



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr R Sutton

v

Hayfin Services LLP

Heard at: Central London Employment Tribunal

On: 9 May 2022

Before: Employment Judge Brown

Appearances:

For the Claimant:

In Person

For the Respondents:

Mr T Kibling, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1.The Tribunal strikes out the Claimant's complaints of:

- a. automatic unfair dismissal;
- b. victimisation;
- c. indirect age discrimination;
- d. breach of contract and/or unlawful deductions from wages in relation to
 - i. unpaid bonus and
 - ii. 2 days' carried over holiday pay

on the grounds that all those complaints have no reasonable prospects of success.

2.The Claimant's complaint of breach of contract and/or unlawful deductions from wages relating to 2 days' holiday pay referred to in a wage slip dated 30 November 2021 is dismissed on withdrawal by the Claimant.

REASONS

This Hearing

1. This hearing was listed as a 6 day Final Hearing in the Claimant's claim against Respondents.
2. On 7 April 2022 the Respondents wrote to the Tribunal asking for the case to be listed to hear their application to strike out the Claimant's claims or order a deposit.
3. On 14 April 2022 the Tribunal wrote to the parties in the following terms: "EJ Goodman ... has directed me to reply as follows: This case is listed for a six day hearing starting on 9 May. The respondent's application is based on analysis of the tribunal decision of 27 October 2021 and the claimant's further information dated 19 November 2021. It is too late to list this case for a preliminary hearing of either application. An open preliminary hearing requires 14 days' notice (rule 54). ... Noting that claim of dismissal for asserting statutory rights has been withdrawn, and that no particulars were given of the age discrimination or victimisation claims, the live claims appear to be unfair dismissal for making protected disclosures, and the claims for holiday pay and bonus. The six day hearing time should be comfortable even if the tribunal decides not to strike out any claim. The application to strike out can be heard on the first hearing day."
4. EJ Goodman had set out a List of Issues at a Preliminary Hearing on 27 October 2021. She had also ordered the Claimant to provide further particulars of his claims. The Claimant provided some further particulars on 19 November 2021.
5. The parties had fully prepared for the Final Hearing. The Bundle of documents had been compiled following disclosure and the parties had exchanged witness statements. At the start of the Final Hearing, the Claimant asked for specific disclosure of some additional documents relevant to the Respondents' stated reason for dismissing him. The Claimant said that the missing documents showed that he had provided figures in the way he had been requested to and that a senior colleague had been rude to him. The Tribunal asked the Respondent to look for those documents and to provide them to the Claimant. Otherwise, disclosure was complete.
6. The Tribunal read the witness statements and the documents referred to in them before the Respondents made their application to strike out the Claimant's claim.

Background

7. It was not in dispute that the Respondents are an asset management firm and that the Claimant was employed by them from 4 November 2019 to 5 October 2021 as a Collateralised Loan Obligation ("CLO") analyst. The Claimant did not therefore have the required 2 years' employment to bring a complaint of "ordinary" unfair dismissal.
8. The Claimant brings complaints of automatic unfair dismissal on the grounds of protected disclosure, age discrimination, victimisation and breach of

contract/unlawful deductions from wages. He has withdrawn a complaint of automatic dismissal for asserting a statutory right.

9. In his automatically unfair dismissal claim, he relies on alleged protected disclosures he made in previous employment to two separate employers, in 2013 and 2018. He does not rely on any protected disclosures he made to the Respondents in his employment by them.
10. EJ Goodman had set out the issues in the complaints as follows:

Public interest disclosure claim/s

5.1. What did the claimant say or write?

5.1.1. To his former employer, Deutsche Bank, in 2013, that documents about a colleague being used in a redundancy selection process work being altered.

5.1.2. to his former employer, Wilmington Trust, in 2018, that they were failing to follow a cash management agreement and so in breach of a legal obligation to report accurately transaction documents

5.2. In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show one of the following? Identify only the one/s upon which the claimant relies.

