EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104626/2020,4105358/2020,4105359/2020 & 4105360/2020
Preliminary Hearing Held by Cloud Video Platform (CVP) on 11 October 2021
Employment Judge P O'Donnell

Mrs Shelley-Anne Aitken	**First Claimant** **In Person**
Ms Danielle Batchelor	**Second Claimant** **In person**
Ms Lisa Kennedy	**Third Claimant** **Not present** **And not represented**
Link Living	**First Respondent** **Represented by** **Ms Mackay** **Solicitor**
Lee Williamson	**Second Respondent** **Represented by** **Ms Mackay** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

1 . The claim by Lisa Kennedy (Case No. 41 05360/2020) is struck-out under Rule 37(1)(c) and 37(1)(d).

2. The application to strike-out the claims by Shelley-Anne Aitken (Case Nos. 4104626/2020 and 4105359/2020) and Danielle Batchelor (Case No. 4105358/2020) is granted to the following extent and the following extent only:-
a. The claims of victimisation under s27 of the Equality Act 2010 are struck out.
b. To the extent that the claim of unfair dismissal under s103A of the Employment Rights Act 1996 relies on a protected disclosure allegedly made to a third party, it is struck out

3. The application to strike-out the claims by Shelley-Anne Aitken (Case Nos. 4104626/2020 and 4105359/2020) and Danielle Batchelor (Case No. 4105358/2020) is otherwise refused.

REASONS

Introduction

1 . This case involves multiple Claimants, each of whom bring a range of claims against the Respondents as set out below. The present hearing has been listed to determine an application by the Respondents to strike-out the claims.

2. There had originally been four Claimants but the claim for one of them was struck-out prior to the present hearing because he had failed to actively pursue his case.

3. The present hearing, therefore, related to the three remaining Claimants; Shelley-Anne Aitken (SA), Danielle Batchelor (DB) and Lisa Kennedy (LK). Only SA and DB attended the hearing and LK was not present. There has been no contact from LK prior to the hearing regarding her attendance. SA and DB confirmed that they were not acting for or speaking on behalf of LK.

4. A bundle of documents was produced by the Respondents for use at the hearing and a reference to page numbers below are a reference to pages in that bundle.

Procedural history

5. The Tribunal considers that a short summary of the procedural history of the case would assist as it is relevant to the issues to be determined.

6. The first ET 1 in this case (pp4-63) was lodged by SA on 20 August 2020. At Part 8 of the form, she has ticked the boxes indicating that she was bringing a claim for discrimination relying on the protected characteristic of disability. The claims being brought are described on the form as *"indirect discrimination by association of disability"* (which refers to SA's mother's cancer), *"discrimination by perceived perception in relation to my mental health"* and *"constructive dismissal due to whistleblowing to Falkirk Council".* The ET 1 form itself goes on to set some further information regarding the alleged whistleblowing but does not set out the detail of how any disclosure made met the statutory definition of a protected disclosure nor did it set out the detail of how any such disclosure led to the SA's constructive dismissal.

7. The ET 1 was accompanied by a narrative running to 1 4 pages. However, this does not expressly identify what matters are said to amount to the alleged disability discrimination nor does it expressly set out what matters are said to be acts by the Respondents which led to the fundamental breach of contract on which the constructive dismissal claim was founded.

8. A second ET1 (pp64-109) was lodged on 5 October 2020 in the name of SA, DB, LK and the other Claimant. At Part 8 of the ET1, boxes are ticked indicating that the Claimants are bringing claims for unfair dismissal and discrimination relying on the protected characteristics of disability and sexual orientation. It goes to describe the claims as *"discrimination against staff by way of harassment, disability by association and sexual orientation".*

9. The ET1 form then sets out details which predominantly relate to the whistleblowing element of the claim. However, it does not set out any detail as what disclosures were made and when nor does it set out how those disclosures led to a fundamental breach of contract.

10. Similarly, there is little detail of the disability discrimination claim beyond a description of one of the Claimants (DB) who has a child with additional support needs being placed on late shift for a full month and remaining on late shifts despite raising the issues this causes for her and her child.

1 1 . The Tribunal pauses at this point to note that the claim of discrimination on the grounds of sexual orientation only related to the Claimant whose claim has previously been struck-out and has no relevance to the remaining claims.

