EMPLOYMENT TRIBUNALS

Claimant: **Mr L Kabzinski**

Respondent: **Vistajet International Ltd**

OPEN PRELIMINARY HEARING

Heard at: **London Central** **On: 1 December 2021**

Before: **Employment Judge Brown**

Appearances

For the claimant: **In person**
For the respondent: **Ms Coyne , Counsel**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The Claimant's complaint of automatic unfair dismissal is are struck out because it has no reasonable prospects of success.

2. The issue of whether the Claimant's race discrimination / harassment allegations are in time will be determined at the final hearing.

3. The Claimant's race discrimination / harassment claims are not struck out, nor made the subject of a deposit order.

4. The Final Hearing will now take place over 4 days

Issues for Open Preliminary Hearing

(1) This open preliminary hearing had been listed to determine the Respondent's applications dated 22 October 2021 as follows:

(i) Whether the tribunal has jurisdiction to hear the claims bearing in mind the time limits in s123 Equality Act 2010.
(ii) Whether the claim or any part of it should be struck out as having no reasonable prospect of success.
(iii) Whether the claimant should be ordered to pay a deposit, not exceeding £1,000 per claim as a condition of continuing to advance any allegation or argument on grounds that it has little reasonable prospect of success.
(iv) Case management as necessary including, if applicable, changing the listing for the full merits hearing.

The Background

(2) By a claim form presented on 1 May 2020 the claimant brought complaints of race-related harassment (alternatively direct racial discrimination) and unfair dismissal.

(3) The unfair dismissal claim is pursued under the Employment Rights Act 1996, s103A. The Claimant was employed by the Respondents for less than two years.

(4) At a preliminary hearing before EJ Snelson on 24 August 2021 the Claimant was ordered to provide further particulars of his claims. He did so, in detailed spreadsheets. The Respondent drafted a list of issues, quoting from the Claimant's further particulars.

(5) The Respondent's list of issues, which I considered did accurately reflect the Claimant's further particulars of his claim of automatically unfair dismissal on the grounds of protected disclosures, recorded the issues in that claim as follows:

1. The Claimant bring claims for:

a. 'Automatic' unfair dismissal contrary to section 94 and 103A ERA 1996;
b. Direct discrimination (race) contrary to section 39 EA 2010; and
c. Harassment (race) contrary to section 40 EA 2010.

(Automatic) Unfair Dismissal

Protected disclosures

2. The Claimant relies on the following alleged written disclosures by him in a 70 page document provided by him to the Respondent as constituting disclosures of information:

a. "Not factual but strongly believe it is "Misprision of felony"" by Denison Usquiano
b. "Not factual but strongly believe it is 1) Possession of illegal pornography without ones consent and 2) Distribution of said illegal pornography" by Corina Serra
c. "Not factual but strongly believe it is 1) Possession of illegal pornography without ones consent and 2) Distribution of said illegal pornography" by Shirwan Dawood

d. “Not factual but strongly believe it is 1) Possession of illegal pornography without ones consent and 2) Distribution of said illegal pornography” by Anita Newcourt
e. “Not factual but strongly believe it is 1) Possession of illegal pornography without ones consent and 2) Distribution of said illegal pornography” by Jessica Heine
f. “Not factual but strongly believe it is 1) Possession of illegal pornography without ones consent and 2) Distribution of said illegal pornography” by Leah Hamilton
g. “Not factual but strongly believe it is 1) Possession of illegal pornography without ones consent and 2) Distribution of said illegal pornography” by Bartosz Golik
h. “Not factual but strongly believe it is "Misprision of felony"" by Alexander Bonner
i. “Not factual but strongly believe it is "Misprision of felony"" by Natalie Manduca
j. “Not factual but strongly believe it is "Misprision of felony"" by Daniel Beahan
k. “Not factual but strongly believe it is "Misprision of felony"" by Abraham Jalo
l. “Not factual but strongly believe it is "Misprision of felony"" by Marta Blyntaye
m. “Not factual but strongly believe it is "Misprision of felony"" by Carolina Ferreira
n. “Not factual but strongly believe it is "Misprision of felony"" by Marta Bylantyle
o. “Not factual but strongly believe it is "Misprision of felony"" by Mila Nikolovska
p. “Not factual but strongly believe it is "Misprision of felony"" by David Ware
q. “Not factual but strongly believe it is "Misprision of felony"" by Aj Arul