5.2.1. A criminal offence had been committed

5.2.2. A person (the employer) had failed to comply with a legal obligation to which he was subject (further information required on the 2013 disclosure)

5.3. If so, did the claimant reasonably believe that the disclosure was made in the public interest? The claimant relies on the following as going to show the reasonable belief: (further information required)

5.4. If so, was that disclosure made, to:

5.4.1. the employer

5.4.2. to another person whose conduct the claimant reasonably believed related to the failure

5.4.3. another person who had legal responsibility for the failure

5.4.4. a legal advisor

5.4.5. a Minister of the Crown

5.4.6. a prescribed person?

5.5. If not, was it made in circumstances where:

5.5.1. it was made other than for personal gain and

5.5.2. the claimant reasonably believed that the information disclosed and any allegation contained in it were substantially true and

5.5.3. it was reasonable for him/her to make the disclosure having regard to the identity of the person to whom it was made, its seriousness, whether it was continuing, the action which had been or might have been expected to have been taken and any procedures authorised by the employer and where:

5.5.4. it was likely that s/he would be subject to a detriment by the employe

or 5.5.5. that evidence would be concealed by the employer if the disclosure was made to him,

or 5.5.6. the employer had failed to respond appropriately to an earlier disclosure. (further information required if the claimant relies on this) Public interest detriment complaints

5.6. If protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that.....(the claimant refers to detriment in the claim form but further information is required on what the detriments are that he relies on)

Public interest unfair dismissal complaints

5.7. Was the making of any proven protected disclosure sole or if more than one the principal reason for the dismissal?

The burden is on the claimant to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was the protected disclosure(s)

.....

8. Section 19: Indirect discrimination on grounds of age

8.1. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely to employ CLOs at salaries lower than that paid to the claimant

8.2. Does the application of the provision put other people in the claimant's age group (early forties) a particular disadvantage when compared with persons who do not share this protected characteristic?

8.3. Did the application of the provision put the claimant at that disadvantage in that he was dismissed.

11. On 19 November 2021 the Claimant provided the following further particulars of his complaints:

Deutsche Bank

a. The protected disclosures were made on 21st August 2013

b. The persons to whom they were made were Louisa Lambert, Human Resources and Nick Bland, Vice President, Team Leader, representing Ketul Tanna, Director, whilst Ketul Tanna was on holiday.

c. The information disclosed was an MS Excel spreadsheet of data on system usage for members of the team.

d. What was said was a disclosure of facts in which information was shared with the HR team, at Deutsche Bank. This information was also shared with a manager, and this was to the effect that documents concerning another employee had been altered during a selection process for redundancy.

e. The people at Deutsche Bank initially aware of the protected disclosures were Louisa Lambert, Human Resources and Nick Bland, Vice President, Team Leader. **The person with the Respondent who**

became aware of the protected disclosures is David Slack of HR.
[emphasis supplied]

f. When these people became aware of the protected disclosures would be included in witness evidence but it must have been apparent at the time.

g. See above. They would have been aware at the time of the protected disclosures being made and the document used was an MS Excel spreadsheet which made it clear that data had been altered after it had been submitted.

Wilmington Trust

a. The protected disclosures were made on 24th October 2018.

b. The person to whom they were made was the Claimant's Line Manager, Ms Eileen Hughes.

c. The information disclosed was that Wilmington Trust was in breach of cash management procedures and had made inaccurate reports to a borrower.

d. What was said was a disclosure of facts in which information was shared with Ms Eileen Hughes to the effect that the Claimant had concerns about conflicting information which had been received for an Investor Report that the Respondent was preparing for a client, Huddle Finance 3 Limited. The discrepancy related to the amount of Commitment Fee to be paid by the client as the Borrower.

e. The person aware of the disclosure was Ms Eileen Hughes.

f. Ms Eileen Hughes would have been aware of the disclosure at the time it was made on 24th October 2018.

g. Ms Eileen Hughes would have become aware when she received the emails of 24th October 2018 which set out the protected disclosures.

2. In respect of the victimisation claim please state to the extent that will be relied on at the hearing.

a. The protected act relied upon is dismissal for reason of the Claimant's age.

b. The protected act occurred on 5th October 2021 when the Claimant was dismissed.

c. The Claimant and the Respondent were both aware of the dismissal.

d. The Claimant suffered a detriment as the Respondent applied a PCP to employ an Analyst at salaries lower than the Claimant. The application of the provision put the Claimant and others of his age at a disadvantage when compared to others who did not share this protected characteristic. Documents will be produced on disclosure as ordered.