1 2. It is also worth noting, at this stage, that none of the Claimants had two years' continuous service at the termination of employment and so could not bring claims of "ordinary" unfair dismissal.

1 3. A case management hearing in respect of SA's single claim was held on 2 December 2021 . The Note of the hearing was at pp171-1 93. At this hearing it was identified that SA required to provide further specification of her claims and this was set out in Orders in the Note.

14. On the same day, and before a different Judge, a case management hearing was held in respect of the claims lodged in the multiple ET 1 . The Note of this hearing (pp194-199) also identifies a need for the Claimants to provide further specification of their claims and sets out what is to be provided. The Tribunal notes that the single claim by SA was subsequently combined with the multiple claim for all the claims to be dealt with together.

15. At these hearings, it becomes clear that the Claimants are seeking to bring claims of victimisation under the Equality Act 2010 and they were directed to provide specification of those claims as well.

16. A further case management hearing was held on 3 February 2021 to review the position and a Note of this hearing is at pp257-265. The Claimants had emailed the Tribunal a link to a cloud drive which contained the document with the particulars along with various addendums containing evidence in support of their claim. This email had not been received by the Tribunal. The Tribunal explained that it was not necessary to produce evidence at this stage and asked them to re-send just the particulars by email.

17. The Claimants did so after the hearing and the particulars (pp202-232) were reviewed by the Tribunal who came to the view that these did not give sufficient notice of the claims being advanced. The Tribunal, therefore, issued an Order setting out a series of specific questions intended to elicit the necessary information for there to be clarity as to the basis of the claims.

18. A further case management hearing took place on 27 May 2021 to review matters. Only SA and DB from the claimant side attended this hearing. The Claimants had not responded to the Order at this stage and they were given a further period to reply with an explanation that a failure to do so could lead to their claims being struck-out.

19. The Claimants did reply to the Order within the new deadline; SA's response

is at pp274-303; LK's response is at pp304-305; DB's response is at pp306-320.

20. A case management hearing was held on 22 July 2021 to review these particulars and make further case management directions. Again, only SA and DB attended from the claimant side. At that hearing, the Respondents' agent made the application to strike-out (which was subsequently set out in writing at pp328-330) and the present hearing was listed.

Respondents' submissions

21 . The Respondents' agent made the following submissions.

22. In respect of LK, it was submitted that the application was primarily made under Rule 37(1)(d) for a failure to actively pursue her claim given her failure to attend the present hearing and the two previous case management hearings.

23. In respect of the further particulars lodged by LK, it was submitted that these amount to two pages in which allegations are made, pieces of legislation are quoted but no link is made between these. LK has, therefore, failed to comply with the Order made originally after the February hearing and no fair notice of her claims has been provided. This claim should also be struck-out under Rule 37(1)(c).

24. Turning to the remaining Claimants, Ms McKay proposed to deal with them together.

25. It was submitted that this was the fourth opportunity which the Claimants had been given to articulate their case and they had been given direction by the Tribunal as to what to provide. It was accepted that they had narrated a lot of factual background but this did not comply with the Orders in terms of content or format. There were lengthy narratives with assertions that these related to certain sections of the Employment Rights Act or Equality Act but it was not for the Respondents to guess at what was meant.

26. Specifically in relation to DB, there was an Order to specify the disability relied on and this had not been done.

27. It is accepted that there was an attempt to identify the perpetrator of any alleged unlawful acts and the dates of these but key information was missing such as how the legislation applied to the facts.

28. It was submitted that a year after the claims had commenced, the Respondents still do not know the case they have to meet and it is difficult to see where it can go from here. Any further steps are likely to involved additional time and cost. A fair hearing is not possible because the Respondents simply do not understand the claims being advanced.

29. Reference was made to *Weir Valves v Armitage* for the principles which should be applied in the Tribunal's consideration such as the magnitude of the default and the prejudice to the parties. Reference was also made to the overriding objective.

30. In rebuttal, Ms McKay submitted that, although the particulars do make reference to particular disclosures, there is crucial information missing such

as what express or implied terms of the contract was said to have been breached and how this was said to have been breached. There is no link between the alleged disclosures and the reason for any constructive dismissal.

