Case No: (1) 1602412/2020, (2) 1600097/2021, (3) 1600213/2021, (4) 1600744/2021, (5) 1601132/2021, (6) 1601653/2021«case_no_year»

EMPLOYMENT TRIBUNALS

Claimant: AB

Respondents: (1) The Commissioners for Her Majesty's Revenue and Customs
(2) Jim Harra (claims 3, 4, 5 and 6)
(3) Esther Wallington (claims 3, 5 and 6)
(4) Daniel Edwards (claims 3 and 4)
(5) Penny Ciniewicz (claims 3, 5 and 6)
(6) Kirsty Telford (claim 4 only)
(7) Lauren Court (claim 4 only)
(8) Jacqueline Ellis-Jenkins (claim 6 only)

Heard at: **Cardiff** **On:** **8 and 9 March 2022**

Before: **Employment Judge S Moore**

Representation
Claimant: In person
Respondent: Mr Allsop, Counsel

JUDGMENT

1. In respect of claim (3) 1600213/2021 the claims against the respondents Ms E Wallington and Ms P Ciniewicz are struck out as they have no reasonable prospects of success.

2. In respect of claim (4) 1600744/2021, the claim advanced under paragraph 5 (k) is struck out because Judicial Proceedings Immunity applies.

3. In respect of claim (5) 1601132/202:

a) The claims against Darren Boston, Penny Ciniewicz, Esther Wallington and Jim Harra are struck out as they have no reasonable prospect of success. The claim advanced under paragraph 3 (breach of contract) is struck out as the Tribunal does not have jurisdiction to hear it and it is out of time.

b) The claim advanced under paragraph 5 for an alleged breach of the public sector duty under S149 Equality Act 2010 is struck out as the Tribunal does not have jurisdiction to hear it and the principle of res judicate applies.

c) The claims advanced under paragraphs 6, 8 and 9 that allege beaches of the Human Rights Act are struck out as the Tribunal does not have jurisdiction to hear those complaints. Further, in respect of paragraphs 6 and 7 because Judicial Proceedings Immunity applies.

4. In respect of claim (6) 1601653/2021:

a) The claims against Jim Harra, Mr XY, Esther Wallington, Penny Ciniewicz and Jacqueline Ellis- Jenkins are struck out as they have no reasonable prospect of success.

b) The claims advanced under paragraphs 1, 2, 3, 4 (d), (g), (h) are dismissed upon a withdrawal by the claimant.

5. The claim advanced under paragraph 4 (e) is struck out as it is out of time.

REASONS

Background and Introduction

1. There is a protracted history to this current set of claims. The claimant had previously lodged multiple claims against HMRC and co respondents which resulted in a "cut off" date of 20 June 2019 point being applied by my order dated 9 January 2020. This meant that any matters arising before this date were due to be dealt with at a final hearing which eventually took place between 17 – 29 July 2020 ("the 1600083/2019 judgment"). Any matters arising after that date would be stayed. The claimant's claims were dismissed by the Tribunal in the 1600083/2019 judgment dated 13 August 2020. Subsequently, the claimant withdrew the other claims that had been stayed pending the hearing to determine the "cut off" point".

2. From 17 November 2020 the claimant started issuing further claims of which there are now 6 live claims against multiple respondents as listed above. The claims are listed for a 15 day hearing due to start on 29 September 2022. In all claims the respondent does not rely on the statutory defences available in respect of claims brought against individual respondents who are employees of the first respondent.

3. At a pre hearing review on 26 October 2021 I directed that a further preliminary hearing would be listed to determine the following issues:

    a. Whether to strike out the claim set out at paragraph 5(k) in 1600744/2021 on the grounds of judicial proceedings immunity, the miscellaneous claims identified in the list of issues and claims 5 and 6 because they have no reasonable prospect of success;

    b. Whether to order the claimant to pay a deposit (not exceeding £1000) as a condition of continuing to advance the allegations above if the Tribunal considers that allegation or argument has little reasonable prospect of success;

    c. Whether any complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other

reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including: whether there was "conduct extending over a period"; whether it would be "just and equitable" for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred. For the avoidance of doubt this shall include considering whether to strike out claims against any of the named respondents including Ms Ciniewicz and Ms Wallington discussed above.

d. In the event an application is made by the Respondent or Claimant, whether to strike out the claims or responses because the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent has been scandalous, unreasonable or vexatious.

e. Whether to stay any or all of the claims including a general stay on any further claims lodged by the claimant;

f. Make further case management orders as necessary and ;

g. List the final hearing.