4. If so, did each disclosure listed in paragraph 2 above constitute a ‘qualifying disclosure’ within the meaning of section 43B(1)(b) ERA 1996 in that:

a. It contained information which the Claimant reasonably believed tended to show that a criminal offence had been committed or was being committed or was likely to be committed by the Respondent?

i. For disclosure 2(a):
1. "Misprision of felony" - "is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it."
2. It shows that:
a. Something happened, someone was using my phone after I passed out.
b. Something most likely inappropriate (most likely of sexual nature) was posted on my Instagram account
c. He has knowledge about it but failed to disclose it to me & authorities

ii. For disclosure 2(b):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography
3. Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it."

iii. For disclosure 2(c):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography
3. Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it."

iv. For disclosure 2(d):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography

3. Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it."

v. For disclosure 2(e):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography
3. Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it."

vi. For disclosure 2(f):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography
3. Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it."

vii. For disclosure 2(g): “Attempted Reckless Homicide (knowledge of)”
viii. For disclosure 2(h): “Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it.”

ix. For disclosure 2(i):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography
3. Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it."

x. For disclosure 2(j): "Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it.”

xi. For disclosure 2(k):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography”

xii. For disclosure 2(l):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography”

xiii. For disclosure 2(m):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography”

xiv. For disclosure 2(n):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography”

xv. For disclosure 2(o):
1. “Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography”

xvi. For disclosure 2(p):
1. "Possession of illegal pornography without ones consent
2. Distribution of said illegal pornography"

b. If so, for each disclosure, did the Claimant reasonably believed he was making each disclosure in the public interest?

5. If so, was each or any of the disclosures the reason or the principal reason for the Claimant's dismissal?

(6) At this hearing, the Claimant agreed that the race discrimination/harassment claim, as he has formulated it thus far, was reflected in the Respondent's List of Issues. The issues in the race discrimination/harassment claim were therefore:

Equality Act 2010 Claims

6. Did any of the following acts occur as alleged?
a. October 2019, in front of "everyone" state "that most of Poles in the UK are criminals or most of foreign criminals in the UK are Poles"

b. In February 2020:
i. Daniel Beahan make "gypsy remarks"
ii. Grave Halstead say "Gyppo"

c. On 2 February 2020, Daniel Beahan state on a work WhatsApp "Ok ok gypsy"

d. On 24 February 2020, Daniel Beahan orally say to the Claimant "You are cheap boy" which he then followed by "Typical gipsy""

e. On 26 March 2020, Daniel Beaham state on a WhatsApp "Hello gypsy"

f. On 27 March 2020, Daniel Beahan state on a WhatsApp "Gypsy" (twice) and "You are good gypsy"

g. On 10 May 2020, Daniel Beahan use the words on a private chat "Jestes zwolniony, nie ma dla ciebie pracy cyganskiej" which translates "You are fired, theres no gypsy work for you". In the same conversation he also said "nie spoznij sie suko" which translates "don't be late you whore"/"don't be late bitch"

h. 3 July 2020, Daniel Beahan state "Gypsy"

i. 29 July 2020, Daniel Beahan state on a private chat "I am good gypsy"

j. 28 Oct 2020, Daniel Beahan state on a private chat ""Hello my little gypsy"

Jurisdiction

7. If upheld, did each of the actions of the Claimant complained of in paragraph 6 above take place within the primary time limit in section 123 EA 2010: namely, the previous 3

months of the date the claim was issued (15 February 2021), save for (and the period increased proportionately) any part of that period falling to be discounted under section 140B EA 2010?

8. If not, is it just and equitable to extend time?

9. Is each act upheld at paragraph 6 above less favourable treatment? (appears the Claimant relies on a hypothetical comparator).