Claimant's submissions

31 . The Tribunal asked each Claimant to address it in turn and started with SA.

32. She understood what was being said but they were not lawyers and had done their best to put down what had happened. It would not be right to dismiss the claim because they cannot articulate the right words.

33. The Tribunal asked SA to identify where, in her further particulars, the information about the protected disclosures was set out. She made reference to matters narrated on pp275, 276, 284, 291 and 292.

34. Similarly, the Tribunal asked SA to identify where the "protected act" for the purposes of any victimisation claim was identified and she referred to p275 and the fact that staff came to her with concerns which she tried to articulate to senior management. The Tribunal asked how this amounted to a "protected act" and SA replied that it was about safety issues which management were not listening to and whistleblowing regarding breach of lockdown.

35. In terms of the disability discrimination claim, the Tribunal clarified with SA whether this was solely one of associative discrimination or whether she alleged that she was disabled for the purposes of the Equality Act. SA clarified that she did not have a disability and that the disability discrimination claim was solely one of associative discrimination relating to how she was treated due to her mother's cancer.

36. The Tribunal then invited submissions from DB who broadly agreed with what was said by SA.

37. Reference was made to a disclosure to Falkirk Council relating to the First Respondent saying that more than one member of staff was on shift and that DB thought this breached the contract with the council. This was raised by phone and email.

38. DB felt she had no choice but to leave to protect her SSSC (Scottish Social Services Council) registration.

39. They had health and safety concerns which they reported and were told not to do anything.

40. As with SA, the Tribunal asked DB to identify where the information regarding the protected disclosures was set out in her further particulars. Reference was made to pp309, 312 and 313. There was a reference to p310 and the delivery of PPE by the Second Respondent but DB said this was not part of the protected disclosure relied upon.

41. The Tribunal also asked DB to identify where the "protected act" for the purposes of the victimisation claim is identified and she made reference to p314. The Tribunal asked her to explain how this amounted to a "protected

act" and she stated that health and safety concerns were not being taken seriously, her son was autistic and her being on night shift affected both her and her son which she raised with the First Respondent but nothing was done and she felt this was unfair.

Relevant Law

42. Section The Tribunal has power to strike-out the whole or part of claim under Rule 37:-
At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds —
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;

43. A Tribunal should be slow to strike-out a claim where one of the parties is a litigant in person *(Mbuisa v Cygnet Healthcare Ltd EAT 0119/18) given the draconian nature of the power.*

44. Similarly, in *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL,* the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

45. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 37 can be drawn from *Bolch v Chipman* [2004] IRLR 140. Although that case dealt with a different provision under Rule 37, the Tribunal considers that the following approach can be applied to Rule 37(1)(c):-
a. The Tribunal must reach a conclusion as to whether the relevant ground under Rule 37 has been made out.
b. Even the relevant ground is made out, the Tribunal must decide whether a fair trial is still possible.
c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.
d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

46. In relation to non-compliance with Orders, the Tribunal needs to address the magnitude of the non-compliance and whether strike-out is a proportionate response to that *(Baber v Royal Bank of Scotland pic* UKEAT/0301/1 5).

Decision - Lisa Kennedy

47. The Tribunal will deal with this aspect of the application separately as there are very distinct issues in LK's case.

48. Although she did respond to the Order made after the February hearing, LK has not been in attendance at the last two case management hearings and, importantly, did not attend the present hearing. She would have been aware from the Note of the July hearing and the Notice of Hearing listing the present hearing that there was an application to strike-out her claim. She was also copied into the written application by the Respondents and so would have

been aware of this.

49. The Tribunal also notes that LK was not copied into the response to the written strike-out application lodged by DB and SA (pp343-346) and so cannot be said to be a party to that response. No other reply to the Respondent's application was lodged by, or on behalf of, LK and so she has not replied or objected to the application.

50. In these circumstances, the Tribunal does consider that LK has not actively pursued her claim and so the claim is struck-out under Rule 37(1)(d). Other than her very sparse reply to the most recent Order, LK has not engaged with the Tribunal process for several months. The Tribunal considers that it would not be in the interests of justice or in keeping with the Overriding Objective for the Respondents to face a claim, and be required to put to the time and cost of preparing to defend that claim, in circumstances where, on the face of it, LK is unlikely to engage with the process and attend any further hearings.