The Law

Strike out

1. The power to strike out a claim or response is contained in Rule 37 of the Employment Tribunal Rules of Procedure 2013. The Respondent's application was on the basis the claims have no reasonable prospects of success. If this ground is made out, there is a further stage to consider namely whether to exercise their discretion or make an alternative order (**HM Prison Service v Dolby *[2003] IRLR 694*, EAT** and **Hasan v Tesco Stores Ltd *UKEAT/0098/16*).**

2. Generally, cases should not be struck out on this ground where there are central facts in dispute (**Ezsias v North Glamorgan NHS Trust [2007] ICR 1126).**

3. Mitting J summarised the approach to be taken when deciding strike out applications in discrimination cases in **Mechkarov v Citibank NA UKEAT/0041/16, [2016] ICR 1121.** This should only be done in clearest case. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence. The Claimant's case must ordinarily be taken at its highest. If the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out. A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.'

4. There is no "blanket ban" on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out. These include claims brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse, if the claim is out of time and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per

Mummery LJ at paragraph 56 of his judgment **in Madarassy v Nomura International plc [2007] IRLR 246 CA):**

'... only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

Conclusions

Claim 3 - 1600213/2021

5. This is the third claim advanced. The ET1 was presented on 13 February 2021. The claimant brought claims of unlawful detriment contrary to S47B Employment Rights Act 1996 ("ERA 1996"), victimisation contrary to S27 Equality Act 2010 ("EA 2010") and unlawful deduction from wages (S13 ERA 1996).

6. The respondent made an application that the claims brought against Esther Wallington and Penny Ciniewicz should be struck out as the pleaded case advanced no claims against them on a personal basis.

7. The grounds of complaint do not set out any complaints against Esther Wallington and Penny Ciniewicz. Ms Wallington is not even mentioned in the claim. Ms Ciniewicz is mentioned once in that she had been sent an email of concern by the claimant on 2 September 2019 and 7 October 2019 which was said to be a protected act and a protected disclosure. There are no particulars of any alleged detriment Ms Ciniewicz is said to have been involved in, in any way.

8. On 26 October 2021 I directed the claimant to lodge further and better particulars of her claims against these individuals but this contained a caveat that the claimant should anchor those further and better particulars by referencing where in the grounds of complaint the original allegations were contained.

9. On 25 November 2021 the claimant provided details of her complaints against Ms Wallington and Ms Ciniewicz but these were entirely new matters had not been pleaded in the original claim and were not accompanied by an application to amend the claimant's claim. Further, the details provided by the claimant about her claims against Ms Wallington and Ms Ciniewicz were significantly out of time. In respect of Ms Wallington she is alleged to have provided the claimant false information by email on 2 February 2019. In respect of Ms Ciniewicz, the claimant alleges she would not have been dismissed if Ms Ciniewicz had chosen not to investigate the alleged protected disclosure made to her on 7 October 2019 by referring to internal governance on or around the 6 December 2019.

10. As there are no discernible complaints against these individuals it must follow that the claims against these individuals cannot have any prospect of success. I consider it appropriate to exercise my discretion to strike out these claims as there is no alternative order than can be made.

Claim 4 applications - 1600744/2021

11. This claim was presented on 22 May 2021. The claimant brought claims of breach of contract, victimisation contrary to section 27 EA 2010, and unlawful detriment contrary to section 47 ERA 1996, failure to provide accurate payslips, unlawful deduction from wages, breach of section 1 ERA 1996.