10. If so, is the act because of:
a. Polish nationality
b. Polish national origin
c. Eastern European ethnic origin

Harassment

11. Was any conduct upheld in paragraph 6 above unwanted conduct?

12. If so, was it related to:
a. Polish nationality
b. Polish national origin
c. Eastern European ethnic origin

13. If so, did the conduct have the purpose or effect of:
a. Violating the Claimant's dignity, or
b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

Strike Out Application – Automatic Unfair Dismissal Claim

(7) I considered that the Claimant had been given an opportunity, before today's hearing, to provide particulars as required in *Cox v Adecco* EAT/0339/19 (HHJ Tayler – judgment 9 April 2021). I considered that reasonable steps had been taken to identify the claims, and the issues in the claims.

(8) I noted that the Claimant had told EJ Snelson that the Claimant relies on disclosures contained in a 70-page document, shown to those responsible for his dismissal, about 30 minutes before he was dismissed. He said that the disclosures tended to show that his friends, ex-colleagues and co-workers had committed criminal offences *(s43B(1)(a) ERA 1996*).

(9) At EJ Snelson's hearing, it was agreed that the 70-page document should be sent with the Claimant's particulars of disclosures, but not incorporated into them.

(10) In his particulars, the Claimant confirms that the relevant criminal offences he alleges are "Possession of illegal pornography without ones consent. Distribution of said illegal pornography. Misprision of felony - it is a crime that occurs when someone knows a felony has been committed but fails to inform the authorities about it."

(11) The Respondent's List of Issues correctly transcribed the Claimant's "further particulars" of the protected disclosure. However, I noted that the Claimant had omitted much of the detail contained in his 70 page document when producing his particulars. I also noted that the 70 page document was incorporated into his ET1 claim form at paragraph 8.2. I decided that it would be inappropriate to assess the merits of the strike out application solely by reference to the Claimant's "particulars" document, rather than by also considering the 70 page document, on which he relies as his disclosures.

(12) I therefore considered the 70 page document. In it, the Claimant says that he suspects that he was drugged by his Polish friends in Poland on 11/12 July 2020 and that they took a pornographic film of him while he was unconscious. He says that he has no memory of this and his account "is solely based on evidence that I started collecting on my social media and chats on WhatsApp." He alleges that his work and former work colleagues conspired in this event and that they later shared the pornographic film. He emphasises that he "suspects" that the crime was committed on 11/12 July 2020.

(13) I considered that, while the "particulars" document produced by the Claimant lacked factual content and appeared to contain allegations only, the 70 page document contained factual particulars which the Claimant said supported the allegations.

(14) However, I also noted the following about the 70 page document.

(15) The Claimant alleges that his work colleagues secretly made their way to Poland in July 2020 and were there in disguise, for example, ".. that's how they arrive in Poland – they left the UK to another country in the EU and crossed into Poland without leaving a trace", pages 21. And "On July 2nd I went to my local forest…, out of nowhere a blonde woman approached.. and asked me in Polish "excuse me, do you know if there are any tall mountains here?"… I thought she was Ukranian/Russian… Now, I strongly suspect it was [a work colleague] wearing some sort of make up/disguise. Tall mountains serve as a reference to my behind…" Page 8.

(16) The Claimant appeared to have extensively examined the social media accounts of his friends, colleagues and former colleagues named in the List of Issues and extracted posts from them, to put into the 70 page document.

(17) The 70 page document therefore contains numerous photographs and posts, with factual details, but the Claimant has interpreted that material in a fantastical and sexualised manner, which appeared to be wholly unwarranted by the innocuous matters recorded. There were multiple examples of this. Just some of the many examples are:

(i) At pages 36 – 49 the Claimant reproduces a young female colleague's Instagram account, showing her selfie photographs in various unremarkable locations. The Claimant makes comments on almost all – creating bizarre and unjustified references to himself. The Instagram posts are, in fact, wholly unrelated to the Claimant.

a. For example, at p39 there was a selfie photograph of the woman smiling, while looking out of an airplane window. The Claimant commented , “Double face reflection in the mirror, possibly reflections of my behind as well.”
b. Of a selfie of the woman horseriding, p41, the Claimant commented, “Riding a horse – most likely reference to sex, other partner or me (horse = whore/whores)”.
c. At p45 the young woman had tweeted an existentialist quote, “’Life is the sum of all your choices’ – Albert Camus”. The Claimant commented, “Life is the ‘cum’ of all your choices – most likely “enemies” same number of letters. Albert Camus – sperm/cum.”
d. At page 48, the young woman had shared a popular Twitter post by a member of Joe Biden’s family, with a photo showing Joe Biden embracing his family members and smiling. The Claimant commented, “Exact date of the incident, people hugging each other – reference to group sex.”