51. Further, the Tribunal also finds that LK's response to the Order comes nowhere close to complying with the terms of the Order. It does not set out any basis for a claim under the Equality Act 2010 at all and it would be impossible for the Respondents to understand the case they had to meet in terms of any discrimination claim making a fair trial on this impossible.

52. Although it does quote provisions of the Employment Rights Act relating to protected disclosures, this is not done in the context of setting out what disclosures were made by LK. Nothing in the particulars lodged by her set out what information she disclosed, to whom and when so as to provide the very basic information needed to establish there was a protected disclosure made let alone setting out a case as to how any such disclosure led to a fundamental breach of contract by the First Respondent.

53. In these circumstances, it cannot be said that the First Respondent has any real notice, let alone fair notice, of the constructive dismissal claim by LK rendering a fair hearing on this claim impossible.

54. LK has been given a number of opportunities to provide this information and the Tribunal can have no confidence that any other option, such as a further Order for specification, would result in a different outcome.

55. The Tribunal, therefore, would also strike-out the claim by LK under Rule 37(1)(c).

Decision - Shelley-Anne Aitken & Danielle Batchelor

56. The Tribunal bears in mind that the Claimants are party litigants who cannot be held to the same standard in pleading their claims as would be expected of a lawyer or other professional representative. It certainly agrees with them that their claims should not be struck-out simply because they did not use the right words or terminology.

57. The Tribunal also bears in mind that the application is not made under Rule 37(1)(a) in relation to prospects of success and so it is not concerned with the merits of the case set out by the Claimants.

58. This is not a case where the Claimants have failed to comply with the most

recent Order (or, indeed, any of the earlier Orders) in whole; a response was lodged and it certainly cannot be said that they have not set out the facts they have offered to prove in their respective cases given the volume of information provided.

59. Indeed, it may be this volume of information which causes the difficulty in this case. The Claimants have provided so much information without clearly linking specific information to the various questions posed in the Order that it becomes difficult to "see the wood for the trees".

60. For this reason, the Tribunal does have some degree of understanding of the Respondents' position and why they say they do not have fair notice of the case they have to answer. They are faced with the task of sifting through the volume of information provided to try to identify the basis of the claims being made against them and there is a risk that what they believe are the issues to be determined does not accord with the Claimants' understanding of the issues. The purpose of pleadings in legal proceedings is for each party to make their respective case clear and avoid such a situation.

61. It is regrettable that the Claimants did not frame their responses to the Order in such a way as to answer the specific questions posed. The Order was deliberately drafted to elicit the information which was needed to provide fair notice of the claims. Although the Claimants did, in part, try to answer the specific questions posed in the Order, they did, at other parts, revert to setting out a long narrative similar to what was lodged with the ET1s or how earlier particulars were drafted. It is difficult, although not impossible, to discern the relevant information needed to specify the claims from these long narratives.

62. The Tribunal, therefore, does find that the Claimants' responses to the Order do not comply with it in precise terms (that is, they do not give a specific answer to each specific question posed in the Order) but that they have sought to provide information which they consider answers those questions.

63. Strike-out is a draconian power which the Tribunal should be slow to exercise particularly in cases involving discrimination, public interest disclosures and party litigants. In these circumstances, the Tribunal needs to consider whether, given the nature and state of compliance by the Claimants, a fair trial is still possible in relation to the various claims advanced and whether some other, less draconian, solution could ensure a fair trial.

64. Looking at the pleadings as a whole (that is, the ET1s and the various further particulars lodged), the Tribunal does consider that it is possible, for the most part, to have a fair trial.

65. For example, the First Respondent says that they do not have fair notice of the basis on which it is said that there was a constructive dismissal in relation to what term of the contract is said to have been breached and how the breach is alleged to have occurred.

66. The Tribunal considers that, although they have not used the terminology which a lawyer might, the particulars provided by the Claimants can only be read as alleging a breach of the duty of mutual trust and confidence implied into all contracts of employment. They clearly allege that the First Respondent was acting in a manner likely or intended to undermine or destroy the employment relationship and, whilst the First Respondent might disagree that

they had acted in such a manner, that is ultimately a matter to be determined at a full hearing after evidence has been heard.

