EMPLOYMENT TRIBUNALS

Claimant: **Mr E Kervaon**

Respondent: **(1) Bingham Hotel and Restaurant Ltd**
(2) Mrs Ruth Trinder
(3) Ms Samantha Trinder

Heard at: **London South Employment Tribunal (by CVP)**

On: **26/05/2022**

Before: Employment Judge Dyal

Representation:

Claimant: Ms Palmer, Counsel

Respondent: Ms Bewley, Counsel

RESERVED JUDGMENT

Amendment

1. The Claimant has permission to amend to aver that the Second and/or Third Respondents dismissed him on the grounds that he made a protected disclosure contrary to s.47B(1A) Employment Rights Act 1996.

Strike-out

2. Nothing is struck-out.

Deposit orders

3. The following allegations/arguments have little reasonable prospect of success and the Claimant must pay the deposit stated below not later than 21 days from the date this order is sent to the parties, failing which the allegations/arguments to which the unpaid deposit applies will stand dismissed without further order:

    a. Deposit order 1 in the sum of £50: this deposit applies to the allegation/argument that all or any of the Claimant's putative protected

disclosures in his reasonable belief tended to show that "a miscarriage of justice was likely to occur, that miscarriage being the unlawful dismissal of an employee".

b. Deposit order 2 in the sum of £50: this deposit applies to the allegation/argument that all or any of the Claimant's putative protected disclosures in his reasonable belief tended to show that "the concerns that had been raised had been, were being or were likely to be deliberately concealed from Mrs Trinder by Ms Trinder."

c. Deposit order 3 in the sum of £50: this deposit applies to the allegation/argument that: the Second Respondent subjected the Claimant to any or all of the detriments (which includes dismissal) complained of on the grounds that he disclosed one or more of the matters he says he did.

Limitation

4. It is not possible to determine whether the matters said to be out of time were or out of time or not without hearing the main evidence in the case. The limitation issues are therefore deferred to the final hearing.

REASONS

Introduction

1. The agenda for this hearing was fixed by the orders of Employment Judge McLaren on 17 June 2021:

   …to determine the respondents' application to strike out the whistleblowing claims as having no reasonable prospect of success. In the alternative, the respondent seeks a deposit order.

   The hearing will also determine whether all claims against the second respondent should be struck out, or in the alternative a deposit order should be made on the same basis.

   The hearing will further consider whether any detriments or pay claims before July 2020 are out of time and it is neither practicable or just and equitable to extend such time.

2. In advance of the hearing there was a small avalanche of correspondence between the parties. Within it the Claimant sought a postponement of this hearing. Essentially, this was on the basis that he could not fairly answer the Respondent's applications because they had never been set out in any detail, whether in an application letter or a skeleton argument. In an email dated 8 May 2022 (which is on the tribunal file) the Claimant's solicitor said that at the PH of 17 June 2021, Employment Judge McLaren had orally made an order that the Respondent's applications be particularised but that this had somehow slipped off of her written orders. This was based upon an attendance note from the

Claimant's previously instructed counsel who attended that hearing. This point was not raised until May 2022 almost a year after the hearing.

3. The application to postpone was refused by Regional Employment Judge Freer on 24 May 2022 for the reasons he gave.

4. Notwithstanding that, the application was renewed at the outset of the hearing by Ms Palmer. I pointed out that I did not have a power to vary REJ Freer's decision absent a material change of circumstances, or it becoming apparent that there was some important factual matter he was unaware of or had been misled upon, or some other exceptional circumstance. Ms Palmer did not immediately accept this characterisation of my powers and suggested I simply had a broad discretion to vary another judge's case management orders. She asked me to take her to the relevant law I was referring to. I was willing to do this and took her, for ease and speed, to Division PI of *Harvey* - the section on '*varying or setting aside case management orders*' which contains references to pertinent authorities and summarises the principles. I think Ms Palmer then accepted that I had stated my powers correctly, but in any event I am satisfied that I did.

5. The application to postpone was renewed nonetheless essentially on the basis that:

    5.1. Employment Judge McLaren had made an order for the applications to be particularised, they had not been, and the Claimant was prejudiced;
    5.2. The Respondent's 12 page skeleton argument had been served at 8.30am on the morning of this hearing;
    5.3. The bundle ran to about 557 pages and had been in the Claimant's possession a matter of days. An additional 30 odd pages had been served more recently.

6. I reviewed the file and read Employment Judge McClaren's handwritten notes of the last hearing. There was no suggestion in them that an order of the sort the Claimant believes was made, was indeed made. I reported this to the parties.

7. I heard from Ms Bewley. She was at the previous hearing. She had no recollection of the disputed order being made and nor did her solicitor. Her solicitor had a detailed attendance note of the hearing which did not record any such order. Ms Bewley accepted the hearing bundle was over-lengthy but said that beyond the pleadings there was a very small handful of documents that needed to be referred to totally about five pages or so.

8. I took a few minutes to consider my decision and then rejected the application to postpone:

    8.1. On the balance of information before me I could not accept that Employment Judge McLaren did order the Respondent to give details/particulars of its applications. The balance of information suggested firmly otherwise. I inferred that the Claimant's previously instructed counsel was innocently mistaken. There was thus no basis to go behind REJ Freer's decision on this ground even if I wanted to.

8.2. The size of the bundle and the timing of the skeleton argument were new points that were not before REJ Freer. However, I do not think that they provide anything close to a basis for postponing.

8.2.1. Having read the skeleton I considered that the gist of it was foreseeable. I pointed out that in some respects it went beyond the precise agenda fixed by Employment Judge McLaren in the limitation points it took. However, that did not seem to me a basis for a wholesale postponement of the hearing. At most it might mean containing my decision to the agenda set or perhaps deferring particular points if they could not be dealt with.

8.2.2. Although the bundle was overly lengthy Ms Bewley had identified in her submissions the small number of documents she would refer to and ask me to take into account. I take the point that the Respondent had not indicated this in advance. However, the nub of it is that the Claimant would in my view have a fair chance to respond to the applications even though he had only found out what sub-set of the documents in the bundle the Respondent would be relying on at the hearing itself. In any event the Claimant had had the bundle for a few days and it was clear the Claimant must have had at the very least the key documents within it for much longer than that (e.g. pleadings, further particulars, key correspondence and the like).

9. I decided that any prejudice could be fairly dealt with by taking a good break between the Respondent's application and the Claimant's response so that Ms Palmer could take instructions as required and collect her thoughts. She said that her solicitor was on holiday; I asked her whether there was any difficulty in taking instructions from the Claimant directly and she confirmed there was not. Ms Palmer indicated that she would prefer to respond after lunch though her lay client would not then be in attendance, rather than to respond after a shorter break while her client was still there. I indicated that if she was content with that I was too and it is what ended up happening.

10. The hearing was listed for 3 hours commencing at 10 am. I continued the hearing in the afternoon in order that it could conclude albeit with a reserved decision. It lasted the day.

The substantive claims that are the subject of the applications

11. I should also note that having dealt with the application to postpone, the next thing I did before hearing the application and response was to clarify the issues. I referred the parties to ***Cox v Adecco*** [2021] ICR 1307 in which HHJ Tayler stressed the importance of being clear as to what the issues are before considering a deposit order or a strike-out application.

12. It seemed to me important then to establish:

12.1. What the whistleblowing complaints are;
12.2. What the complaints against Mrs Trinder are;
12.3. What the pay complaints are.

13. There was a draft list of issues at p287 and following of the hearing bundle. It had been the subject of *inter partes* correspondence but was not formally agreed. Ms Palmer was not familiar with the solicitors' correspondence about this document so was cautious in relation to it. I was likewise cautious in the circumstances. Still it represented a useful starting point and so I went through the relevant sections with Ms Palmer checking whether or not it accurately stated the claimant's case. Through that discussion the issues were identified as follows:

14. Did the Claimant make the following disclosures of information[1]:

    14.1. On 21 and 22 December 2015 and on 6 and 7 January 2016, telling Mrs Trinder about cash flow issues and the First Respondent's ability to pay VAT that was due and owing?
    14.2. Between June and November 2018, at a meeting with Mrs Trinder and Keith Wilkinson, raising concerns about money that Ms Trinder was taking from the First Respondent and the effect it was having on cashflow?
    14.3. In June 2019, at a meeting with Mrs Trinder and Mr Wilkinson [the First Respondent's bank manager], saying Ms Trinder was taking too much money out of the First Respondent to prop up her business, Bhuti. As a result, the First Respondent was unable to pay its rent or VAT that was due and owing, which in turn meant that the property company that owned the First Respondent's building was unable to pay its mortgage?
    14.4. In May 2020, at a meeting with Mrs Trinder, raising concerns about Ms Trinder in relation to the First Respondent's cash flow and the Claimant's fear that she would unlawfully remove him from the business in order to access the First Respondent's remaining money?

15. If so, do they amount to qualifying disclosures of information further to sections 43A, 43B, 43C and 43G?

16. If so, did the Claimant reasonably believe that the disclosures were in the public interest and tend to show:

    a. That a criminal offence had been and was likely to continue to be committed, that offence being theft? The Claimant says every alleged disclosure tends to show this.

    b. That the First Respondent was likely to fail to comply with the legal obligations to which it was subject, those obligations including (i) the payment of VAT and (ii) the duty not to dismiss an employee unlawfully? The Claimant says every alleged disclosure tends to show

    this.

[1] Ms Palmer confirmed that the Claimant does not rely upon a disclosure to an accountant in 2020 referred to at paragraph 11 of the Particulars of Claim. Therefore it is omitted from this list.

c. That a miscarriage of justice was likely to occur, that miscarriage being the unlawful dismissal of an employee? The Claimant says that his June 2019 and May 2020 alleged disclosure tend to show this.

d. That the concerns that had been raised had been, were being or were likely to be deliberately concealed from Mrs Trinder by Ms Trinder? The Claimant says every alleged disclosure tends to show this.

17. Was the Claimant subjected to the following detriments on the ground that he had made a protected disclosure:

    17.1. From 22 June 2020 to 1 July 2020 failing to follow a fair redundancy dismissal process and to investigate any concerns raised by the Claimant or to take any steps to protect him?
    17.2. The first dismissal [now added by amendment - see below];
    17.3. From 6 July to 14 August 2020 failing to follow a fair appeal process in relation to his redundancy dismissal and to investigate any concerns raised by the Claimant or to take any steps to protect him?
    17.4. From 10 to 21 August 2020 failing to follow a fair disciplinary process, including refusing to provide a reasonable right of reply and a hearing in relation to the serious allegations made against the Claimant and failing to investigate any concerns raised by the Claimant or to take any steps to protect him?
    17.5. The second dismissal [now added by amendment see below]
    17.6. On 7 October 2020 rejecting the Claimant's out of time (20 September 2020) attempt to appeal his gross misconduct summary dismissal?
    17.7. Upon termination of employment, failing to pay out the value of the share options under the EMI scheme?
    17.8. On 31 July 2020 and 31 August 2020 making unlawful deductions from the Claimant's wages, namely:
        17.8.1. the reduction of his salary due to furlough from 1 July 2020;
        17.8.2. and the non-payment of accrued but untaken holiday and lieu days upon termination?

18. The complaints against Mrs Trinder are, and only are, the above whistleblowing detriment (including dismissal) complaints.

19. The claims for unauthorised deductions from wages are:

    19.1. Wages for July 2020 (which are said to have became payable on 31 July 2020);
    19.2. Wages for August 2020;
    19.3. Accrued but untaken holiday pay upon termination.

20. As now defined there are no limitation issues in relation to these wages claims.

21. I note that, the claim form was presented on 8 December 2020 following Early conciliation as follows:

    21.1. R1: day A 23 October 2020, Day B 20 November 2020
    21.2. R2: day A 23 November 2020, Day B 23 November 2020
    21.3. R3: day A 23 November 2020, Day B 23 November 2020

Law

Two different approaches: striking-out vs finally determining an issue at a preliminary stage

22. At a preliminary hearing a tribunal may be asked to strike-out a claim on the basis that it has no reasonable prospect of success and/or it might be asked to make a final determination of an issue notwithstanding that the proceedings are at an interim stage. A different approach is required depending upon which of those things the tribunal is doing.

23. Ellenbogen J gave a helpful distillation of the principles in ***E v X*** UKEAT/0079/20 RN. The context was an appeal arising out of PH in which there was an issue about whether there was or was not a continuing act. Some of the principles she distilled relate to that matter specifically and others are more general. She said as follows:

> *[50] With the qualification to which I have referred at para 47 above, from the above authorities the following principles may be derived:*
>
> > *1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: Sougrin;*
> > *2) It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: Robinson;*
> > *3) Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: Sridhar;*
> > *4) It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue: Caterham;*
> > *5) When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: Lyfar;*

6) An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: Aziz; Sridhar;
7) The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: Aziz;
8) In an appropriate case, a strike-out application in respect of some part of a claim can been approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading: Caterham (as qualified at para 47 above);
9) A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: Robinson and para 47 above;
10) If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: Caterham;
11) Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: Caterham;
12) Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: Caterham;
13) If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively,, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: Caterham.

24. I note that in ***E*** the employment judge who ordered the preliminary hearing specifically put the issue of whether or not there was a continuing act on the agenda. Ellenbogen J found that there was an error of law when a different employment judge hearing the preliminary hearing deferred that matter to trial. It had not been open to him to vary the first employment judge's order.

25. It is also worth setting out some of what HHJ Auerbach said in ***Caterham School Limited v Mrs K Rose*** *UKEAT/0149/19/RN* because there is learning in it that is relevant here:

> *53. … in short, because, at this preliminary hearing, the judge did not have any evidence before her, at all, on the continuing conduct issue; and she did not make, indeed could not have made, any finding of fact at all relevant to that issue, nor any findings about whether any of that alleged conduct involved (subject to the time point) conduct amounting to discrimination, as alleged. Absent such findings she could not properly have determined, definitively, whether any of the matters complained of involve something which, taken together with other matters complained of (so all of them), formed part of conduct extending over a period.*
>
> *54. Rather, as is apparent in particular from paragraph 28, she reached her conclusion – in respect of the conduct extending over a period issue relating to these claims – solely on the basis of the consideration of the contents of the claim form. That, indeed, may be contrasted with the tribunal's conclusion on the question of just and equitable extension, which proceeded from the facts found…*
>
> *…*
>
> *56. But even if (which I did not, I think, have to decide), the Judge did, and was entitled to, take that view, that could only have led to the conclusion that the claims in question should not be struck out as being out of time. They would then proceed to a full hearing on the basis that the continuing conduct issue, and all the time points attendant upon it, remained live. …"*
>
> *58. First, it is always important for there to be clarity, when a Preliminary Hearing is directed, at such a Hearing, and in the Tribunal's decision arising from it, as to whether the Tribunal is considering (or directing to be considered), in respect of a particular complaint, allegation or argument, whether it should be struck out (and/or made the subject of a deposit order), or a substantive determination of the point.*
>
> *59. The differences, in particular, between consideration of a substantive issue, and consideration of a strike out application, at a Preliminary Hearing, are generally well understood, but still worth restating. A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact. If a strike out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point, or*

on the merits), that will bring that complaint to an end. But if a strike out application fails, the point is not decided in the Claimant's favour. The Respondent, as well as the Claimant, lives to fight another day, at the Full Hearing, on the time point and/or whatever point it may be.

60. By contrast, definitive determination of an issue which is factually disputed requires preparation and presentation of evidence, to be considered at the Preliminary Hearing, findings of fact, and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the Full Merits Hearing of the case.

61. All of that applies equally where the issue is whether there has been conduct extending over a period for the purposes of the section 123 time limit. If the Tribunal considers (properly) at a Preliminary Hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out. But if it is not struck out on that basis, that time point remains live. If, however, the Tribunal decides at a Preliminary Hearing, that the claim does relate to something that is part of continuing conduct, and so is in time, then the issue has been decided and cannot be revisited.

62. Some of the authorities do, I think, need to be read with some care in this regard, because it is not always apparent, without a close and careful reading, whether the Tribunal's decision under challenge was by way, effectively, of a decision whether or not to strike out a complaint by reference to a time point, or by way of definitive determination of that point. That is, sometimes, because the authorities do not always use the express language of "strike out", or refer to the strike-out Rule, or use the language of "no reasonable prospect of success". But, on a careful reading, it is clear that a number of these authorities are, indeed, concerned with whether a particular complaint or complaints should have been struck out, on the basis that there was no reasonable prospect of success of establishing that they were in time because they formed part of conduct extending over a period; and that these authorities (properly) use the "prima facie case" test as a synonym or shorthand for the strike-out test.

63. So, in short, the prima facie case test is appropriate, as shorthand for the "no reasonable prospects of success" test, where the Tribunal is persuaded that the matter is suitable for consideration at a Preliminary Hearing, of whether a particular complaint or complaints should be struck out on the basis that it is, in isolation, out of time, and there is no reasonable prospect of success, on the pleaded case, of it being found in time as forming part of continuing conduct.

64. But a determination of whether, substantively, there is conduct continuing over a period, cannot be reached at a Preliminary Hearing on the basis merely of consideration of whether there is a prima facie case on the pleading. Were it otherwise, it would mean that there was actually a lower threshold for establishing conduct extending over a period, if the matter were

considered at a Preliminary Hearing, than if it were considered at a Full Hearing. That cannot be right. Read as a whole, and with care, none of the previous authorities so holds.

65. The authorities do indicate that it is not necessarily in every case an error of law for an Employment Tribunal to consider a time point of this sort at a Preliminary Hearing, either on the basis of a strike out application, or, possibly even, in an appropriate case, substantively. If that can be done properly, it may be sensible and, potentially, beneficial, so that time and resource is not taken up preparing, and considering at a full merits hearing, what may be properly found to be truly stale complaints that ought not properly to be so considered.

66. But, as is well-known, the authorities also repeatedly urge caution – having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; because there may be no appreciable saving of preparation or hearing time in any event, if episodes that could potentially be severed as out of time, are in any case relied upon as background to more recent complaints; because of the acute fact sensitivity of discrimination claims, and the high strike-out threshold; and because of the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue."

26. There was a small point of disagreement between Ellenbogen J and HHJ Auerbach but not one that is material in this case.

Strike-out and deposit order

27. By rule 37 (1) (a) the tribunal has a power to strike-out a case or part of case if it has no reasonable prospect of success. This is a draconian power that must be exercised carefully.

28. Cases should not, as a general principle, be struck out on when the central facts are in dispute. There are limited exceptions to this principle as described in e.g. ***Ezsias v North Glamorgan NHS Trust*** [2007] EWCA Civ 330, [2007] IRLR 603, [2007] ICR 1126 and ***Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly*** [2012] CSIH 46, [2012] IRLR 755.

29. Central facts include not only issues such as what happened but also *why* they happened (this is obvious but if authority is needed see e.g. ***Romanowska v Aspirations Care Ltd*** UKEAT/0015/14.)

30. Upon a strike-out application of this kind, the Claimant's factual case should be taken at its reasonable highest (see e.g. ***Cox***).

31. There is a power to make a deposit order if a particular argument/allegation has little reasonable prospect of success.

32. In ***Van Rensburg v Royal Borough of Kingston-Upon-Thames***, UKEAT/0096/07 at [24 – 27], Elias P (as he was) made clear that when applying the 'little reasonable prospect' test the tribunal is not limited to legal matters alone. Elias P also made clear that there was more scope for exercising the power to order a deposit because of the improbability of essential facts being established than when exercising the power to strike out for that reason. For instance, he said:

    [27]… *the tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim or response.*

Substantive law of public interest disclosures, detriment and dismissal

33. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43B to 43H.

34. A qualifying disclosure is defined by section 43B, as follows:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur.*
> *[…]*
> *(d) that the health and safety of any individual has been or is likely to be endangered.*
> *[…]*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

35. In ***Williams v Michelle Brown AM***, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'*

36. Dealing with the first of those matters, as for what might constitute a disclosure of information for the purposes of s.43B ERA, in ***Kilraine v London Borough of Wandsworth*** [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> *'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]*
>
> *31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.*
>
> *[…]*
>
> *35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).*
>
> *[…]*
>
> *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.*
>
> *[…]*
>
> *41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the Cavendish Munro case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'*

37. The Court of Appeal considered the 'public interest' test in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. There is lengthy discussion of that leading case in ***Dobbie v Felton (t/a Feltons Solicitors)*** **- [2021] IRLR 679**, in which HHJ Tayler said this:

There are a number of key points I consider it is worth extracting from Underhill LJ's reasoning, and re-emphasising:

(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence
(2) while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – Underhill LJ doubted whether it need be any part of the worker's motivation
(3) the exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest
(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith
(5) there is not much value in trying to provide any general gloss on the phrase 'in the public interest'. Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression
(6) the statutory criterion of what is 'in the public interest' does not lend itself to absolute rules
(7) the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest
(8) the broad statutory intention of introducing the public interest requirement was that 'workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers'
(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis:
i. the numbers in the group whose interests the disclosure served
ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
iii. the nature of the wrongdoing disclosed
iv. the identity of the alleged wrongdoer
(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest.

38. HHJ Tayler went on to say this:

There are a few general observations I consider it worth adding:

(1) a matter that is of 'public interest' is not necessarily the same as one that interests the public. As members of the public we are

interested in many things, such as music or sport; information about which often raises no issue of public interest
(2) while 'the public' will generally be interested in disclosures that are made in the 'public interest', that does not necessarily follow. There may be subjects that most people would rather not know about, that are, nonetheless, matters of public interest
(3) a disclosure could be made in the public interest although the public will never know that the disclosure was made. Most disclosures are made initially to the employer, as the statute encourages. Hopefully, they will be acted on. So, for example, were a nurse to disclose a failure in the proper administration of drugs to a patient, and that disclosure is immediately acted on, with the consequence that he does not feel the need to take the matter any further, that would not prevent the disclosure from having been made in the public interest – the proper care of patients is a matter of obvious public interest
(4) a disclosure could be made in the public interest even if it is about a specific incident without any likelihood of repetition. If the nurse in the example above disclosed a one off error in administration of a drug to a specific patient, the fact that the mistake was unlikely to recur would not necessarily stop the disclosure being made in the public interest because proper patient care will generally be a matter of public interest
(5) while it is correct that as Underhill LJ held there is 'not much value in trying to provide any general gloss on the phrase 'in the public interest' – noting that 'Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression' – that does not mean that it is not to be determined by a principled analysis. This requires consideration of what it is about the particular information disclosed that does, or does not, make the disclosing of it, in the reasonable belief of the worker so doing, 'in the public interest'. The factors suggested by Mr Laddie in Chesterton may often be of assistance. While it certainly will not be an error of law not to refer to those factors specifically, where they have been referred to it will be easier to ascertain how the analysis was conducted. It will always be important that written reasons set out what factors were of importance in the analysis; which may include factors that were not suggested by Mr Laddie in Chesterton. As Underhill LJ held 'The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case'. It follows that if no account is taken of factors that are relevant; or relevant factors are ignored, there may be an error of law
(6) for the disclosure to be a qualifying disclosure it must in the reasonable belief of the employee making the disclosure tend to show one or more of the types of 'wrongdoing' set out in s 43B(a)–(f) ERA. Parliament must have considered that disclosures about these types of 'wrongdoing' will often be about matters of public interest. The importance of understanding the legislative history of the introduction of the requirement for the worker to hold a reasonable belief that the disclosure is 'made in the public interest' is that it explains that the purpose was to exclude only those disclosures about 'wrong doing' in

circumstance such as where the making of the disclosure serves 'the private or personal interest of the worker making the disclosure' as opposed to those that 'serve a wider interest'
(7) while the specific legislative intent was to exclude disclosures made that serve the private or personal interest of the worker making the disclosure, that is not the only possible example of disclosures that do not serve a wider interest, and so are not 'made in the public interest'. There might be a disclosure about a matter that is only of private or personal interest to the person to whom the disclosure is made and does not raise anything of 'public interest'
(8) while motivation is not the issue; so that a disclosure that is made with no wish to serve the public can still be a qualifying disclosure; the person making the disclosure must hold the reasonable belief that the disclosure is 'made' in the public interest. If the aim of making the disclosure is to damage the public interest, it is hard to see how it could be protected. Were a worker to disclose information to his employer, that demonstrates that it is discharging waste that is damaging the environment, with the aim of assisting in a coverup, or to recommend ways in which more waste could be discharged without being found out; while the disclosure would otherwise be a qualifying disclosure, it is hard to see how the disclosure could be 'made' in the public interest. The fact that a disclosure can be made in 'bad faith' does not alter this analysis. A worker might make public the fact that the employer is discharging waste because he dislikes the MD, and so is acting in bad faith, but nonetheless hold the reasonable belief that making the disclosure is in the public interest because the discharge of waste is likely to be halted. Generally, workers blow the whistle to draw attention to wrongdoing. That is often an important component of why in making the disclosure they are acting in the public interest.

39. Dealing with the fourth and the fifth matters identified in ***Williams*** a number of points need to be made.

    39.1. A worker can make a qualifying disclosure even if the content of the disclosure is in fact wrong ***Darnton v University of Surrey*** [2003] I.C.R. 615.

    39.2. The worker must subjectively hold the belief in question. This was described as a fairly low threshold: ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** 2012 IRLR 4 at [61]. However, the belief in question must also be objectively reasonable.

40. Section 47 ERA make it unlawful to subject a worker to a detriment on the ground of making a protected disclosure. S.47(1A) extends liability to co-workers and agents of the employer.

41. Where the complainant is an employee, the detriment complained of is dismissal, and the complaint is against the employer, the complaint lies under s.103A ERA not s.47. However, if such a complaint about dismissal is against a co-worker or

agent of the employer then (i) it is a complaint that is known to law and (ii) falls under s.47(1A) ***Timis v Osipov*** [2019] IRLR 52.

42. S.103A ERA provides: *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*

43. There is an important distinction between detriment cases under s.47(1A) where it is sufficient that the disclosure is a material factor in the treatment, and unfair dismissal cases, where it must be the sole or principal reason (***Fecitt v NHS Manchester*** [2012] ICR 372 CA).

<u>Limitation</u>

44. Section 48 ERA provides as follows:

> *48 Complaints to employment tribunals.*
> *(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B*
> *(2)On a complaint under subsection… (1A) …t is for the employer to show the ground on which any act, or deliberate failure to act, was done.*
> *(3)An employment tribunal shall not consider a complaint under this section unless it is presented—*
> *(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
> *(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
> *(4)For the purposes of subsection (3)—*
> *(a)where an act extends over a period, the "date of the act" means the last day of that period, and*
> *(b)a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.*
> *(4A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).*

45. That time limit is subject to the Early Conciliation regime:

> *207B Extension of time limits to facilitate conciliation before institution of proceedings*
> *(1)This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").*
> *(2) In this section—*

(a)Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b)Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
(3)In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4)If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
(5)Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

46. The authorities cited in *E* are a good summary of what a continuing act is and how it is proven. There is also helpful learning on that upon what a series of similar acts is in ***Arthur v London Eastern Railway*** [2007] IRLR 58 where Mummery LJ said this:

34. In my judgment, it is preferable to find the facts before attempting to apply the law. I do not think that this is a strike out situation in which assumptions have to be made as to the truth of the facts in order to decide whether there is a cause of action. It is assumed at this stage that the acts (and failures) alleged occurred and that the complainant may be able to establish a cause of action in respect of the acts within the three-month period. The question is whether he can bring in pre-14 April 2004 acts as part of the claim.

35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the three-month period and the acts outside the three-month period. We know that they are alleged to have been committed against Mr Arthur. That by itself would hardly make them part of a series or similar. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find 'motive' a helpful departure from the legislative language according to which the determining factor is whether the act was done 'on the ground' that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure.

47. The onus of proving that it was not reasonably practicable to present a complaint within the primary limitation period is upon the employee. (***Porter v Bandridge Ltd*** *1978 ICR 943, CA 1150.)*

48. It is clear from ***Palmer v Southend-on-Sea Borough Council*** [1984] 1 WLR 1129, that:

    a. "not reasonably practicable" is best understood as meaning "not reasonably feasible";
    b. the tribunal should investigate the effective cause of failure to comply with statutory time limit.

49. There is some learning on the relevance and proper analysis when a claim is lodged late because of the employee's ignorance of the law or time-limit.

50. In ***Cullinane -v- Balfour Beatty Engineering*** unreported UKEAT/0537/10, considered the second limb of the limitation test. In a passage that should be better known than it is, he stated that:

    "…the question of whether a further period is reasonable or not, is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. Instead, it requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted having regard to the strong public interest in claims being brought promptly and against the background where there is a primary time limit of 3 months."

Amendment

51. Turning to the law the tribunal has a discretion to allow applications to amend. In ***Selkent Bus Co Ltd v Moore*** *[1996] ICR 836,* Mummery J, gave guidance as to the main factors that need to be considered when considering an application to amend. This guidance, which has itself been explained in subsequent case-law identifies the following key-factors:

    1.1 Nature of the proposed amendment;
    1.2 Timing and manner of the application to amend;
    1.3 Applicability of time limits;
    1.4 The balance of hardship.

52. In ***TGWU v Safeway Stores Ltd*** (2007) UKEAT/0092/07, Underhill P (as he was) reviewed the authorities and concluded that on a correct reading of *Selkent* the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment. It was but a factor to be taken into account in the balancing exercise

53. In ***Abercrombie and others v Aga Rangemaster Ltd*** *[2014] ICR 209* Underhill LJ, with whom the rest of the Court agreed, said:

 …It is perhaps worth emphasising that head (5) of Mummery J's guidance in Selkent's case was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)…

 "…the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it is that it will be permitted. It is thus well recognized that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted."

 […]

 "Mummery LJ says in his guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836 that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a relabeling case – justice does not require the same approach."

54. In ***Vaughan v Modality Partnershi****p* [2021] IRLR 97, HHJ Tayler said this:

 14. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not

allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

Discussion and conclusions

Limitation

55. The Respondent invites me to find that certain PID detriments were presented out of time. It accepts that other PID detriments are in time. Thus the PID detriments that are on the face of it out of time are only actually out of time if they do not form part of a continuing act or series of similar acts/failures with detriments that are in time. It is the Claimant’s case that they do.

56. The Respondent’s position is that I must finally decide the issue because that is what Employment Judge McLaren ordered. I asked Ms Bewley how I could do that in the absence of hearing the evidence in the case and her position was that I had to because that is what had been ordered and that there had been permission for the Claimant to give evidence.

57. I think it would be an error of law for me to finally determine the question of whether there was or was not a continuing act or a series of similar acts/failures without hearing any evidence. Moreover, I just do not understand how I could actually undertake this task. Here is a description of roughly what the task involves using Mummery LJ’s words in *Arthur:*

34 In my judgment, it is preferable to find the facts before attempting to apply the law. I do not think that this is a strike out situation in which assumptions have to be made as to the truth of the facts in order to decide whether there is a cause of action. It is assumed at this stage that the acts (and failures) alleged occurred and that the complainant may be able to establish a cause of action in respect of the acts within the three-month period. The question is whether he can bring in pre-14 April 2004 acts as part of the claim.

> *35 In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the three-month period and the acts outside the three-month period. We know that they are alleged to have been committed against Mr Arthur. That by itself would hardly make them part of a series or similar. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find 'motive' a helpful departure from the legislative language according to which the determining factor is whether the act was done 'on the ground' that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure.*

58. Not only do I think it is impossible for me to undertake this exercise, I do not think I am obliged to do so.

59. Employment Judge McLaren's order said this: "*The hearing will further consider whether any detriments or pay claims before July 2020 are out of time and it is neither practicable or just and equitable to extend such time."* That order must be construed to understand its meaning.

60. The only order for witness evidence Employment Judge McLaren made was for the Claimant (and only the Claimant) to provide a witness statement. Further this was, and only was, *"in relation to any extension of time sought".* If there was a continuing act between the detriments that are out of time and those that are in time (or if they are part of a series), then the apparently out of time detriments are not out of time at all and no extension of time is needed. The subject matter of the witness evidence Employment Judge McLaren gave permission for, then, was not the continuing act/series of similar acts issue but a different issue. Further, this preliminary hearing had just a 3 hour listing and has other matters on the agenda than simply limitation.

61. In the circumstances, I cannot believe that when Employment Judge McLaren said that the hearing would "*consider whether any detriments or pay claims before July 2020 are out of time"* she meant that the hearing would have to finally resolve disputed questions over whether or not there was a continuing act / series of similar acts that could only be properly decided having heard, what would need to be, the main evidence in the case and made findings of fact upon it. If that is what she had meant (a) she could and I think would have made that clear and (b) would have made very different case management orders. There would need to be evidence from *both* sides. The evidence would need to be on the relevant points not simply upon an *extension* of time. There would need to a lengthy hearing to allow the evidence to be heard and tested and for findings of fact to be made. That could not possibly be done in a three hour hearing that also had other demanding items on its agenda.

62. The order Employment Judge McLaren in fact made was simply for the time limit issues to be considered. In my view read in context that leaves well open to me the option of faithfully considering the issue (as I have) and concluding that it is not possible to resolve it without hearing the main evidence and thus not doing so.

63. I am simply in no position to make a final decision on whether or not there was a continuing act or series of similar acts/failures. That is a deeply fact sensitive matter and I have heard submissions only. The case management orders did not envisage the Respondent giving evidence or the Claimant giving evidence on anything other than an extension of time and there has been no witness evidence. I cannot begin to answer most of the questions of the kind posed at paragraph 35 of *Arthur*.

64. I note that the terms of EJ McLaren's order are quite different to those in *E*. In *E* the first employment judge specifically ordered the continuing act issue to be dealt with at a subsequent preliminary hearing.

65. If I am wrong in the construction of Employment Judge McLaren's order then in the alternative my view is that there are exceptional circumstances such that I am entitled to depart from it. I cannot be required to do the impossible. It would be impossible for me to decide whether or not there was a continuing act / series of acts in the way *Arthur* tells me to, without hearing any evidence. It is not just evidence from the Claimant I would need (not that I have any) but also the Respondent.

66. If I am wrong about that too, then I note that Employment Judge McLaren's order in relation to limitation says nothing of detriments or pay claims in or after July 2020. I therefore am not obliged to deal with detriment and pay claims in and after July 2020. There are no wages claims that predate July 2020 and there is only one detriment complaint that does so; but even that in part is said to have occurred in July 2020 ("*From 22 June 2020 to 1 July 2020 failing to follow a fair redundancy dismissal process and to investigate any concerns raised by the Claimant or to take any steps to protect him."*) To my mind it would be absurd to deal just with that allegation in isolation of the rest of the claims. Equally it would be absurd to deal with just the part of that allegation that predates July 2020. It just makes no sense to do either particularly as the next allegations on the list of issues relate to the appeal process of the self-same dismissal procedure. It would be a jurisprudential abomination to divide up the analysis of whistleblowing claim in this way violating, as it would, central principles about assessing evidence as a whole, standing back from primary facts as found and identifying what if any secondary facts/inferences should be drawn.

67. All in all, I am satisfied that it is in the interests of justice to defer a decision as to whether there was or was not a continuing act/series of similar acts to the final hearing rather than finally determining those issues today as I am invited to. Further, I am also satisfied that it is open to me to that.

Application to amend

68. In the course of her submissions Ms Palmer made clear that the Claimant had intended to bring whistleblowing detriment complaints about his dismissals against each of the individual Respondents (in addition to the unfair dismissal claim against the First Respondent). She applied for permission to amend if that were needed.

69. The Respondent contended that permission to amend was indeed needed and that it should be refused.

70. In my judgment, although there is a complaint of s.103A ERA unfair dismissal against the First Respondent, and although there are detriment claims against the Second and Third Respondent that relate to some procedural matters in relation to the dismissals, the detriment claims are not strictly speaking about the decisions to dismiss themselves (see that actual wording the Claimant has used). I accept the Respondent's position that permission to amend is required.

71. I grant permission. This is a very minor amendment. The dismissal is pleaded as flowing from the putative PIDs. There is no suggestion that the decision makers in respect of dismissal are otherwise than the Second/Third Respondents. The two Respondents are already impugned in relation to whistleblowing detriment.

72. I do not accept that there is any prejudice to the Second or Third Respondent if I allow the application to amend beyond potential personal liability if the claim succeeds. Realistically Ms Bewley could not point to any. It is clear that they are both required as witnesses in this litigation already. All respondents are jointly represented. The amendment will not, save perhaps in an entirely trivial way, expand the amount of evidence that they need to give. It will not expand the overall scope of the tribunal's inquiry.

73. On the other hand, I accept that there is prejudice to the Claimant if I do not allow the amendment. He is concerned that if the claim succeeds against only the corporate respondent the other Respondents would take steps to withdraw assets from the corporate respondent preventing him from recovering some or all of his compensation. I am not finding as a fact that that is what they would do. However, I saying is that I see the Claimant's concern as a perfectly rational one to have, and thus for me to give weight to, particularly as it has not been disputed that the Third Respondent did on numerous occasions remove what I infer must have been significant sums of money from the First Respondent's assets to divert them to other business interests. I am not suggesting she was doing anything wrong thereby, nor suggesting that she was not – there is controversy about that matter I do not resolve now. The balance of prejudice/hardship favours allowing the application.

74. The application is made at a moderately early stage. I am told the parties held off case preparation pending a recent effort at ADR which failed. There will be no adverse effect on case preparation.

75. In my view this is a mere relabelling exercise, or alternatively if it is not it is extremely close to that since it does not add in any material way to the tribunal's

inquiry or the evidence required. As such time limits are not a significant factor in deciding whether to allow the amendment or not.

76. Overall, in my judgment it is clearly right to exercise my discretion to allow the Claimant to amend.

Strike-out of the whistleblowing claim and deposit orders

77. The Respondent made wide ranging submissions to the effect there was no or little reasonable prospect of the Claimant establishing that he made protected disclosures. A very large proportion of these submissions were based upon alleged facts that I am in no position to today assess the veracity of or likelihood of those facts being established at trial. I reject all of the submissions that turn on factual allegations I am unable to form any sensible view on today.

78. However, that does not account for all of the submissions the Respondents made and I now deal with what I consider to be the gist of the remainder.

79. Ms Bewley submitted that in various respects there was no/little reasonable prospect of the Claimant proving at trial that he made protected disclosures. I did see some force in her submissions and I do think the Claimant has some difficulties. However, *save as set out below,* I do not think his case is so weak that I can say it has no/little reasonable prospect of success:

    79.1. On an admittedly generous (to the Claimant) interpretation of what he says he disclosed on each occasion, he was effectively disclosing that Ms Trinder was taking significant sums of money out of the Frist Respondent's assets and deploying them elsewhere. On an again generous view, he was also disclosing, by implication if not words, that in so doing that she was defrauding the First Respondent. This had implications for its solvency and general ability to meet its obligations including to HMRC VAT. One of the disclosures also added that Ms Trinder's conduct may cause another group company to default on a mortgage. Taking this generous view I think there is more than little reasonable prospect of the tribunal finding that there was on each occasion a disclosure of information.

    79.2. It appears to be accepted (certainly it has not today been denied) that Ms Trinder was indeed taking significant sums of money out of the First Respondent's accounts to fund other interests. Based on the submissions made and limited documentation I have been asked to look at I am simply unable to form any view as to whether or not in so doing Ms Trinder was doing anything wrong. Much more importantly, I am unable to say that the Claimant has no/little reasonable prospect of proving that he reasonably believed she was effectively defrauding the First Respondent when disclosing information to that effect. I cannot, then, find that there is such a lack of prospects.

    79.3. *If* the Claimant did reasonably believe that Ms Trinder was defrauding the First Respondent, then I think there is more than little reasonable prospect of the tribunal accepting at trial that he had a reasonable belief that

the disclosure was in the public interest (though an analysis of his mental processes etc would be required and ultimately conclusion is for the tribunal at trial). Of course not every financial transgression in a private business could engender a reasonable belief that a disclosure about it was in the public interest. But disclosing matters of the above sort, with the above possible implications in relation to taxation, obligations to lenders, solvency and impact upon a cohort of employees is something a tribunal properly directed in law might consider capable of supporting a reasonable belief that the disclosures were in the public interest. I note that ultimately, insolvency would inevitably affect not only the Claimant's employment but also that of the First Respondent's other employees. I do not know how many employees the First Respondent employed at the time of the disclosures. However, according to the ET3 it employs 49 people – as at the date of the ET3. I am told it is a hotel and events venue. I think, then, it is fair to assume for today's purposes, that it employed something in order of that number of people at the time of the disclosures. The precise number does not matter.

80. I think the above is a generous but still fair analysis of the Claimant's pleaded case. I think it is appropriate to take such an approach, rather than a more literal, or pedantic approach, when considering the tests that I am considering. This gives the best possibility of avoiding injustice in the exercise of summary powers under rule 37 and, though the extent of the injustice would be lower, rule 39.

81. However, there are some specific matters related to the disclosures that even being generous have little reasonable prospect of success:

81.1. It is averred that all of the disclosures tended to show that "a miscarriage of justice was likely to occur, that miscarriage being the unlawful dismissal of an employee". Neither counsel could refer me to any caselaw on the meaning of 'miscarriage of justice' in the context of s.43(1)(c) ERA. However, I seriously doubt it is concerned with the unlawful dismissal of employees. I agree with Ms Bewley that it appears to be directed more towards failures in the justice system. The Claimant's argument that s.43(1)(c) is engaged by his disclosures has little reasonable prospect of success and should be subject to a deposit order. Since there is apparently no authority on the point, I prefer not to strike the point out since novel points of whistleblowing law are better determined after hearing evidence. I am also not so confident of the meaning of s.43(1)(c) that I would say *no* as opposed to *little* reasonable prospect.

81.2. It is averred that all of the disclosures tended to show that the concerns that had been raised had been, were being or were likely to be deliberately concealed from Mrs Trinder by Ms Trinder. I cannot discern from the disclosures as they have been stated any clear suggestion or implication that Ms Trinder was concealing what she was doing from Mrs Trinder. This allegation has little reasonable prospect of success on current information. I prefer not to strike the matter out because ultimately it is in part at least a factual issue and it may be that when the evidence is heard the context makes good this averment. That is another way of saying that I cannot be satisfied that there is *no* reasonable prospect of success.

82. The next matter I consider is whether any of the complaints against the Second Respondent have no/little reasonable prospect of success. The complaints are that she subjected the Claimant to whistleblowing detriment/dismissal as set out above. In my view:

    82.1. The gist of the disclosures is that the Claimant was from 2015 onwards impugning Ms Trinder directly to Mrs Trinder and that in so doing he was taking steps to protect Mrs Trinder's interests. Although in principle, this is something that might upset a mother where the complaint is about her daughter, there is nothing before me today that gives any indication that is what happened here.
    82.2. The Claimant has been pressed for an explanation as to why he is bringing a claim against Mrs Trinder. His explanation is that he has not had full sight of the decision making process so is not clear who made which decision and whether decisions were made jointly. That may be true, but it is a somewhat speculative basis of claim.
    82.3. The clear gist of the Particulars of Claim is that *Ms* Trinder had an issue with him and that she had that issue because he was trying to stop *her* taking money out of the business.
    82.4. It is notable that the disclosures to Mrs Trinder went on in much the same way for over four years before the first alleged detriment occurred.
    82.5. The moment in time at which the detriments commenced coincides with the early part of the pandemic and this lends significant credibility to the Respondents' case that the Claimants' initial dismissal was for the reasons its has given. The hospitality sector was hit particularly hard.
    82.6. No complaint/allegation about PID detriment/dismissal was made until 30 October 2020 which seems very surprising given all that had happened over the summer of 2020.

83. Adding these points up and looking at matters in the round, in my view it is fair to say that there is little reasonable prospect of the Claimant showing that Mrs Trinder subjected the Claimant to any detriment/dismissal because of the disclosures he says he made. I could not go so far as to say *no* reasonable prospect given the test that involves.

84. Although some of the same factors would apply in relation to the First and Third Respondents, I am not persuaded that I could go as far as saying there is little reasonable prospect of a tribunal finding that they subjected the Claimant to any of the detriments/dismissals because of a protected disclosure. The key difference is that there is a reasonably cogent case that Third Respondent (who acted on behalf of the First Respondent, being one its directors and the Claimant's line manager) had a motive for subjecting the Claimant to detriment/dismissal. He was making disclosures about her taking money out of the First Respondent and deploying it elsewhere. This included speaking to the First Respondent's bank manager and trying to put controls in place to stop her doing that. It is unclear if/when/how Ms Trinder found out about this but those are factual issues for trial as is her reaction. The key point is, I do not find it implausible that someone in her position might react adversely to such disclosures and do not find it implausible that it could lead to victimisation of the

kind alleged. Of course I am not saying that is what happened. All I am saying is that I cannot be satisfied that the detriment/dismissal complaints have little reasonable prospect of success as against the First and Third Respondents.

85. In fixing the amount of each deposits I have had regard to the Claimant's means. Ms Palmer explained the Claimant's means to me and indicated that the Claimant would be able to afford a small number of deposits each of say £50 which is the sort of level of deposit the Respondent indicated that it sought. I am satisfied that the Claimant has the means to comfortably pay deposits totalling £150.

Employment Judge Dyal

Date 26 May 2022