3. Statutory Rights

a. [Note: The asserting statutory rights claim is withdrawn.]

4. In respect of the age discrimination claim, please state to the extent that will be relied on at the full hearing.

a. The characteristics of the comparator/s said to have placed the Claimant, because of his age at a disadvantage are that they were younger (and less experienced in the job).

5. In respect of the unpaid wages claim, please state to the extent that will be relied on at a full Hearing.

a. Ten days accrued holiday, GBP 3,153.84; and,

b. Accrued bonus amounting to GBP 8,406.90 (equivalent of EUR 10,000.00 based on 19 November 2021 exchange rate of 0.84069).

12. It was not clear, at the start of the Final Hearing, what was the nature of the age discrimination claim and the victimisation claim. On the Claimant's further particulars, the protected act in the victimisation claim appeared to be his dismissal by the Respondents. However, he did not appear to be alleging any post-dismissal detriment. In his age discrimination claim, his particulars had stated that the "characteristics of the comparator/s said to have placed the Claimant, because of his age at a disadvantage are that they were younger (and less experienced in the job)." That appeared to relate to a direct discrimination claim, rather than an indirect discrimination claim as set out in the Preliminary Hearing before EJ Goodman.
13. The Claimant gave further details of his complaints during submissions on the strike out application.
14. It was agreed that the Claimant was not bringing a separate protected disclosure detriment complaint – his claims relate to his dismissal alone (and his replacement by another employee).

Respondents' Arguments

15. At this hearing, Mr Kibling for the Respondents argued that the Claimant's entire claim should be struck out because his complaints had no reasonable prospects of success. He contended that the Claimant makes inherently implausible allegations: His case is that the Respondents dismissed him for disclosures he says he made years earlier in different and unconnected employment.
16. In their 7 April 2022 written application for strike out, the Respondents also contended that there is very little evidence that the Claimant made any disclosures which would qualify as protected disclosures. They said that the Claimant had supplied no documentary evidence to support his assertion that he made a protected disclosure, either to Deutsche Bank in 2013, or to Wilmington Trust in 2018. They said that the information provided by the Claimant in his further and better particulars was wholly inadequate and did not allow the Respondents to plead a sensible defence to those allegations.
17. The Respondents contended that, to succeed, the Claimant would need to show that the Respondents knew of his alleged previous disclosures. The Claimant says Mr Slack, at the Respondents' HR department "must have known" because the Claimant told him that he had been involved in legal proceedings against his

previous employers. The Respondents contended that this does not provide an arguable basis to say that the Respondents knew of his protected disclosures.

18. Mr Kibling argued that the victimisation claim, as detailed in the Claimant's further particulars is wholly without merit, given that the protected act was said to be the dismissal itself. He said that, now disclosure had taken place, there was nothing to support the Claimant's contention that the Respondents knew about the Claimant's alleged disclosures, or that his claims against previous employers included age discrimination claims.
19. With regard to the age discrimination claim, the Respondents argued that there was no arguable basis for the Claimant's claim, given that the person who was appointed to replace the Claimant was aged 41 - and therefore was in the same age group - and was appointed at a higher salary.
20. They said that, on the plain terms of the Claimant's contract, he was not entitled to any outstanding holiday pay or to a bonus.

The Claimant's Submissions

21. The Claimant told the Tribunal that his case is that David Slack, of the Respondent's HR department, knew about the Claimant's previous protected disclosures made in previous employment. He relies on his 2 conversations with Mr Slack, on 25 September and 30 September 2020, in contending that Mr Slack knew about his previous protected disclosures and the litigation relating to them. He also relies on these conversations to show that Mr Slack was aware that he had done a protected act by alleging age discrimination in previous Tribunal claims against previous prospective employers. These 2 conversations followed an email the Claimant had sent to a number of media organisations, including the BBC and the Financial Times on 24 September 2020.
22. The Claimant drew the Tribunal's attention to the email he had sent on 24 September 2020 to these media organisations, copying in employees at his previous employers, wherein the Claimant had said, "Give me a call. I would like to talk about the misconduct by the below individuals and the below companies." The Claimant had then listed individuals and companies which did not include the Respondents or any of the Respondents' employees.
23. The Claimant also drew the Tribunal's attention to the record of the conversation on 30 September 2020, p203. He relied on the note of the conversation, p203. albeit he said that it was not complete. The relevant parts were as follows :

"DS: Are you comfortable being a little more specific?