(ii) At page 62, there is a photograph of another young female colleague, smiling, with blurred green and brown foliage in the background. The Claimant has circled a portion of the foliage and labelled it “most likely my butt from the rape video”. The photograph is in an outside location and the foliage, however, is plainly foliage –- and bears no resemblance to any part of the human anatomy.

(iii) On the same page, the Claimant has magnified the eye of the young woman – which is now blurred – and commented “possibly me reflecting in her eye.” There is no image visible in the young woman’s eye.

(iv) At page 60, the Claimant reproduces a post from a former male colleague at a previous employer. The post has a photograph of the Lea Valley cycle path with the Olympic stadium in the background. The accompanying commentary said, “Breathtaking cycle loop today up through post-industrial/ industrial east London...North Woolwich, Lea Valley, Wanstead, Abbey Mills Pumping Station. ..Walthamstow... Greenwich #thamespath #leavalley #cyclelondon #londonist#londonlife. The Claimant comments on this, “I suspect this post, posted on 11 July refers to the incident, if it took place. Cycling route = sex. Lea Valley (Leah’s But crack) … I am quite confident he is not talking about a cycle path here. “ Objectively, however, there is nothing in this post which alludes to anything other than a cycling trip along a London cycle path.

(v) At page 59, the Claimant reproduces a post from a former colleague’s Instagram which shares a quote from Robert F Kennedy saying “The government loves pandemics. They love pandemics for the same reason they love war; because it gives them the ability to impose controls on the population that the population would never otherwise accept”. The Claimant says of this, “I suspect this is a reference to me

being drugged and exploited." Plainly, however, the post is about the coronavirus pandemic and restrictions imposed on society as a result.

(vi) At p58, in a particularly inappropriate comment, the Claimant copies this former colleague's post about a little girl, which includes a photo of the little girl with an amusing, quizzical expression. The poster had commented, "Needed this little lady today x" and "Have you heard about the donut thief?" "Special thanks to [girl's name] and her family." The Claimant comments, "Donut Thief – posted on my birthday. Donut refers to anus." In this case, the Claimant has twisted an entirely innocent, amusing post about a very young child, into a sexualised comment linked to himself.

(vii) Also at p58, the same former colleague had posted a comment "Feeling a bit pickled today" referring to her "birthday weekend" and saying "Thank you to everyone that made me feel like the most special person on earth". This was a perfectly standard birthday post, which apparently referred to the poster having drunk alcohol and therefore being "pickled" The Claimant comments ""Bit pickled" – reference to penises".

(viii) The Claimant makes several references to group sex which appear wholly unrelated to the material he reproduces.

(18) In summary, the 70 page document, is, as the Claimant himself says, a compilation of his friends' and colleagues' social media accounts. The social media posts on them consist of innocuous photographs and thoughts from the people posting. They record their social gatherings, holidays, selfies and comments about life. The Claimant has imposed upon these a narrative which is, at best, a paranoid and deluded sexual fantasy. His comments appear to reflect his own sexual and pornographic obsessions. There is nothing in the material he has copied from his colleagues' social media accounts which warrants the interpretation which the Claimant has placed on them.

(19) It is not in dispute that Claimant first provided the 70 page document to the Respondent during a disciplinary meeting on 17 December 2020. It is not in dispute that the disciplinary hearing concerned allegations that the Claimant had behaved inappropriately towards a female colleague. The Claimant does not dispute that the colleague made a complaint against him, but says that the complaint was not supported by evidence and that he was not provided with details of it.

(20) It is also not in dispute that, 30 minutes after he provided the 70 page document to the Respondent, the Claimant was dismissed.

(21) The Claimant wrote to the Tribunal and the Respondent on 14 October 2021 , following his particularisation. He said that he did not consider that the Respondent could have properly read or understood any of the information in the 70 page document in the 30 minutes before the decision to dismiss him. He said that the "HR representatives glanced at it" and "It was virtually impossible to

digest the 70-page document in a matter of a "30 minute glance" demonstrates that the Respondent did not even read it, let alone investigate it" and "they decided about my termination after "glancing".

