purposes that any alleged detriments suffered by the claimant between May 2015 and November 2017 constitute an act extending over a period, such that the "date of the act" means the last day of that period (that is, 27 November 2017). I am also prepared to assume for

present purposes that any deliberate failure to act is to be treated as done when it was decided on and that falls no later than 27 November 2017. For that purpose, I am also prepared to assume that, in the absence of evidence establishing the contrary, the respondents decided on a failure to act by acting inconsistent with doing the failed act (or, if it has done no such inconsistent act, when the period expires within which it might reasonably have been expected to do the failed act if it was to be done) and that the relevant date for this purpose is no later than 27 November 2017. In other words, as to matters of time, I take the claimant's position at its most favourable to her.

150. The original ET1 is presented 20 months later. The application to amend, if it is made expressly at all, is made in January 2021, a further 18 months later. It is being considered as at September 2021, a further 8 months further on. (I ignore the delay that has occurred since September 2021, which is no fault of the claimant).

151. An employment tribunal shall not consider a section 47B complaint under section 48 unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them. The claim, whether amended or unamended, has been presented by any measure comfortably more than that three months' time limit. On the face of it, the Tribunal has no jurisdiction to hear the claim, unless it has been presented within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

152. The time limit is relatively strict and my discretion under section 48 is relatively narrow.

153. Unfortunately, the claimant has provided me with little evidence upon which I might base any exercise of discretion in her favour. She is a law graduate and qualified barrister. She has worked in the field of employment law advice and employment tribunal litigation, albeit some 10 years earlier. She is clearly an intelligent and articulate person, as one would expect of someone who has achieved a PhD, who has qualified and worked as a teacher, and who has specialised in English. Throughout the relevant period, both before November 2017 and afterwards, she had access to the assistance of her trade union. She also sought advice from Citizens Advice. It is apparent that while on sick leave she could engage with her employer and was able to fight her corner, despite her medical condition. There is no adequate or sufficient explanation for why she delayed in presenting a complaint of detriment to the Tribunal between November 2017 and July 2019, or why she waited until she was dismissed when there were earlier grounds of real substance to support a detriment claim, or why the evidence of her ill health at this time does not address matters sufficiently by providing an explanation of any delay in commencing proceedings.

154. The Tribunal considers that it was reasonably practicable for the claim to have been presented within 3 months of 27 November 2017 (or the wider claim by 29 March 2019). Even if this was a case where the Tribunal could be satisfied (which it is not) that it was not reasonably practicable for the complaint to be presented before the end of that period of three months, the claim (amended or unamended) being advanced now has not been presented within a reasonable further period (and there is independently no adequate explanation for the delay).

155. For the avoidance of doubt, I make it clear that the fact that the claim was presented shortly after the claimant's dismissal is not sufficient to result in any detriment complaints stretching back to 2015 to be in time. The sequence of events was broken in November 2017 when the claimant commenced sick leave. Any detriments that arose during that sick leave are also not of a piece with the decision to dismiss the claimant for capability. Thus, the cut off date of 29 March 2019 (as measured from the date of presentation of the ET1) is important.

156. That would be sufficient for the claim to be struck out as having no reasonable prospect of success on the ground that it is time-barred and that the Tribunal has no jurisdiction to hear it. However, the Tribunal would also have refused any application to amend the claim to include (whether expanded or not) a section 47B complaint.

157. The time limitation question is one consideration in that determination. The Tribunal's power to allow an amendment of the claim is based upon a broad judicial discretion. It is exercised in accordance with the overriding objective. The test involves a balancing of injustice and hardship in allowing or refusing the application.

158. There has been considerable difficulty in bringing the claimant to a position whereby she has set out the specific acts complained of. Judge Johnson's hard work in identifying, defining, and narrowing the issues was then undone or undermined by the claimant going further than was required of her and raising many additional complaints and allegations. The respondents have undoubtedly been prejudiced thereby.

159. This Tribunal seeks to do justice between the parties having regard to the circumstances of the case. The *Selkent* principles require a careful balancing of all the relevant factors. It recognises the relative hardship that is caused to the claimant by refusing an amendment, as she is left without redress for matters of concern that arose during her employment. But account must be taken of the nature of the amendment, which is extensive; of the applicability of time limits, which are against the claimant; and of the manner and timing of the application to amend, which is some considerable time after the events in question, and relatively late in the case management process, despite the efforts of three earlier judges to define the parameters of the claimant's claim (even allowing for the delays that have been caused during the pandemic).

160. The further we move away from the events of 2015 to 2017, the more the prejudice to the respondents, as their counsel has reasonably explained. Even those complaints that might be said to creep into 2018 or 2019 – as identified as potential complaints by Judge Johnson or advanced subsequently in greater detail by the claimant – are out of time. They pre-date 29 March 2019 or, so far as the claimant's dismissal appeal is concerned, are properly part of a section 98 or section 103A complaint rather than a section 47B complaint.

161. The application is not simply concerned with the correction of small mistakes. This is either a fresh labelling of facts already pleaded and/or new factual allegations that change the basis of the existing claim. The amended claim is likely to involve substantially different areas of enquiry than the original unfair dismissal claim. This weighs in the balance against permitting an amendment.

162. The applicability of the time limit must also be considered (and whether time may be extended). This is only relevant because the proposed amendment raises a new cause of action (albeit arising out of the root facts pleaded as part of the original claim). This is a case where it is necessary to determine time points as part of the amendment application.

163. Weighing all these matters in the balance, the application to amend the claim is refused. If it were necessary to explain my decision further, I would also adopt the oral and written submissions made by or on behalf of the respondents.

164. As Ms Quigley reminded me in her reply, the claimant is not a typical litigant in person. She has been a professional employment law adviser. She would have been aware of the time limits. A plea of ignorance is not available to her. She also had trade union assistance at relevant times. If her trade union were negligent in not advising her as to the time limits, then that is not an excuse, because she has a potential remedy against the trade union. The claimant understands the relevant law. She intended to bring a public interest disclosure claim. There is insufficient evidence that the claimant's ability to bring a fully formed claim in a timely fashion was adversely affected by PTSD. She has been clearly capable of conducting this litigation and communicating with the Tribunal and the respondents. The whole period from 2015 to 2017, and from 2017 to 2019, and from 2019 to 2021 needs to be explained.

Disposal

165. The application to amend the claim to include a complaint (whether expanded or not) under section 47B of the Employment Rights Act 1996 is refused. In any event, the complaint has not been presented in time within the terms of section 48 of the Employment Rights Act 1996. Accordingly, the Tribunal has no jurisdiction to hear the complaint. It has no reasonable prospect of success, therefore, and it is struck out. The claim is otherwise dismissed.

Date: 29 November 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

30 November 2021

FOR THE TRIBUNAL OFFICE

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