67. In terms of what actions by the First Respondent are said to amount to the breach of trust and confidence, although it may not be clearly pled in the way that a lawyer may set out such matters, the Tribunal does consider that the Claimants do specify the First Respondent's actions relied on in this regard where they say that certain matters relied upon are relevant to their claim under ERA (which can only be a reference to the unfair dismissal claim now that it is clear that this is the only claim brought under the ERA).

68. Similarly, the facts which the Claimants offer to prove in relation to the discrimination claims are set out and the Tribunal does consider that the Respondents have fair notice of the claim they have to meet albeit it is not one set out in the way in which a lawyer may set out such a claim. The Claimants have set out the acts which they believe amount to unlawful discrimination; some of these may overlap with acts relied on in the unfair dismissal claim but it is often the case that claimants may attribute mixed motives to a respondent's actions and doing so does not mean that the Respondents have not had fair notice of such claims.

69. The Claimants clarified at the hearing that the claims of disability discrimination are ones of associative discrimination relating to people associated with them who are disabled for the purposes of the Equality Act. In this regard, the Tribunal does not agree with the specific submission on behalf of the Respondents that DB had not specified the disability of the person with whom she is associated; this is set out at pp315-316 as part of her response to the Order.

70. The Tribunal has also considered whether or not there are other steps which could be taken to overcome the difficulties caused by the way in which the Claimants have set out the basis of their claims. In particular, whether there is something which could be done to ensure that parties (and the Tribunal) have a common understanding of the substantive issues to be determined in this case that would overcome the problem which the Tribunal identified above that is caused by the volume of information which has been provided by the Claimants.

71. The Tribunal is of the view that this can be done by having a detailed list of issues for any further hearings which is the subject of agreement by the parties. Once this list of issues is finalised then the parties would not be allowed to lead evidence on issues which were not on the agreed list of issues except with the express permission of the Tribunal after making an application to depart from the list of issues.

72. To this end, the Tribunal has prepared an initial draft of the list of issues which is appended to this judgment. A further case management hearing to be held by way of telephone will be listed to finalise the list of issues and make arrangements for listing a substantive hearing in this case.

73. There are, however, two exceptions to the general position set out above where the failure by the Claimants to reply to the Order is such that the Tribunal considers it does prevent a fair trial on particular issues.

74. The first exception relates to the protected disclosures relied on by the

Claimants.

75. The identification of the protected disclosure(s) relied on as founding the unfair dismissal claim is fundamental to that claim and any lack of fair notice of such matters goes to the heart of the claim. If the Claimants fail to properly specify the protected disclosures relied on then it means that the First Respondent is prejudiced in defending that claim. They cannot, for example, confirm whether they accept that the disclosures took place as alleged, whether what was done amounts to protected disclosures as defined in the ERA or whether decision makers who are alleged to have carried out the actions which lead to the alleged breach of contract knew of any alleged disclosure.

76. The Claimants rely on two disclosures; one made to the First Respondent and one made to another organisation.

77. In relation to the disclosure which is said to have been made to the First Respondent, the Tribunal does consider that the Claimants have given sufficient notice of this for the First Respondent to be able to identify this disclosure. It is described as a complaint made to HR and, although the Claimants have not set out the specific detail sought in the Order, the Tribunal considers that this complaint must be within the First Respondent's corporate knowledge and they can check their records to identify this.

78. Further, the Claimants do identify that this disclosure involved information which showed or tended to show a matter which fell within s43B(1)(d) regarding health and safety. The First Respondent, therefore, has sufficient information about the Claimants' case in respect of this disclosure to be able to prepare its own case.

79. However, the position is different for the disclosure made to the other organisation. This is not a matter which can be said to be in the First Respondent's knowledge; they were not a party to that disclosure and it was made, at least in part, by phone. As a result, there needs to be a greater degree of specificity of the Claimants' case in respect of this disclosure and the lack of any information about what was disclosed, how it was said this tends to show a matter falling within s43B ERA or how the organisation in question falls into one of the categories of persons within the ERA to whom protected disclosures can be made is a significant failing on the part of the Claimants. The First Respondent is, therefore, not in a position to prepare to defend a claim based on this disclosure and it would not be in the interests of justice for them to face a final hearing at which they would effectively be hearing the detail of this issue for the first time.