(22) In the 14 October 2021 email, he argued for the first time that he himself had "discovered "the case" [the alleged 11 July 2020 drugging incident] on November 3rd 2020, "I strongly believe the Respondent found out that I found out at the same time". The Claimant therefore suggested that the Respondent had found out about his alleged drugging on 11 July 2020, before the disciplinary hearing.

(23) The Claimant does not suggest any evidential basis for his belief that the Respondent discovered about the alleged drugging. The 70 page document is the Claimant's own creation.

(24) The Claimant has contended that he had also sent the 70 page document to the police. He provides no evidential basis for contending that the police may have shared it with the Respondent before 17 December 2020.

(25) At this Open Preliminary Hearing, the Claimant agreed that the Respondent could not have read his 70 page protected disclosure document in the 30 minutes before he was dismissed. He said that he believed that the Respondent did not take the document seriously. I asked him how, in those circumstances, he contended that the disclosures were the reason for dismissal. The Claimant told me that he knew he would be dismissed if he did not send the document; the Respondent told him that he would be dismissed if he did not send it.

(26) I considered that the Claimant's case on this was highly improbable and did not make sense.

Strike Out - Relevant Law

(27) An Employment Judge has power to strike out a claim on the ground that it is scandalous, vexatious or has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37(1)(a*).

(28) The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said: "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 recessions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".

(29) A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46. On a striking-out application (as opposed to a hearing on the merits), the tribunal is in no position to conduct a mini-trial. Only in an exceptional case will it be appropriate to strike out a claim for having no reasonable prospect of success where the issue to be decided is dependent on conflicting evidence. Such an exceptional case might arise where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, or, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation', Ezsias para 29, per Maurice Kay LJ.

(30) The correct approach for a tribunal to adopt is to take the Claimant's case at its highest, as it is set out in the claim, 'unless contradicted by plainly inconsistent documents', *Ukegheson v London Borough of Haringey* [2015] ICR 1285, EAT.

(31) The Claimant bears the burden of proving that the reason or principal reason for dismissal was that he had made a protected disclosure/s, because the Claimant did not have the 2 years' service required to bring an ordinary unfair dismissal claim.

(32) "Qualifying disclosures" are defined by *s43B ERA 1996*,

"43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is bien committed or is likely to be committed S…".

(33) The disclosure must be a disclosure of information, of facts, rather than opinion or allegation (although it may disclose both information and opinions/allegations). Although there is no strict dichotomy between an allegation and the disclosure of information, a bare assertion, devoid of factual content, such as, "You are not complying with health and safety requirements", will not constitute a valid protected disclosure, *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR 325 [24] – [25].

(34) In order for a statement to be a qualifying disclosure for the purposes of s43B(1) ERA, it has to have sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a) –(f) of that section, Kilraine v LB Wandsworth [2016] IRLR 422.

(35) Therefore, an assessment of whether there has been a qualifying disclosure involves five questions. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly,

if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in s43B(1)(a) - (f). Fifthly, if the worker does hold such a belief, it must be reasonably held, *Williams v Michelle Brown* AM UKEAT/0044/19/OO.

(36) It is therefore necessary that the worker making the disclosure has a *reasonable belief* that the disclosure *is in the public interest* and *tends to show* one of the six statutory categories of 'failure' set out in *ERA 1996 s 43B(1)*.

(37) It is not necessary for the information itself to be actually true. A disclosure may nevertheless be a qualifying disclosure even if it later transpires that the information disclosed was incorrect, *Darnton v University of Surrey* [2003] IRLR 133, EAT. The factual accuracy of the allegations may be an important tool in determining whether or not the employee did have a reasonable belief that the information tended to show one of the categories in *s43B(1),* but the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

(38) Where the individual is disclosing information that he or she has received from elsewhere (which is not within his or her direct knowledge) it is not necessary for that individual to have a positive belief in its truth, *Soh v Imperial College of Science, Technology and Medicine* UKEAT/0350/14 (3 September 2015, unreported). The EAT held that, under the wording of *ERA 1996 s 43B* the question is not whether the claimant can say 'I believe X is true', but whether he or she can say 'I believe that this information tends to show that X (ie one of outcomes (a) to (f) in s 43B(1), is true'.