RS: there have been several instances of litigation (which he seems reluctant to share). He has tried to resolve them in various ways. He doesn't know why they are treating him this way.

...

DS: can you tell me more about the instances of litigation?

RS: it would be inappropriate to discuss as he would be in breach of a confidentiality agreement. There have been 2 rounds of employee tribunals and 1

in county court. At DB someone challenged a redundancy based on an altered "submission". He made his submission and when he saw it later as part of communicating the outcome it was clear it had been altered. He simply produced the original submission and that was the start of the issues."

24. The Claimant said that one of the calls on 25 and 30 September 2020 was 40 minutes long.
25. He told the Tribunal in submissions, "I recall that I did say public interest disclosure ... I am not sure that I did, I cannot remember that I did." (The Claimant said all this at once, without interruption or intervention). The Tribunal considered that the Claimant very honestly accepted that he could not give evidence that he had mentioned his previous protected disclosures to Mr Slack.
26. The Claimant also relies on an email sent by Mr Slack on 25 January 2021 in which Mr Slack said, "I am sorry to hear that you don't want to discuss these issues. 360 feedback is a valuable opportunity to get input from the people with whom you work to guide your development. ...With regards to the dispute that we became aware of last year I am afraid this item is not closed for the firm. While there has been a delay the need remains to further understand any potential implications for Hayfin and to you as a member of the team. I will schedule another time for us to discuss."
27. In his witness statement for the Final Hearing, the Claimant referred generally to the fact of his previous Employment Tribunal claims against prospective employers. In those previous claims he had contended that those prospective employers had not employed him because of his protected disclosures in previous employment. The Claimant relies generally on an assertion that he has been "blacklisted" in the industry. He does not make specific assertions about how the "blacklisting" came to the Respondents' attention.
28. He relies generally on the fact that the Respondents have commercial relationships with some of the prospective employers against whom the Claimant has previously brought claims. He does not make any specific assertion about how this means that his previous protected disclosures, or the nature of his previous claims, came to the Respondents' attention.
29. The Claimant told the Tribunal that he believes that Nicholas Thomson knew of his previous protected disclosure / protected act but he made no positive assertion as to how this was the case, other than "he must have known".
30. The Claimant said that he would rely on cross examination to show that the Respondents knew of his protected acts and his protected disclosures.
31. The Claimant also said that brings an indirect age discrimination claim, not a direct age discrimination claim. He accepted that his replacement, Adam Jenner, was aged 41 and was in the same age group as the Claimant. He accepted that the Respondents employed Mr Jenner on a higher salary than the Claimant and appointed him at the same level of seniority in its organization as the Claimant. He said, however, that Mr Jenner had less experience than the Claimant.

32. He accepted that, when he had originally brought his age discrimination claim, he had thought that the Respondent had employed a different, younger person, Jose Hilchez, to replace the Claimant, at a lower level and on a lower salary. He accepts, following disclosure, that Mr Hilchez employee was not employed to replace the Claimant.
33. The Claimant said that he relied on the Respondents “using experience as a criterion... that people are senior / too experienced”.
34. He agreed that he contends that that PCP puts people in their “early 40’s” at a disadvantage, compared to people who do not share that characteristic.
35. The Claimant said that he relies on an email sent by David Slack on 16 October 2019 before he was employed, about his prospective employment. In it, David Slack of HR said to Bronwyn Martin, the Claimant’s manager, “Agreed, he is not the right fit long term. He could be a useful stop gap while we're looking for our permanent person who will likely be more for a more junior options who's a better fir [sic] for the team and career trajectory. Do you think you could work with him for 6 months?” p168.
36. The Claimant accepted that the terms regarding payment of his bonus were set out in his contract of employment. He claims for a bonus which would have been paid on a date after he was dismissed.
37. His permanent contract of employment provided, p92,
- 11.2 “In addition to basic salary you may be eligible to receive payments of bonus, subject to any rules in force from time to time. Such payments are at the sole discretion of the Firm and in any year the Firm may award no bonus payment to you.
- 11.3 All bonuses are (i) conditional on you being employed and not under notice (given or received by you) on the payment date, and (ii) subject to such deductions as are required by law, including for tax and national insurance.”
38. The Claimant 2 brings a breach of contract/ unlawful deductions from wages claim for 2 days’ outstanding “carried over” holiday pay. He said that he relies on an oral agreement with Bronwyn Martin that he could carry over these 2 days, beyond a 31 May 2021 cu-off date for carry over. He contends he took the 2 days in June 2021.
39. His contract provided,
- “15.3 Up to five days holiday untaken by the end of any holiday year may be carried forward until 31 March of the next holiday year. If any such holiday entitlement is not used by 31 March of the next holiday year, it will be lost and will not be paid in lieu.” P92.
40. The Claimant agrees that this date was extended by the Respondents to 31 May 2022 because of the pandemic, albeit he says that there was an oral agreement that he could carry over days for a longer period. The Claimant did not address this in his witness statement.

Law - Strike Out – No Reasonable Prospects of Success

41. An Employment Tribunal 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)*.
42. 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 recensions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect”.
43. 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.
44. Discrimination cases should only be struck out in the very clearest circumstances, *Anyanwu v Southbank Student’s Union* [2001] IRLR 305 House of Lords.
45. In *Ahir v British Airways Plc* [2017] EWCA Civ 1392, Underhill LJ said, [16] “Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided that they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.”
46. In *Madarassy v Nomura International Plc* [2007] IRLR 246 Lord Justice Mummery said that, in discrimination cases, the burden of proof does not shift from the Claimant to the Respondent where the Claimant proved only the bare facts of a difference in status and a difference in treatment. He said that a difference in protected status and a difference in treatment 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 a Respondent had committed an unlawful act of discrimination, paragraph 56 of that Judgment.

Decision – No Reasonable Prospects of Success

Protected Disclosure and Victimisation Complaints

47. This is a comparatively unusual strike out application because it is made at the start of the Final Hearing, after disclosure has been completed and after witness statements have been exchanged.
48. The Claimant's complaint of protected disclosure automatic unfair dismissal is also unusual, in that he relies on disclosures he says he made 8 years and 3 before his dismissal, in different and unconnected employment. The Tribunal agreed with the Respondents that is inherently unlikely that the current Respondents dismissed the Claimant because of historic disclosures, in unrelated employment.
49. The Claimant will need to show that the Respondents knew of these historic alleged protected disclosures. In addition to showing that the Respondents knew of the previous protected disclosures, the Claimant will also need to show that the Respondents dismissed him because of these, as he does not have 2 years' service in order to bring an ordinary unfair dismissal claim. The Respondents do not need to show that they had a potentially fair reason for dismissal, given that he was dismissed before 2 years' service.
50. Further, in order for the burden of proof to shift to the Respondent in his victimisation claim, the Claimant will have to show facts from which the Tribunal could conclude that the Respondent dismissed him because of his protected act. Again, the Claimant relies, not on a protected act done in his employment with the Respondents, but on the Respondents' alleged knowledge of the nature of previous employment tribunal claims against other prospective employers. The Tribunal considered that it was likely that the Claimant would need to show that the Respondent knew of those protected acts, as part of the primary facts from which the Tribunal could conclude that he was dismissed because of the protected acts.
51. The evidence on which the Claimant relies in asserting the Respondents knew of his alleged protected disclosures/ protected acts are his telephone calls with Mr Slack, his email of 24 September 2020 to media organisations, the general circumstances of his previous litigation against other potential employers and general commercial relationships between the Respondents and these other employers.
52. The note of the phonecalls does not show that the Claimant told Mr Slack of his protected disclosures, or his protected acts. Indeed, it records that the Claimant did not wish to discuss the nature of the litigation. The only detail he gave related to a "redundancy" dispute – which would not suggest a protected disclosure or discrimination claim. The 24 September 2020 email clearly does not state any protected disclosure or protected act.

53. The Claimant himself cannot give positive evidence that he mentioned protected disclosure or a protected act to Mr Slack. His case was, "I recall that I did say public interest disclosure ... I am not sure that I did, I cannot remember that I did."
54. Disclosure has taken place. The Claimant's outstanding applications for specific disclosure do not relate to knowledge of the protected acts or protected disclosures.
55. None of the disclosure documents contain any evidence that the Respondents knew of the Claimant's disclosures or protected acts. There is therefore no supporting evidence at present that the Claimant's disclosures / protected acts were known or discussed by the Respondents at any stage, let alone around the date of his dismissal.
56. The Claimant cannot give an account of how Mr Slack came to know of the protected disclosure or protected act. He says that he will rely on cross examination of the witnesses to establish that his disclosures were known.
57. The Tribunal considered that the fact that the Respondents may have commercial relationships with employers against whom the Claimant has previously brought claims provided no evidence from which the Tribunal could infer that knowledge of the alleged disclosures passed to the Respondent.
58. The Claimant cannot point, therefore, to any positive evidence that any of the Respondents knew of his disclosures made years previously. He intends to rely on cross examination to extract evidence that they knew of his disclosures. His cross examination, however, will necessarily be unspecific, because he cannot put any details of how the disclosures or protected acts came to the Respondents' knowledge.
59. The Tribunal reminded itself that it must not strike out discrimination claims, or claims where there are disputed facts, except in exceptional circumstances as described in the caselaw.
60. However, the Tribunal considered that it could properly be said that there was no reasonable prospect of the Claimant succeeding in his automatic unfair dismissal claim for the following reasons.
61. The basis of the claim is highly improbable, given that it relates to disclosures allegedly made in previous employment.
62. The Claimant has adduced very little evidence, including no documentary evidence, that he ever made protected disclosures at all. The Tribunal agreed with the Respondents' contention that the Claimant's argument that he made a disclosure in 2013 has no reasonable prospect of success. It is very unclear what legal obligation might have been breached, or how the Claimant reasonably believed that disclosure of information relating to an individual redundancy exercise would be in the public interest.
63. The Respondents' knowledge of disclosures is crucial to the claims. There is currently no evidence to support the Claimant's contention that the Respondents

knew of the protected disclosures. The Tribunal considered that there is no reasonable prospect that he will extract such evidence from cross examination, when he has no positive, specific case to put to witnesses.

64. Even if there were a reasonable prospect that the Tribunal would be satisfied that the Respondents knew of the historic protected disclosures, the Claimant would still have to show that the disclosures were the reason or principal reason for dismissal. Even following disclosure, there is no evidence that the protected disclosures were the reason for dismissal. The contemporaneous documents do not suggest this. It is extremely unlikely that the Tribunal would find that historic protected disclosures were the principal reason for dismissal, given that the Claimant will need to rely solely on cross examination to establish his asserted reason.
65. Taking all those matters together, the Tribunal considered that it could properly be said that there is no real substance in the Claimant's factual assertions in his automatic unfair dismissal claim. His assertions are contradicted by the only documentary evidence available and he has no positive evidential case to put.
66. His victimisation claim relies also relies on the Respondents having knowledge of protected acts. There is no evidence, even after disclosure, to support the Claimant's contention that the Respondents knew of his previous protected acts. Again, there is no reasonable prospect that he will extract such evidence from cross examination, when he has no positive, specific case to put to witnesses.
67. Further, after disclosure and exchange of witness statements, there is no documentary evidence to suggest that the dismissal was because of his protected act. The Claimant suggests no positive evidence of anything more than a dismissal and (even if the Respondent knew of it) a protected act.
68. It can properly be said that the prospect of the Claimant establishing primary facts from which the Tribunal could conclude that his dismissal was an act of victimisation is fanciful.
69. There is therefore no reasonable prospect of the Claimant succeeding in his victimisation claim.

Indirect Age Discrimination Complaints

70. The Claimant's age discrimination is now put as an indirect discrimination claim, not a direct discrimination claim. It is put on a different basis to the claim envisaged by EJ Goodman. The Claimant concedes that his replacement was, in fact, in the same age group as he is.
71. To succeed in his claim, he will need to establish that the Respondents applied a PCP of "using experience as a criterion... that people are senior / too experienced". The Claimant asserts that the Respondent did not wish to employ people who were too experienced. He relies on an email sent before he was employed, in 2019.

72. However, on the undisputed facts, in 2021 the Respondents in fact employed Adam Jenner, aged 41, at the same level of seniority and on a higher salary than the Claimant. The Tribunal considered that, on these undisputed facts, there was no reasonable prospect of the Tribunal finding that the Respondents applied a PCP of not employing people who are too senior or too experienced, in 2021, when they actually dismissed the Claimant.
73. Furthermore, the Claimant has not produced any evidence of group disadvantage to people “in their early 40s” caused by that PCP. In the absence of such evidence, and on the agreed evidence that the Claimant’s replacement was also in his early 40s, the Tribunal considered that the Claimant had no reasonable prospect of showing that the PCP (even if it was applied) put people in their early 40s at any disadvantage.
74. The Tribunal noted that the Claimant’s case had completely changed from the one he had first intended to bring. When he had originally brought his age discrimination claim, he had done so on the basis that the Respondent had employed a different, younger person to replace him, at a lower level and on a lower salary.
75. That added to the implausibility of the Claimant’s current age discrimination claim. By his own admission, he has retrospectively tailored his case to the disclosure.
76. There is no reasonable prospect of his succeeding in his indirect age discrimination complaint.

Breach of Contract/ Unlawful Deductions from Wages

77. Regarding the Claimant’s bonus claim, he claims for a bonus which would have been paid on a date after he was dismissed.
78. His permanent contract of employment provided, p92,
- 11.2 “In addition to basic salary you may be eligible to receive payments of bonus, subject to any rules in force from time to time. Such payments are at the sole discretion of the Firm and in any year the Firm may award no bonus payment to you.
- 11.3 All bonuses are (i) conditional on you being employed and not under notice (given or received by you) on the payment date, and (ii) subject to such deductions as are required by law, including for tax and national insurance.”
79. The Claimant concedes that his contractual right to a bonus is governed by his contract of employment. Its express terms provide that a bonus is conditional on the Claimant being employed and not under notice on the payment date.
80. There is no reasonable prospect of the Claimant succeeding in his claim for failure to pay his bonus.
81. The Claimant claims for failure to pay 2 days holiday pay “carried over”.

82. The Claimant relies on an oral agreement to establish an extended date for carry over. Again, there is no reasonable prospect of the Claimant establishing that. His witness statement does not address the matter at all, so he has produced no relevant evidence of such an oral agreement

Additional Contractual Holiday Pay Claim

83. After the Tribunal had given oral judgment, the Claimant raised the fact that he also claimed for 2 days unpaid holiday pay. He asked the Tribunal to reconsider its judgment in relation to the contractual holiday pay claim. He said that he had received a payslip for these 2 days' holiday but had never received payment for them. The relevant payslip was dated 30 November 2021, p150.

84. Mr Kibling said that the Respondents assert that the Claimant did receive that payment. However, he said that, if the Claimant would withdraw his claim for this payment, the Respondents would pay the amount shown on the 30 November 2021 payslip, without admission of liability.

85. The Claimant agreed to this proposal. The Respondent then paid the Claimant the amount on that payslip and the Claimant withdrew his claim for 2 days holiday pay arising from the 30 November 2021 payslip. He agreed that his claim, for that amount only, should be dismissed on withdrawal. It did not seem necessary to reconsider the strike out judgment because it had not dealt with this particular holiday pay claim.

Employment Judge **Brown**
Date: 10 May 2022

SENT to the PARTIES ON

10/05/2022.....

FOR THE TRIBUNAL OFFICE