Application to strike out claim advanced in paragraph 1 – failure to provide accurate

payslips contrary to S8 ERA 1996

12. The respondent applied to strike out the claim set out in paragraph 1 which read as follows:

"Failure to provide accurate payslips in any one or more of January 2021, February 2021 March 2021."

13. The respondent submitted that the tribunal did not have jurisdiction to embark on a exercise to establish the accuracy of the said payslips. It should be noted that the claimant already has an unlawful deduction from wages claim in respect of the wages she says she should have received during this period and this claim will determine whether or not there have been any unlawful deductions on the relevant dates. The respondent submitted that the payslips clearly comply with the requirements of section 8 and I agree that this is the case having had sight of those payslips in the bundle.

14. I noted that section 11 (3) (b) ERA 1996 provides that a question as to the particulars which ought to have been included in a pay statement do not include a question solely as to the accuracy of an amount stated in any such particulars. For these reasons I agreed with the respondent that the tribunal does not have jurisdiction to deal with an accuracy of the payslips as advanced under this claim and as such the claim has no reasonable prospect of success. I exercise my discretion to strike out the claim as no alternative order can be made.

Application to strike out claim advanced Paragraph 5 (k)

15. The respondent applied to strike out of the claim set out at paragraph 5 (k) which read as follows:

"Attempting to undermine the credibility (as was done on behalf of the respondent by their representatives at the hearing that was in case 1600097/2021 in Cardiff on the 26 February 2021) in relation to any one or more of protected disclosures are alleged to have made for the purposes of that hearing, most particularly those in relation to the original incident of 30 August 2018 (the original incident of deliberate and unwanted touching)."

16. The respondent relied upon the principle of Judicial Proceedings Immunity ("JPI"), being an absolute immunity from suit in respect of things said or done in the course of the judicial proceedings.

17. The hearing the claimant referenced was an interim relief hearing that took place on 26 February 2021 following her application for interim relief (whistleblowing) advanced in her claim 1600097/21 before Employment Judge Harfield. I had before me the judgment in the bundle. At paragraph 19 of that judgment, Judge Hartfield records that Mr Allsop had argued that the claimant could not demonstrate a pretty good chance of successfully establishing the asserted protected disclosures. He goes on submit that the findings and observations made in the 1600083/19 judgment meant the claimant came to that interim relief hearing with a significant credibility gap. Mr Allsop also stated that it was unlikely the claimant would be able to persuade the Tribunal she had the requisite reasonable beliefs. It was this passage that the claimant relied upon in her contentions are set out in paragraph 5(k) in Claim 4.

18. The claimant provided me with a note in the form of an email sent to the tribunal on 8 March 2022 in time for the claimant's comments on the applications that were

due to be heard and continued on the morning of 9 March 2022. In that note the claimant explained further why she considered the respondent's behaviour at the hearing for interim relief on 26 February 2021 to be unreasonable and as such result in the respondent not being able to rely on JPI. In that email the claimant submitted that the respondent had been unreasonable to attack the reasonableness of her belief as to what happened on 30 August 2018 as the 1600083/19 judgment found she had done protected acts.

19. Firstly, I concluded that even if the respondent had made an unreasonable attack on the claimant's belief in her protected acts at the interim relief hearing, the judicial proceedings immunity principle would still apply. Although there are exceptions to JPI, I do not consider any of those exceptions to apply in this case. I should say I do not find there was any such unreasonable attack. The claimant was referring to findings made the 1600083/19 judgment about protected acts which fell under her victimisation claim. The subject of the claim at the interim relief hearing and accordingly the subject reference of the comments of Mr Allsop I have outlined above were in respect of protected disclosures which attract a different statutory test in terms of the belief of the individual making those disclosures. There is no similar test under S27 EA 2010. Therefore the claimant's position is wholly misconceived and this claim has no reasonable prospect of success. I exercise my discretion to strike out the claim as no alternative order can be made.

Strike out of claim for breach of S1 ERA 1996 (as set out in paragraphs 4 and 5 (d) of the grounds of complaint).

20. The respondent applied to strike at this claim which read as follows:

"Breach of the statutory right to reasonable access to the terms and conditions of my employment at 5D below….