(39) The statutory test is a *subjective* one – what is required is that there must be a reasonable belief *of the worker making the disclosure*. The relevant test is not whether a hypothetical *reasonable* worker could have held such a reasonable belief, *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, EAT.

Automatic Dismissal Claim Struck Out

(40) I decided that the Claimant's claim for automatic unfair dismissal had no reasonable prospects of success.

(41) The burden of proof is on the Claimant to show that he made a protected disclosure.

(42) The Claimant relies on his 70 page document as his protected disclosure/s. In the circumstances that the Claimant relies on the 70 page document, there was no factual dispute about the content of his alleged protected disclosure/s. A tribunal at a final hearing would be presented with the same 70 page document to consider.

(43) I noted that it was not necessary for the information disclosed by the Claimant to be true, or for the Claimant to believe it to be true. The Claimant need only believe that the information tends to show that a criminal offence has been committed.

(44) The test is a subjective one – whether the Claimant had a reasonable belief.

(45) I considered, however, that there was no reasonable prospect of a tribunal finding that the Claimant had a reasonable belief that the information disclosed in his 70 page document tended to show that his friends, colleagues or former work colleagues had taken illegal pornography of him while he was drugged and had distributed it, or that they were guilty of "misprision".

(46) As set out above, in his 70 page document, the Claimant relies solely on information he has taken from these peoples' social media accounts. His interpretation of that information is, objectively, a deluded fantasy, unwarranted by the information in it. His sexualised interpretation bears no relation to any of the innocent, innocuous and quotidian content he has extracted from these social media accounts. The social media posts are plainly not connected to the Claimant in any way – sexually or otherwise. His alleged belief cannot be reasonable if it is an unjustified fantasy which bears no relation to the relevant information.

(47) Furthermore, I considered that there was no reasonable prospect of a tribunal finding that the alleged protected disclosures were the principal reason for the Claimant's dismissal.

(48) It is not in dispute that the Claimant was in a disciplinary hearing for another matter when he made his alleged protected disclosure.

(49) The Claimant's own case is that the Respondent could not have read his 70 page protected disclosure document in the 30 minutes before he was dismissed. He says that the Respondent did not take the document seriously.

(50) I asked him how, in those circumstances, he contended that the disclosures were the principal reason for dismissal. The Claimant told me that he knew he would be dismissed if he did not send the document; the Respondent told him that he would be dismissed if he did not send it.

(51) The Claimant says that the Respondent could not have read his disclosure document and did not take it seriously, yet dismissed him principally because of it – when he was already in a disciplinary hearing about another matter. I considered that the Claimant's case was so improbable and illogical that, where he has the burden of proof to show that the protected disclosures were the principal reason for dismissal, it could properly be said that there was no reasonable prospect of him doing so.

Race Discrimination/ Harassment. Time Limits and Deposit Order

(52) The 11 alleged acts of race discrimination / harassment are alleged to have occurred in a 12 month period between October 2019 and October 2020. The vast majority are alleged to have been done by one person, Mr Beahan and relate to the Claimant being called a "gypsy".

(53) The Respondent contended that all allegations, save for Allegation 6, are out of time. It contended that the Claimant cannot establish a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs because: Although the comments are mainly alleged to have been from the same individual, Mr Beahan, this is not decisive; There are clusters of alleged activity, which dissipate in intensity over time; After July 2020, there is a 3-month gap before the next allegation falls; The matters relied upon (taking them at their highest) are a series of discrete acts.

(54) The Respondent asked that, if the Tribunal considered that the allegations were arguably part of a continuing act, the Tribunal should not include all, but instead limit to those closest to the 'in time' allegation.

Preliminary Hearing – Continuing Act - Law

(55) By *s123 Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of

(i) the period of three months starting with the date of the act to which the complaint relates or
(ii) such other period as the Employment Tribunal thinks just and equitable.

By *s123(3)* conduct extending over a period is treated to be done at the end of the period.