80. The Tribunal does not have any confidence that a further Order for the Claimants to provide the necessary information about this disclosure would resolve the problem. The Claimants have had multiple opportunities to provide this information with the most recent Order being deliberately framed as a series of questions, the answers to which would provide the necessary information. The Claimants have, however, not provided the necessary information for the First Respondent to have fair notice of this disclosure.

81. Although there would be some prejudice to the Claimants if the reference to this latter disclosure is struck-out, the Tribunal does not consider that it is significant given that the Claimants can still pursue their unfair dismissal claim relying on the disclosure which they say was made to the First Respondent

They are not, therefore, being denied access to justice as a whole in respect of their unfair dismissal claim.

82. Striking out the reference to the disclosure to a third party will assist parties in narrowing the scope of the claim and so reduce the amount of evidence which both sides would need to lead at a final hearing (which will reduce the length of such a hearing).
83. In these circumstances, does consider that it is appropriate to exercise its

power to strike-out the unfair dismissal claim insofar, and only insofar, as it relates to the disclosure allegedly made to the third party.

84. For the avoidance of doubt, the unfair dismissal claim will proceed on the basis of the disclosure allegedly made to the First Respondent.

85. The second exception relates to the claim of victimisation under the Equality Act 2010 and, in particular, the specification of the protected act. For the reasons as set out above in relation to the protected disclosures, the Tribunal considers that the identification of the protected act is fundamental to a claim of victimisation and a failure to properly identify this can mean that a fair hearing is not possible.

86. The Tribunal notes that, strictly speaking, the claim of victimisation is not a formal part of the Claimants' case. It was not pled in the original ET1s and has not been the subject of a formal application to amend the ET1s to add the claim of victimisation. Rather, the case management process has proceeded on the basis that this is a claim which requires specification as opposed to being one which needs to be the subject of an application to amend. The Tribunal considers that it would be an artificial exercise (and a cause of delay) to have the Claimants make a formal application and for the application to strike-out then to be renewed. It, therefore, intends to treat any victimisation claim as a formal part of the claim and address it as part of the strike-out application.

87. The Tribunal cannot identify from the further particulars a clear and express specification of the protected act on which the claim of victimisation is based. Whilst the Claimants do make reference to acts by the Respondents which they consider to be victimisation, the Claimants do not identify the protected act said to have been the cause of these.

88. The Claimants make broad references to concerns about health and safety in the written response to the Order and when asked by the Tribunal at the hearing to identify the protected act they also made reference to issues of health and safety. The Tribunal considers that the Claimants have conflated a "protected disclosure" under the Employment Rights Act with a "protected act" under the Equality Act and this is why the position is confused.

89. In these circumstances, the Tribunal considers that the Claimants have not identified a fundamental issue in the victimisation claims, that is, the protected act. As a result, the Respondents do not have fair notice of this claim. They would, therefore, be prejudiced if the victimisation claim proceeded to a final hearing as they could not properly prepare their defence. For these reasons, the Tribunal does not consider that a fair trial of the victimisation claim is not possible.

90. The Tribunal does not have any confidence that a further Order to specify the protected act would resolve the situation. The Claimants have had multiple opportunities to provide this information and have not been able to do so.

91 . In considering whether strike-out of the victimisation claim is a proportionate response, the Tribunal notes that all of the alleged acts by the Respondents said to amount to victimisation are also said to amount to be acts for the purposes of the discrimination claim and are also relied upon for the purposes of the unfair dismissal claim. The Claimants would, therefore, not be prevented from seeking a remedy in respect of these matters if the victimisation was struck-out.

92. For these reasons, the Tribunal exercises its power to strike-out the victimisation claim.

93. Apart from these two exceptions, the Respondents' application for strike-out is refused.

Employment Judge: P O'Donnell
Date of Judgment: 1 November 2021
Entered in register: 3 November 2021
and copied to parties

Case Nos. 4104626/2020, 4105359/2020 and 4105358/2020

Appendix - draft list of issues

1 . Did the Claimants make a protected disclosure (as defined in s43A of the Employment Rights Act 1996) to the First Respondent?
a. What information was disclosed to the First Respondent by the Claimants in their complaint to HR made on [date to be inserted by the Claimants]?
b. Was the disclosure of this information, in the reasonable belief of the Claimants, made in the public interest?
c. Did this information, in the reasonable belief of the Claimants, show or tend to show that the health or safety of any individual has been, is being or is likely to be endangered in terms of s43B(1)(d) of the 1996 Act?
d. Was the disclosure made in accordance with s43C of the 1996 Act?

2. Were the Claimants dismissed as defined in s95(1)(c) of the Employment Rights Act 1996?
a. Was there a fundamental breach of contract by the First Respondent

in that it, without reasonable or proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?
b. Did the Claimants resign because of such conduct by the First Respondent?
c. Did the Claimants affirm the contract by delaying too long before resigning?

3. Was the protected disclosure made by the Claimants the sole or principal reason for the conduct of the First Respondent which gave rise to the fundamental breach of contract so as to make the dismissal automatically unfair under s103A of the Employment Rights Act 1996?

4. Were the Claimants associated with persons who are disabled as defined in s6 of the Equality Act 2010 or who are deemed to be disabled in terms of Schedule 1 , paragraph 6 of the Act?

5. Did the First or Second Respondent treat the Claimants less favourably, because of disability (that is, the disability of a person associated with them) than it treated, or would treat others contrary to ss13 and 39(2)(d) of the Equality Act 2010?
a. What acts by the First or Second Respondent amount to less favourable treatment of the Claimants?
b. Was that treatment less favourable than the way in which the First or Second Respondent treated or would have treated those who are not associated with a person who is disabled?
c. Were those acts done because the Claimants were associated with a person who is disabled?

6. Did the First or Second Respondent indirectly discriminate against the Claimants contrary to ss19 and 39(2)(d) of the Equality Act 2010?
a. Can s19 of the Equality Act 2010 be interpreted or read down in such a way as to include associated discrimination so as to be compatible with reserved EU law?
b. If so, did the First or Second Respondent apply a provision, criterion or practice (PCP) to the Claimants that they applied or would apply to other employees who are not associated with persons who are disabled?
I. What was that POP?
c. Did that POP, or would that PCP, put persons who are associated with a person with a disability at a disadvantage as compared to those who are not associated with a person with a disability?
d. Did that PCP put the Claimants at a disadvantage?
e. Was the PCP a proportionate means of achieving a legitimate aim?

7. Did the First or Second Respondent harass the Claimants because they were associated with persons who are disabled contrary to ss26 and 40 of the Equality Act 2010?
a. What acts by the First or Second Respondent amounted to unwanted conduct towards the Claimants?
b. Was that conduct related to the disability of persons associated with the Claimants?
c. Did that conduct have the purpose or effect of violating the Claimants' dignity or create an intimidating, hostile, degrading or humiliating environment for the Claimants?

8. Is the First Respondent to be treated as having done any acts of the Second Respondent which form the basis of the direct discrimination, indirect discrimination and harassment claims under s109 of the Equality Act 2010?
a. Were the acts of the Second Respondent done in the course of employment?
b. Did the First Respondent take all reasonable steps to prevent the Second Respondent from doing such acts?

9. Is the Second Respondent to be treated as having contravened s1 10 of the Equality Act 2010 and be liable for any acts of discrimination carried out by them?
a. Were they an employee of the First Respondent?
b. Did the Second Respondent carry out acts for which the First Respondent, by virtue of s109(1) of the 2010 Act, is treated as having done?
c. Did those acts by the Second Respondent amount to a contravention of the 2010 Act by the First Respondent?

10. If the Tribunal finds that the First Respondent unfairly dismissed the Claimants, what compensation would it be just and equitable for the Tribunal to award the Claimants?

11. If the Tribunal finds that the First Respondent or Second Respondent discriminated against the Claimants, what compensation would it be just and equitable for the Tribunal to award the Claimants in respect of each Respondent?

This is the Appendix referred to in the Judgment dated 1/11/21
Employment Judge Peter O'Donnell