Falsely telling me, in Mr Daniel Edwards email to me of 3 November 2020 that no published HMRC guidance was available with respect to the some other substantial process he was decision manager for in respect to me, and/or otherwise causing me to falsely understand was available with respect to that process."

21. This was in respect of a document referenced by Mr Edwards, who dismissed the claimant which was an internal management guidance document for consideration when potentially dismissing employees for some other substantial reason. I shall refer to this document as "the line in the sand" document as this was the subject of the documents title. It is the claimant's case that in failing to provide her with that document, the respondent has breached S3 ERA 1996, as the claimant argues the line in the sand document falls under the requirements in section 3 and accordingly should have been provided to the claimant. The claimant argues this on the basis it is a disciplinary rule or procedure under S3 (aa) ERA 1996 and in failing to provide her with that line in the sand document the respondents are in breach of S1 ERA 1996..

22. Mr Allsop argued that S3 (aa) cannot be said to apply to the line in the sand document as it is neither a disciplinary rule or procedure and furthermore the reference to a decision to dismiss the employee in that section can only apply to employees being dismissed under such disciplinary procedures. For example Mr Alsop submitted that there could be no such requirement to supply the redundancy policy under that rule or capability procedure which could lead to an employees dismissal and this is plainly not envisaged as the purpose of the statute.

23. Having heard from both parties, I concluded it was not possible for me to say that the claimant had no prospect of success in respect of this claim. For these reasons

I refuse the respondent's application to strike out this particular claim. This claim will need to be heard by the tribunal at a full hearing.

Claim 5 – 1600132/2021

24. The ET1 was presented on 22 August 2021, following a period of early conciliation between 8 July 2021 and 23 July 2021. The claimant brought claims of sexual harassment (S26 EA 2010), breach of contract, Victimisation (S27 EA 2010), Unlawful detriment (S47B ERA 1996), breaches of the public sector duty and breaches of the Human Rights Act 1996. The claimant brought claims against HMRC, Mr Boston, Ms Ciniewicz, Ms Wallington and Mr Harra.

Applications

25. Application to strike out paragraphs 1 and 2 of the claim which read as follows:

.1. "I feel sexually harassed by Mr Boston's decision of 7 May 2021.
2. I consider at least Mr Boston to be responsible for his decision of 7th of May, as well as Mr Christopher Symons, Sir Jim Harra, Penny Ciniewicz and Esther Wellington (and others)."

26. The respondent also sought strike out of the claims lodged against the co respondents. I deal with this application first of all.

27. At the hearing I recorded that I was striking out the claimant's claim brought against Mr Boston as well as the other named respondents. This was an error in my part and I have written to the parties about reconsidering my decision. No strike out was sought in respect of Mr Boston.

28. I decided to strike out the claims against the other named respondents as the allegation that they were also responsible for the decision to uphold the appeal is entirely speculative and unparticularised. There are no particulars of claim that could go any way to supporting such allegations and I consider the claims as advanced to fall within the plainest and obvious case. It is not even possible to say the claimant's case should be taken at its highest. There are no alleged facts on which this allegation can be contemplated other than a theory the claimant has which is not substantiated in the claim before me. It was unexplained as to why the claimant cited Mr Simon in paragraph 2 but did not name him as a co respondent when she considers he played a part in the decision to uphold the appeal. I consider that this is indicative of the claimant's scatter gun approach to this litigation in naming individuals as co respondents in allegations of discrimination without identifying any basis for doing so.

The S26 claim under paragraphs 1 and 2

29. Mr Boston upheld the decision to dismiss the claimant in a letter dated 7 May 2021. The claimant stated in paragraph one that she felt sexually harassed by Mr Boston's decision of 7 May 2021 and that he (amongst others) was responsible for that decision.

30. I asked the claimant to explain to me what it was about Mr Boston's decision that could amount to sexual harassment. We looked at the definition of sexual harassment under S26 (2) EA 2010. The claimant told me it was Mr Boston upholding Mr Edward's decision that he had concerns about the claimant's inability to treat Mr XY with dignity and respect. This was referenced several times in the appeal outcome letter. The claimant referenced this part of the appeal letter and explained that this made her feel sexually harassed as in her opinion it could

potentially enable a worse sexual assault. In reality what the claimant complains about here, is the suggestion that the claimant would have an inability to treat Mr XY with dignity and respect and that this was relied upon in part as a reason to dismiss the claimant. This falls squarely under a S26 (3) (c) EA 2010 claim albeit with the problematic issue that the previous Tribunal have made findings that there was not unwanted conduct of a sexual nature.

31. I noted from the appeal letter that Mr Boston concluded as follows:

"On the question of whether Daniel Edwards was unfair or unreasonable in viewing as evasive your answers to his questions about whether you treat Mr XY with dignity and respect were you to return to work, I have reviewed the notes of your meeting and I do not find such a view unfair or unreasonable".

32. The decision therefore appears to be more about the conclusion that it had not been unfair or unreasonable of Mr Edwards to conclude that the claimant had been evasive with her answers to the questions about treating Mr XY with dignity and respect.

33. I concluded that it was not possible for me to conclude that there was no reasonable prospects of the claimant succeeding with this claim. It requires evidence to be heard about the separate elements of S26 (3) and legal submissions. For these reasons I decided not to strike out paragraphs 1 and 2 of the claim.

34. Application to strike out paragraphs 3 which is as follows:

"Mr Darren's (sic) decision of 7 May 2021 was also made in breach of my contract, including, but not limited to, breach of the implied term of trust and confidence, and breach of duty of care.

35. This claim is brought as a breach of contract claim pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

36. The contract in question terminated on 15 January 2021.

37. The breaches are said to arise from Mr Boston's decision on 7 May 2021. Firstly I remain unclear as to what the breaches are said to be other than the breach of implied term of mutual trust and confidence and duty of care cited by the claimant. The claimant cites the decision made by Mr Boston as the breach but not how this breached her contract.

38. In any event, the claim cannot be said to be one that arises or is outstanding on the termination of the contract. Whatever the breach is, it is said to have happened on 7 May 2021. A claim will only be "outstanding" on the termination date if it is in the nature of a claim which, as at that date, was immediately enforceable but remained unsatisfied. The breach is said to have happened after the effective date of termination and as such the claim could not be said to have "arisen" or to have been "outstanding" at that date and the Tribunal, therefore, had no jurisdiction to consider his claim.

39. Further, the claim is out of time. Claims under Article 3 must be presented within three months beginning with the effective date of termination of the contract giving rise to the claim. The contract was terminated on 15 January 2021 and the claim was not presented until 22 August 2021. I heard no submissions as to why it was not reasonably practicable for the complaint to have been presented in time.

40. For these reasons I conclude the claim has no reasonable prospect of success and I exercise my discretion to strike out that claim as no alternative order can be made.

Application to strike out paragraphs 4 and 10

41. I refused the application to strike out these claims (S27 EA 2010 and S47B ERA 1996) as these claims require evidence to be heard and appropriate findings of fact to be made.

Application to strike out paragraph 5

42. I have not reproduced this paragraph due to its length but the claim was an alleged breach of the public sector equality duty under S149 EA 2010. The Tribunal does not have jurisdiction to hear such claims as provided in S156 EA 2010.

43. For these reasons I conclude the claim has no reasonable prospect of success and I exercise my discretion to strike out that claim as no alternative order can be made.

Application to strike out paragraphs 6, 8 and 9 in so far as they allege breaches of the Human Rights Act 1996 and offending the JPI principle

44. The Tribunal does not have jurisdiction to hear free standing complaints regarding alleged breaches of the HRA 1998. I also find that the references to alleged failures to disclose information to the previous final hearing in 1600083/2019 fall foul of the JPI principles. For these reasons I conclude the claims have no reasonable prospect of success and I exercise my discretion to strike out that claim as no alternative order can be made.

45. The claim advanced in paragraphs 9, that the alleged failure to respond to a complaint of unlawful deduction from wages amounts to victimisation and detriment contrary to S47B ERA 1996 may proceed. The issue of time shall be determined at the final hearing.

46. The claim advanced in paragraph 10, that the alleged failure to resolve concerns of 15 January 2021 forwarded to Mr Harra amounted to victimisation and detriment contrary to S47B ERA 1996 may proceed. The issue of time shall be determined at the final hearing.

Claim 6 – 1601653/2021

47. At 4pm on 8 March 2022 the claimant advised she wanted to withdraw claim 6. I was concerned that the claimant should be given time to consider this, particularly as the claimant had stated she felt overwhelmed and therefore adjourned until 9 March 2022.

48. On 9 March 2022 the claimant confirmed she wished to withdraw all of claim 6 save those matters set out in paragraphs 4 (a), (b), (c), (e) (f) and (5). I explained that this would mean I would issue a Judgment dismissing the other claims upon withdrawal and that would bring the claims to an end. The claimant confirmed to me after I had explained this to her that she understood and still wished to withdraw those claims.

49. I therefore continued to consider the Respondent's application to strike out the

remaining claims.

50. This claim was presented on 19 October 2021 following a period of early conciliation between 19 August 2021 and 20 September 2021. The claimant brings claims of breach of implied term of mutual trust and confidence, victimisation (S27 EA 2010), detriment (S47B ERA 1996), breach of contract in terms of the Civil Service Code and breach of S149 EA 2010).

51. In so far as any claim in respect of S149 EA 2010 remains I strike out this claim as the Tribunal does not have jurisdiction. I also strike out any breach of contract claims as being out of time and not arising out of or outstanding on the termination of contract for the same reasons as set out in paragraphs 37-40 above.

52. This therefore leaves S27 EA 2010 and S47B ERA 1996 claims to consider.

53. Paragraph 4 claims concerned various alleged failures by the respondent to do certain things further to a warning the claimant says she had issued to Mr XY on 30 August 2019 by South Wales Police. The claimant says the failures were detriments under S27 EA 2010 and S47B ERA 1996.

54. The first issue is that as they are pleaded as ongoing failures I am not able to determine whether they are out of time (except for 4 (e) – see below). On the face of it, they would appear so unless the claimant can show that it only became apparent to her that the respondent was not going to act on or after 19 August 2021. Whilst this seems unlikely, I considered I was unable to make such a determination and as such, the time point must be decided by the Tribunal at the final hearing.

55. That alleged warning issued to Mr XY was not in the bundle before me but in the 1600083/19 Judgment it said this about this communication (Paragraph 45):

"On 30 August 2019, the claimant persuaded an inspector of the local police to send an email to Mr XY which effectively said the claimant was concerned that Mr XY might try and invade personal space and touch her. Mr XY was asked not do so but it was equally made clear within the email that the police had no intention of taking any action in relation to Mr XY or the allegations made by the claimant. The evidence bundle shows that the claimant is continuing to raise complaints about the police to its professional standards department as she does not accept the decision not to press charges against Mr XY (pages 1669-1679)."

56. Turning now to whether I can conclude there is no prospect of successfully establishing that the alleged ongoing failures were because the claimant had done protected acts (victimsation) or on the grounds she had made the protected disclosures. I cannot so conclude as this requires evidence and findings of fact to be made about the reason for the ongoing failures, I therefore refuse the application for a strike out. I do however agree that it is appropriate to make deposit orders in respect of these claims as I have concluded it is inherently more plausible that the respondent did not act in the way the claimant suggests they should because of their pleaded reason, which was the police concluded there was insufficient evidence to take any action against My XY and as such, no such actions were necessary. I make separate case management orders in this regard.

<u>Paragraph 4 (e)</u>

57. I am able to determine that this claim is out of time. This is set out as follows:

"Failure of the Respondent to provide this information to Daniel Edwards when referring

for potential dismissal for 'some other substantial reason' on the basis of the outcome in case 1600083/2019, or to Mr Darren Boston for my appeal against Mr Daniel Edwards (or to me at any time before 20th May 2021)."

58. The alleged failure to provide information to Mr Edwards must have taken place by 15 January 2021 as by this date he had decided to dismiss the claimant. The alleged failure to provide information to Mr Boston must have taken place by 7 May 2021 as by this date he had decided upon the appeal. This gives a primary limitation date of 14 April 2021 and 14 August 2021 respectively. As the claimant did not contact ACAS to initiate early conciliation procedure until 19 August 2021 both claims are out of time.

59. For these reasons I conclude the claim has no reasonable prospect of success and I exercise my discretion to strike out that claim as no alternative order can be made.

Claim 6, paragraph 5

60. This is set out as follows:

Detriment contrary to s27 Equality Act, and detriment contrary to s47 Employment Rights Act 1996, and breach of contract, including but not restricted to the implied term of trust and confidence and policies and procedures as otherwise incorporated as terms into my contract, in the failure of the Respondent to respond to my concern of 14th June 2021 to Vicki Bithell (copying in Kate Tilley), and of 21st June 2021 to Sir Jim Harra.

61. The breach of contract claim is struck out for reasons set out above at paragraph 37 - 40.

62. This therefore leaves S27 EA 2010 and S47B ERA 1996 claims to consider. The alleged detriments are a "*failure to respond to concerns"* of 14 June 2021 to Vicki Bithell and 21 June 2021 to Mr Harra. (The protected acts and disclosures are set out in an Appendix in the grounds of complaint. It should be noted that the communications themselves to Ms Bithell and Mr Harra are not pleaded as protected acts or protected disclosures). There are 12 of these as well as reliance on giving evidence at the 1600083/19 hearing).

63. The respondent pleaded that there was no record of an email from the claimant to Ms Bithell on 14 June 2021 although they acknowledged there were emails on 16 and 17 June 2021 which were not responded to due to ongoing litigation. The claimant is then said to have emailed Ms Bithell to say she wished to withdraw her grievance which Ms Bithell replied to on 21 September 2021. In respect of the failure by Mr Harra to reply, the respondent accepts Mr Harra did not reply but say this was also due to ongoing litigation.

64. I determined that I could not conclude there was no prospect of success in respect of these claims against the first respondent and they were permitted to proceed. My reasons were that I consider the Tribunal would need to weigh and evaluate the evidence as to why the first respondent had not replied to those emails of concern.

Claim 6 claims against named respondents.

65. I now deal with the claims under claim 6 advanced against named respondents who are Jim Harra, Mr XY, Esther Wallington, Penny Ciniewicz and Jacqueline Ellis Jenkins.

66. I remind myself that the claimant withdrew the bulk of the claims under Claim 6. As a result in my judgment there is no discernible claim that remains which could amount to a cause of action against Mr XY, Esther Wallington, Penny Ciniewicz and Ms Ellis Jenkins under S110 EA 2010. None of those individuals can be said to be linked to the alleged ongoing failures in paragraph 4, relied upon by the claimant following the communication from South Wales Police in August 2019 or paragraph 5. For these reasons I conclude the claims against these named respondents have been withdrawn and I dismiss them.

Paragraph 5

67. I struck out the claim against Mr Harra personally. In respect of Mr Harra, he is alleged to have failed to respond to the claimant's concern dated 21 June 2021 as an act of detriment either because the claimant had done protected acts or on the grounds she had made protected disclosures. I decided that the personal claim against Mr Harra should be struck out albeit continue against the claim against the first respondent for the following reasons.

68. Mr Harra is the First Permanent Secretary and Chief Executive of the first respondent (HMRC). Apart from one of the protected disclosures relied upon (19 October 2020) Mr Harra was not the recipient of any of the other alleged protected disclosures and is not cited in any of the protected acts. Mr Harra occupies a very senior position within the respondent and would not have been involved in dealing with the claimant on a day to day basis. Other than speculation on the claimant's part there was no evidence to conclude that Mr Harra did not reply to the claimant's concern as required by the relevant claims. The respondent says he did not reply due to the ongoing litigation. I found some force with this contention. Although I recognise that Mr Harra did not reply to a letter of concern I have concluded the overwhelming evidence is such that the reason he did not reply was not because of protected acts or protected disclosures but because of ongoing litigation. In my judgment this is a case where there is a clear basis to strike out the claim against Mr Harra personally and is a case that is plain and obvious.

69. I noted that the claimant has not cited Ms Bithell as a named respondent even though she is subject to the same allegations as Mr Harra. As with Mr Simon, this indicates to me a "scatter gun" approach of naming co respondents on the basis of speculation and in the absence of any real evidence.

70. Although this was not in my reasons given orally, whilst writing up these written reasons I had sight in the bundle of a number of emails and in particular an email dated 12 May 2021 from a Ms Lane, Head of Workforce, Transformation to the claimant which has compounded my decision to strike out the claim against Mr Harra.

71. The email states as follows:

Subject: Correspondence with HMRC

Dear MS AB

The purpose of this email is to set out how HMRC will communicate with you going forward.

HMRC has received several emails from you relating to ongoing litigation matters and complaints.

HMRC's Lawyer, Felicity Carroll, wrote to you on 10/05/2021 setting out the terms of ho

w she will correspond with you, relating to the current Employment Tribunal Claims.

I have set out below HMRC's terms for your specific attention:-

a. Jim Harra shall not be replying to you under any circumstances;
b. The Manager's that you have been emailing in HMRC will be blocking your email addresses with immediate effect.
c. Any correspondence that will be reviewed is that which relates to your ongoing concern with HMRCand the only person that will respond to you in this regard (where necessary and reasonable) is the decision Manager, Vicki Bithell.
When a decision is reached for the concern there will be no further communication /emails responded to
by Vicki Bithell. If an appeal is submitted relating to this concern, then any correspondence relating to the appeal will be responded to by the appointed Appeal Manager (where necessary and reasonable).
d. Internal closed investigations will not be reopened

I do hope this makes the position of HMRC very clear.

Regards

Sue Lane on Behalf of Kate Tilley

72. The background to this email to the claimant is that the claimant had sent multiple emails to multiple recipients within the first respondent. I was advised by Mr Allsop that the emails in the preliminary hearing bundle were only a selection of the voluminous correspondence from the claimant. For example on 23 March 2021 to the claimant wrote to Mr Harra making multiple complaints regarding the 1600083/19 judgment and alleging that Ms Jenkins had committed perjury. This was followed by a further email on 1 April 2021 to Mr Harra where the claimant requested Mr Harra give her permission to appeal the 1600083/19 judgment out of time and made multiple challenges to the findings of the judgment. (It is plain that Mr Harra would not have the ability to agree to such a request, it being a matter reserved for the Employment Appeal Tribunal). On 11 April 2021 the claimant wrote to Mr Harra again, attaching a photograph of the door she alleged had been the location of the alleged sexual assault by Mr XY along with measurements. This email contained further multiple challenges to the 1600083/19 judgment and clearly sought to reopen matters requesting further investigations. On 13 April 2021 the claimant sent a further email inviting Mr Harra to tell her where Mr XY's genital area was on 30th August 2018.

73. These emails in my judgment plainly and clearly show there is no reasonable prospect of success in a claim that Mr Harra, as a named respondent, did not reply to the claimant's email of 21 June 2021 because of the protected disclosures or protected acts. If one stands back and looks at the circumstances the email above makes it absolutely clear that the reason Mr Harra will not be replying to the email of concern is due to the volume and nature of emails being sent by the claimant rather than the protected disclosures and protected acts. I exercise my discretion in the absence of any alternative order and strike out the claim advanced against Mr Harra in paragraph 5.

Case No: (1) 1602412/2020, (2) 1600097/2021, (3) 1600213/2021, (4) 1600744/2021, (5) 1601132/2021, (6) 1601653/2021«case_no_year»

Employment Judge S Moore

Date: 14 March 2022

JUDGMENT SENT TO THE PARTIES ON

17 March 2022

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FOR THE TRIBUNAL OFFICE