(56) Tribunals can decide at a Pre-Hearing Review whether acts of discrimination are out of time and therefore not permitted to go to a full Hearing or, on the other hand, whether they could form part of a course of continuing acts and therefore should be allowed to proceed to a Final Hearing, where the question of whether they do form part of such a course of continuing acts will be determined. At such a Pre-Hearing Review, in deciding this question, Tribunals apply the tests set out in Lyfar v Brighton & Sussex University Hospital Trust [2006] EWCA Civ 1548 and Aziz v FDA [2010] EWCA Civ 304. In Aziz the Court of Appeal said that the test to be applied at the Pre-Hearing Review was to consider whether the Claimant has established a prima facie case. The Employment Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period. Another way of formulating the test to be applied at the Pre-Hearing Review is this: the Claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. One relevant, but not conclusive factor in deciding whether there is a prima facie case of a continuing act, is whether the same, or different, individuals were responsible for the discriminatory acts.

Decision: Whether Complaints in Time Shall be Decided at Final Hearing

(57) I considered that it was reasonably arguable that all the alleged acts of race discrimination were are so linked as to be continuing acts, or to constitute an on-going state of affairs. The fact that the same person was alleged to have done the acts, which were very similar in nature, was highly material to whether they

could constitute an ongoing state of affairs. The acts were alleged to have happened over a relatively short period of time (12 months), but there were relatively frequent. Put simply, it was clearly arguable that there was an ongoing state of affairs whereby Mr Beahan regularly and persistently called the Claimant a gypsy. I considered that this was a potentially derogatory term. I also considered that the alleged comment that Polish people in the UK were criminals was similarly derogatory. It was arguably part of the same discriminatory state of affairs.

(58) Whether the race discrimination/harassment complaints have been brought in time should therefore be decided at the final hearing, having heard all the evidence.

Deposit Order application

(59) The Respondent also argued that the Claimant had no, or little reasonable prospect of success in contending that the alleged acts constituted detriments, or were unwanted by him - because he never complained about them at the time and only did so after he was dismissed. The Respondent said that the complaints were clearly retaliatory.

(60) The Claimant agreed that he had not complained about his fellow workers' comments during his employment. He said that that did not mean that he had not taken offence. He said that he was worried about losing his job if he complained; he was pleased to be in a job which was better paid than his previous ones.

Deposit Order Law

(61) If, at a Preliminary Hearing, an Employment Judge considers that and specific allegation or argument in a claim or response has little reasonable prospect of success, he or she may make an order requiring that party to pay a deposit not exceeding £1,000 as a condition of continuing to advance the allegation or argument, r39(1) ET Rules of Procedure 2013.

(62) When determining whether to make a deposit order, a Tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07, [2007] All ER (D) 187 (Nov). Although, as Elias J pointed out in that case, the less rigorous test for making a deposit order allows a tribunal greater leeway to take such a course than would be permissible under the test of no reasonable prospect of success, the Tribunal 'must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response' (para 27).

Decision - No Deposit Order

(63) I considered that there was a reasonable prosect that a final hearing would accept that the Claimant had been offended by the relevant comments, and that they

were unwanted by him, even if he did not complain about them at the time. It was reasonably arguable that the Claimant's lack of complaint was because he was worried about the consequences of complaining, rather than because he did not feel disadvantaged by name-calling.

(64) It was not appropriate to make a deposit order in the circumstances.

Case Management

(65) The Claimant said that there were further instances of race discrimination/ harassment which he had not previously particularised because he could not prove them. I said that if he wanted to make further complaints of race discrimination / harassment, relying on new factual allegations, he would need to make an amendment application. He should do so in writing, copied to the Respondent. I said that the Tribunal would consider whether the new complaints had been brought out of time when deciding whether to allow the amendment. The Respondent said that it would seek its costs of any amendment application.

(66) I said that, at this hearing, I would only consider the claim as it was currently presented. The surviving claim was of race discrimination/ harassment and related to 11 alleged acts.

(67) The parties agreed that a 4 day final hearing would be needed to determine those race discrimination complaints.

(68) I ordered that 13 April 2021 should therefore be removed from the current listing. The final hearing will take place on 7,8, 11, 12 April 2021.

(69) The parties were not interested in judicial mediation.

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Employment Judge Brown

2 December 2021

Judgment sent to the parties on:

02/12/2021.

For the Tribunal: