CASE NO: 2601347/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr Piotr Gruszka**

Respondents: **1) Linear Recruitment Limited**
2) Sportsdirect.com Retail Limited

Record of an Open Preliminary Hearing heard at the Employment Tribunal

Heard at: **Nottingham** **On:** **15 June 2022**

Before: **Employment Judge Rachel Broughton (sitting alone)**

Representation

Claimant: **In person with Interpreter**

Respondent: **1) Mr Mayberry - solicitor**

2) Mr Harris - counsel

JUDGMENT

1. The Claimant's claims for holiday pay and unlawful deduction of wages against the **Second Respondent** are dismissed on withdrawal by the claimant.

2. The claims against the **Second Respondent** under section 47B Employment Rights Act 1996 have no reasonable prospect of success and those clams are struck out under Rule 37 in their entirety.

3. The claim that the **First Respondent** prevented the Claimant from taking annual leave **prior to 21 December 2020** and that the Claimant was provided with incorrect information about his annual leave entitlement **prior to 21 December 2020**, have no reasonable prospects of success and those claims are struck out under Rule 37.

4. The application for an Order under Rule 37 and/or 39 in respect of the claim that the **First Respondent** prevented the Claimant from taking holiday requested **after** 21

December 2020 and/or provided incorrect information about his annual leave entitlement **after** 21 December 2020, is refused.

5. The Employment Judge considers that the Claimant's allegations/complaint made pursuant to section 47B Employment Rights Act 1998, that the **First Respondent** fabricated and/or used evidence that it knew to be false to justify the termination of the Claimant's engagement, on the grounds that he had made the alleged protected disclosures, has little reasonable prospect of success and Deposit Order is made, the details for which appear in a separate Order.

6. All the remaining applications for Orders under Rule 37 and/or Rule 39 against the First Respondent are refused.

REASONS

Background

1. The Claimant issued his claim on 9 June 2021 following ACAS Early Conciliation from 12 March 2021 to 23 April 2021 in respect of the First Respondent and 27 May 2021 in respect of the Second Respondent.

2. For the avoidance of doubt, I have made no findings of fact. I have formed a provisional view only on the merits of the claims, on the submissions and limited documents presented during the course of this hearing. No oral evidence was heard on the merits of the claims..

3. The First Respondent (R1) is an employment business which supplies agency workers to the Second Respondent (R2). It is not in dispute that the First Respondent engaged the Claimant as an agency worker and that he worked for the Second Respondent as a warehouse operative pursuant to section 43K of the ERA from 16 December 2019 until 21 May 2021.

4. The was a Preliminary hearing for case management before Employment Judge Ayre on 24 January 2022. At that hearing the Claimant had assistance from Mr Gracka, a Consultant who provided his services on a voluntary basis. Both Respondents were represented by the same Counsel and Solicitor as appear before me today, Mr Mayberry for R1 and Mr Harris for R2.

5. At that Preliminary Hearing Judge Ayre identified the complaints that the Claimant is bringing and the issues. The complaints were identified to be as follows:

    - An unlawful deduction from wages claim under section 13 and 23 of the Employment Rights Act 1996 in respect of holiday pay.

    - Breach of regulation 13 and 13A of the Working Time Regulations 1998.

    - That he was subjected to detriments contrary to section 47B of the Employment Rights Act 1996.

6. With regard to the whistleblowing complaints, at the Preliminary Hearing, he identified three disclosures, they are as follows:

    *6.1. On **21 December 2020** in an email to Mr Dean Plumb and another employee of the*

first Respondent.

*6.2. On **6 May 2021** in an email to Mr Plumb.*

*6.3. On **14 May 2021** in an email to Mr Plumb.*

7. Mr Dean Plumb is the Managing Director of R1.

8. The Claimant then alleges that as a result of those disclosures he was subjected to a number of detriments.

Detriments against R1

9. As identified at the Case Management Hearing the detriments that he alleges against R1 are:

9.1. That it terminated the Claimant's engagement on 21 May 2021.

9.2. That it provided incorrect information about the Claimant's annual leave entitlement. The Claimant says the incorrect information was provided by Ms Katarzyna, Rick and Billy Land verbally on several occasions and from November 2020 onwards in writing.

9.3. Prevented the Claimant from taking annual leave.

9.4. Fabricated and/or used evidence that it knew to be false to justify the termination of the Claimant's engagement.

Detriment against R2

10. With regards to the allegations against R2 he alleges that he was subjected to the following detriments:

10.1. Fabricated and/or used evidence that he knew to be false to justify the termination of the *Claimant's engagement with R1.*

10.2. Ask/or instructed R1 to terminate the Claimant's engagement.

Amendment application : made during the course of this hearing which was granted : against R1 only

11. I dealt at today's hearing in the morning, with a number of applications by the Claimant to amend his claim. For the reasons set out in the separate record of the hearing, dealing with case management, those applications were granted. The claim was amended to include a complaint against R1 only, that pursuant to section 47B ERA, he was subject to a detriment, namely did not receive payment during a period of suspension because he had made the alleged protected disclosures.

Amendment application in writing : 16 February 2022 – R1 and R2

12. Following the Case Management Hearing on 24 January 2022, the Claimant had sent in an email on 16 February 2022 applying to amend his claim.

13. Within this document he refers to two additional disclosures which are not listed in

Employment Judge Ayre's Case Management Order. Those are the following:

*13.1. An email of **22 December 2020** to Mr Dean Plumb. This email appears in the bundle at page 172 and is timed at 16.52.*

*13.2. An email on **22 December 2020** to Billy Land, the first Respondent which appears within the joint bundle at page 176 and is timed at 21.35.*

14. That amendment application is relevant to both Respondents and those applications, for the reasons given orally to the parties (and set out in the written record of the Preliminary hearing) were granted.

Applications: Strike out / Deposit order

15. The above amendments are also the subject of the application to strike out and/or for a deposit order and after granting those applications, I have gone on to consider whether they should be subject to an order under rule 37 or 39.

Today's Hearing

16. The Claimant attended today's hearing and was assisted throughout by an Interpreter.

17. At the commencement of the hearing the parties produced a joint bundle prepared by the first Respondent. This bundle numbered 240 pages. There was some initial confusion because it appears the Claimant had also sent into the Tribunal a bundle of documents received on 8 March 2022. Neither of the Respondents had been sent a copy of this bundle, however, we established that what was contained in this bundle was also contained within the joint bundle and I understand that this bundle had been sent into the Tribunal before the joint bundle had been agreed.

18. Submitted along with the bundle was a witness statement from the Claimant. That witness statement did not deal with the issue of time limits in relation to any application to amend it was essentially a statement setting out further details of the claim.

19. There was also a witness statement submitted by Mr Dean Plumb, Managing Director of Linear, who was in attendance at the Tribunal. The Respondents had jointly prepared and submitted a document headed 'Application for Strike Out or Deposit Order'.

20. On 14 June 2022 handed to me at the commencement of the hearing was an email from the Claimant timed at 15.38 which included his response to the Respondents' applications for strike out or deposit orders, the completed CVP form and an application for disclosure of documents from the Respondents. Unfortunately, that email which only came to my attention on the morning of the hearing had not been copied into either of the Respondents. However, they were able during the course of the hearing to consider it.

Employment status / Jurisdiction of the Employment Tribunal

- **An unlawful deduction from wages claim under section 13 and 23 of the Employment Rights Act 1996 in respect of holiday pay.**

- **Breach of regulation 13 and 13A of the Working Time Regulations 1998.**

21. In relation to the claim for unlawful deduction of wages and holiday pay the Claimant confirmed that both those claims were related to a claim that he had not received his full

holiday entitlement. He maintains that he only used 20.68 days and that he was entitled to 28 days and thus should have been paid for the shortfall which as set out in the Schedule of Loss he calculates to be £205.70 and that is the totality of the claim both in terms of holiday pay and unlawful deduction.

22. The Claimant confirmed that in relation to those two complaints he was only pursuing those against the **R1** and was withdrawing those complaints of holiday pay and unlawful deduction from wages against R2. Those claims are dismissed on withdrawal.

23. It was conceded at today's hearing by R1 that the Claimant was a worker of R1 and therefore the Tribunal has jurisdiction to determine those claims against R1.

    - **That he was subjected to detriments contrary to section 47B of the Employment Rights Act 1996.**

24. Turning to the 'whistleblowing' claims, R1 and R2 accept that the Claimant is covered by the extended of the definition of a worker under section 43K of the Employment Rights Act 1996 and neither Respondent takes any issue therefore with the jurisdiction of the Tribunal to determine those claims.

Applications under Rule 37 and 39

25. I considered both the written application prepared by the Respondents and the response to that application prepared by the Claimant and additionally, the parties oral submissions. I summarise below the key submissions of all parties.

Submissions of the Second Respondent

26. In addition to the written submissions, Mr Harris made brief oral submissions arguing that the matter was straightforward, as far as the whistleblowing complaints against R2 are concerned in that quite simply, it did not know of the alleged protected disclosures. Therefore any alleged detriments committed by R2 could not have been *because* of any of the disclosures.

27. Mr Plumb in his statement asserts (paragraph 12) that there was no suggestion or pressure from R2 for R1 to punish the Claimant or terminate its engagement with the Claimant.

28. The email of the 13 May 2021 (p 216) refers to expecting the Claimant's assignment with R2 to be terminated if he is proven to have packed the package with the note in it, but it does not refer to an expectation that R1 will terminate its direct engagement/contract with the Claimant. The Claimant pleads his case on the basis of the termination of the engagement *as between himself and R1*.

Disclosure: 21 December 2020

29. With respect to the first alleged protected disclosure, the 21 December 2020 email to Dean Plumb and Tanya Smirnova (a Manager , which appears at **page 173** of the bundle, Mr Harris simply makes the point that both recipients of that email, Ms Smirnova and Mr Plumb, worked only for R1. They were not employees of R2 and no employee of R2 was copied into that email.

Disclosure: 6 May 2021

30. In relation to the second disclosure of 6 May 2021, Mr Harris took me to a copy of a document at **page 214** of the bundle which he referred to as being the relevant email. Although there was no header to that email the Claimant did not dispute that this email was indeed the email that he had sent and that it was only sent to Mr Plumb of R1.

Disclosure: 14 May 2021

31. In terms of the email on 14 May 2021 again I was taken to that email which was in the bundle and appears at page 221. Again, there is no header to that email to show the recipients, but it is headed "Dear Dean" and the Claimant did not seek to dispute that was the email he had sent and it had only been sent to Mr Plumb alone of R1.

Amendment: additional disclosure: 22 December 2020 to Dean Plumb

32. Mr Harris made the point, not disputed, that the only recipient of the email of 22 December 2022 at page 172, was Mr Plumb.

Amendment: additional disclosure: 22 December 2020 to Billy Land.

33. With regards to the second email of 22 December 2022 which appears at page 176, it is submitted that the only recipient of this email was Billy Land of the R1 .

34. Mr Harris submits that this is not a case where there is an argument about disputes of fact, there is simply no evidence that R2 was ever aware of the disclosures and referred to the burden of proof being on the Claimant to establish knowledge.

35. Mr Harris referred to the failure by the Claimant to identify anyone who works for R2 who knew about the disclosures and therefore R2 is not in a position to call any evidence or call any witnesses to rebut the allegations.

36. Mr Harris submits therefore that there is no reasonable prospect of success.

Causation - detriments

37. Mr Harris submits that in terms of a customer complaint about the offensive note being placed in a package (which ultimately lead to the Claimant's engagement with R1 being terminated), that the evidence concerning the customer complaint received by R2 can be found at pages 216 to 217. He submits that it is clear that when the complaint was received from the customer it was not known that the package had been packed by the Claimant.

38. On the 12 May 2021, Mr Haynes an Apprentice reports the package containing the offensive note. The note is without doubt extremely offensive (p.219) states; " *Fuck you look at your name. Bitch".* There is a small drawing of a smiling face at the side of the wording.

39. The initial email from Mr Haynes, (page 217-218) states:

"Hi not sure who I should contact about this. But I have a customer who claims they received this message in their order, I have attached an image, could you speak to the employee who packaged this?"

40. There is an email in the bundle, from Mr Haynes sent internally within R2 (p.217) stating that he is not sure who to contact but that; " …*I have a customer who claims they received*

this message in their order, I have attached an image. Could you speak to the employee who packaged this?"

41. There is then an email (p.216) sent from Fraud Analysis within R2 asking for someone to look at it and on the 13 May 2021, (after it would seem some investigation had taken place), an email is sent from the Section Manager of the R2, Osmon Taylor to staff at R1 (sent to an email address which I am told is an email address for R1's staff who work on R2 premises) which states:

"Please can the below where a very unpleasant note has been added to a customer's order be investigated immediately.

Order was packed at chute 3678 on sorter 4 by Piotr Gruszka at 12.30 on 11-05. Please remove the individual from the floor and carry out this investigation as soon as possible.

If it is proven it that it was packed by him then I expect the outcome to be to terminate his assignment here at Frasers Group as we cannot allow this to happen again, and he can no longer be trusted".

42. Mr Harris's submits is that at that time when the initial complaint was escalated the Apprentice who escalated it did not know who the packer had been, and it would only later be identified as the Claimant who had scanned this package.

43. Mr Harris therefore argues that the Claimant has an 'insurmountable hurdle' to prove that R2 fabricated a complaint from a customer because when that complaint was first reported, it is clear that R2 did not know that this concerned the Claimant.

44. Its primary position, however, is that the Claimant has simply not identified anyone within R2 who had a knowledge of any of the alleged protected disclosures.

Submissions of First Respondent

45. Mr Mayberry dealt with each of the alleged detriments taking each in turn.

Termination of engagement

46. Mr Mayberry referred to the Claimant's case being based on the existence of a conspiracy and invited me to consider the merits of that in the context of the facts, which were that the complaint was raised by the customer and the Claimant had not been identified initially as being the packer.

47. Mr Mayberry took me to a document at page 186 of the bundle. This is an email from the Operations Manager of R1, Monika Gecaite to the Claimant on 21 May 2021. It referred to the Claimant having been unable to attend a meeting which had been set up out of courtesy to explain the findings of the investigation and R1's decision based on those findings and goes on to state:

"As you know, you have been banned from our Client's site because a customer received a message in their order stating, "Fuck you, look at your name bitch". We were then informed that the order was packed at chute 3678 on sorter 4 by yourself at 12.30 on 11/05. We had a meeting this Tuesday (18/5/2021) with you where we discussed the allegation against you and the evidence that we had found. You explained that you did not remember where you were at the time the package was made and you said you may not have been

at the packing station at the time the offending package was packed ready to send to a customer.

We have now checked CCTV footage of the area and have taken still images with a date and time stamp (attached) where it clearly shows that you are at the packing station at the time the order was packed, added to the fact that it was your scanner which you were logged into with your pin number that scanned the item.

It is therefore our reasonable belief that you are the one that inserted this note into the package. In the light of that, please note we are ending your engagement with Linear Recruitment Limited."

48. Mr Mayberry argues that his engagement was terminated only after there had been an investigation and R1 had formed a reasonable belief that it was the Claimant who had inserted the offending note into the package.

49. A copy of the documents relating to the investigation were not contained in the joint bundle. Mr Mayberry took instructions from Mr Plumb who was present at the Tribunal, who gave information that there was no investigation report as such, but there were investigation documents, but they had not been included within the bundle. However, he went on to submit that there was no evidence at all to support the Claimant's case. That the reason his engagement was terminated was because of the disclosures.

50. Mr Mayberry referred to the absence of a causal link beyond the Claimant's 'conspiratorial theory'.

51. It was explained to me by Mr Mayberry and not disputed by the Claimant that packages are scanned, and the operative will print off a label and put the label in the package and seal it and send it on. They were able to identify the Claimant because each scanner has a unique number.

Incorrect Information re: Annual Leave

52. The allegation is that the Claimant was provided with incorrect information about his annual leave. However, Mr Mayberry asserts that the allegation is that he was given incorrect information from November 2020 onwards and yet his first protected disclosure was not made until **December 2020** and it follows therefore that this could not have been because of the alleged disclosures and thus there can be no prospect of success.

53. It is submitted that the holiday queries that the Claimant raised, were the sort of queries made on a daily basis and not in the public interest. Mr Mayberry refers to the evidence of Mr Plumb which is that when these matters were brought to the attention of R1, he instructed his colleagues to look into them. He refers to paragraph 21 of Mr Plumb's witness statement, where he states that he was aware that the Claimant raised concerns and that an issue the Claimant had raised, about the payroll system not automatically adding holiday accrual during the Claimant's sick leave, was correct and that this error was then corrected (albeit the Claimant believes the holiday calculation to be incorrect).

Prevented from Taking Annual Leave

54. It is submitted and was not disputed by the Claimant, that the process is that workers fill in a holiday request form and take it to their Line Manager in the department in which they

are working .The Line Manager checks holiday availability to either approve the holiday or reject it, the worker then brings the signed form back to the Agency office and that during peak times when the R2's warehouse is very busy, holidays were restricted or blocked and workers were unable to take annual leave during those blocked periods.

55. Mr Mayberry submits that there are documents in the bundle which although not directly relevant to the Claimant, show examples of blocked periods when holiday cannot be taken (page 224, 225 and 226).

56. R1's position is that requests by the Claimant for holiday were not granted the same way that requests by other workers were not granted and this had nothing to do with the alleged protected disclosures but the R1's policy around blocked holiday periods.

57. The Claimant had also referred in his witness statement produced for today's hearing (he did not give evidence under oath) to trying to take holiday in May, in June, July, August, September, October and November (2020) and being told that he could not because the amount of holiday allocation was "fully booked". As Mr Mayberry points out, all those dates pre-date the date of the first alleged protected disclosure on 21 December 2020.

58. Mr Mayberry refers to the Claimant asking for holiday at the last minute and that R1 had a policy that it only allowed 7% of its workforce to be absent at anytime and further that he was actually allowed to take holiday in December 2020 after he had made the first alleged disclosure.

59. Mr Mayberry also refers to the R1 having introduced some changes because it now recognises that workers may be prevented and lose holiday entitlement because of these blocked periods and rather than have a 'lose it or use it policy', R1 now allows leave which is has been accrued during blocked periods of up to 40 days to be carried over into the next leave year.

That R1 provided incorrect information about the Claimant's annual leave entitlement. The Claimant says the incorrect information was provided by Ms Katarzyna, Rick and Billy Land verbally on several occasions and from November 2020 onwards in writing.

60. It is submitted that the allegation that the Claimant was given incorrect information from November 2020 onwards again, the start of this alleged detrimental treatment, pre-dates the first protected disclosure.

61. It is submitted that the Claimant may well have not been paid his correct holiday entitlement. The Claimant had been absent during a period of sickness from November 2020 and when he returned, he was trying to take his remaining holiday, but he was told that it was a blocked period and could not take it. The Claimant alleges, which is not in dispute, that he had been told by Mr Plumb that R1 would pay him the holiday that he was not able to take, however, the Claimant was not happy about that and he checked out the legal position and thought that what they were proposing was unlawful, that he should be allowed take his holiday rather than be paid for it.

62. The Claimant alleges that he had been told on 30 November that he was entitled to and he had accrued 1 week and 2 days annual leave and that he would be paid for the holiday if he did not take it. He then raised the disclosure on 21 December and was allowed to take 5 days holiday to have an operation in December but after 21 December he was still entitled, he believes to a further 2 days on R1's own calculations, but he was never paid for those 2 days.

63. Ultimately it was established during today's hearing that as the Claimant clarified, he is alleging was that 2 days of his annual leave had *'disappeared*', he was not allowed to take it and he was not paid for it and he believes that this was because of the protected disclosure.

64. Mr Mayberry submits that his instructions were that the Claimant did not want to be paid for the outstanding holiday at the end of the year and normally that would mean that employees would lose their entitlement because it was not allowed to be carried over (even if because of R1's policy of having blocked periods meant that it had not been possible for him to take it). However, his instructions are that in the Claimant's case they nonetheless paid him for those 2 days that he had not been able to take in December.

65. The Claimant denies that they did pay him 2 days holiday pay on termination.

66. There was no breakdown within the bundle to show exactly what the Claimant was paid and thus no documents confirming that the 2 days it is accepted he could not take, had been paid.

67. I was taken to the document at page 150 which is a payslip, and R1's position is this included the payment for the 2 days. The Claimant says that that payslip reflects holidays that he took in December and not the 2 days. There is a clear dispute of fact over whether those 2 days were actually paid or not and how his holiday should have been calculated.

68. In summary, it is submitted that Mr Plumb will say that the Claimant was paid in full for his annual leave (paragraph 33 of his witness statement) and that there is no evidence to suggest he was underpaid.

Fabricating of Evidence and or used Evidence that it knew to be falsified to justify the Termination of the Claimants Employment; and

That it terminated the Claimant's engagement on 21 May 2021.

69. Mr Mayberry's submissions in relation to these detriments are that it can be clearly seen from the packaging that R1's position is that there was clear evidence that a note had been inserted into a package and that there is no evidence that this note had been fabricated or that this evidence was false and further the CCTV stills are contained in the bundle and show that the Claimant was at the workstation at the relevant time.

70. The Respondents case is that it was the Claimant's pin code on the scanner that was on the relevant package and thus it was reasonable to conclude that it was his scanner that had been used to pack that particular parcel.

71. Mr Mayberry accepts the Claimant's contention that other people may have had access to the package, but he refers to the chances of that being 'infinitesimally small' . He submits that it is unlikely that R1 had wanted to find and found a package that the Claimant had packed in order for the note to be inserted to implicate him, because tens of thousands of packages are scanned in the warehouse and one packed by the Claimant would have required someone to look through thousands of packages.

72. The emails it is submitted show that when this matter was first escalated it was not known who the packer was therefore it is submitted that the Claimant's case that evidence around this note in the package was fabricated or that the R1 used false evidence to justify

terminating his engagement, has no reasonable prospect of success.

Suspension

73. In relation to the addition of the detriment regarding the decision to suspend the Claimant on 13 May 2021, (the amendment made as a result of the application made granted earlier in today's proceedings), Mr Mayberry referred to the suspension being part of the 'normal process' you would be expect when investigating this sort of matter.

74. In summary Mr Mayberry referred to R1 not accepting that the alleged disclosures were qualifying disclosures, however he did not address me on that further other than to say that today he was focussing on causation as there was no evidence offered by the Claimant.

75. We then had a break for the Claimant to consider the submissions of the Respondents before putting forward his own.

Claimant's submissions

Fabricating of Evidence and or used Evidence that it knew to be falsified to justify the Termination of the Claimants Employment; and

That it terminated the Claimant's engagement on 21 May 2021.

76. The Claimant conceded in his submissions that; *"We have no evidence at this stage that the Second Respondent was involved in that process".* He submitted, however that no staff of R1 could have printed the label and that some staff of the R2 *"may be involved in it".*

77. The Claimant in his submissions did not dispute that he had failed to identify anyone within R2 who he alleges was aware of the disclosures nor did he allege any specific person was behind or responsible for the fabrication and/or misuse of evidence in order to terminate his engagement or anyone he identifies as instructing R1 to terminate his engagement.

78. With respect to the alleged protected disclosures which relate to holiday pay, the Claimant does not dispute that liability for paying this rests with R1 and failed to make submissions about the reasons why R2 would subject him to a detriment because of those issues over holiday pay.

79. Ultimately in his submissions the Claimant submitted that if a strike out order was made striking out the claims against R2 , he would "*not have any objection*" .

80. The Claimant stated that he intended to refer these matters to the Police or CPS.

81. The Claimant focussed in his submissions on the circumstances giving rise to the termination of his engagement. He referred to the fact that 7 workers would have been involved in despatching the parcel, only the Claimant was subjected to an investigation.

82. He also referred me to the document at page 235 in the bundle from Osmon Taylor, Section Manager of the second Respondent which states:

"I've viewed the CCTV footage of this myself and at no point is the employee found to have written and placed a note inside the parcel. I can confirm however that a white item is indeed packed, and what I can only assume is not the black joggers they ordered. Do you have further images of the item they received and has this item been returned?"

83. The Claimant therefore refers to this email confirming that he had not been seen on the CCTV putting the note in the package 20 May 2020 however, while this was confirmed on 20 May, the very next day his engagement was terminated.

84. The Claimant also in his submissions refers to the lack of any documents disclosed by the Respondents in terms of the alleged investigation which was carried out. All he has seen so far is a couple of emails.

85. The Claimant also claims that the scanner that he was provided with has a pin number supplied by R1 and that Agency Staff can scan with his pin.

86. The Claimant also refers to the absence of the actual complaint itself within the documents disclosed by the Respondent. He submits that he had never been shown the actual complaint received from the customer and therefore he asserts that it is possible that there was no complaint.

87. The Claimant submits that the evidence did not support the finding that he had inserted this note into the package, and he believes that they were looking for an excuse to terminate his engagement because of the issues that he raised about holiday.

88. The Claimant refers to finding out only at this hearing that R1 had changed its policy around holiday in January 2021 as a result of the issues that he had raised but this had never been communicated to him.

89. The Claimant referred to page 172 which is his alleged protected disclosure to Dean Plumb. He had carried out a calculation which showed that at that time, given the policy on blocked periods and the limit on the percentage of people that could be absent on holiday at any one time, that it was not actually possible for all staff to take their full annual leave. He had also highlighted in this email that the only time someone can be paid in place of taking statutory leave is when they leave their employment. The document at page 171, is an email from Mr Plumb to Mr Pear, Ms Smirnova and Mr Land, in which he asks that further information is obtained about holiday accrual for temporary workers and whether paying for remaining holidays is an issue or not but goes on to instruct that the Claimant is contacted and that it is explained that 10% allocation is correct but it is on a first come first serve basis and if he had booked his leave well in advance the chances are he they would have been authorised.

90. I now turn to the legal principles which I have considered when determining those applications.

Legal Principles

91. The relevant statutory provisions which relates to what is a protected disclosure and relevant to claims of detriment for making a protected disclosure, are set out in section 43B and 47B Employment Rights Act 1996;

43B Disclosures qualifying for protection.

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

(a)that a criminal offence has been committed, is 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 or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Section 47B Protected disclosures.

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority,

on ***the ground*** *that W has made a protected disclosure.*

(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection

(1A), that thing is treated as also done by the worker's employer.

(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer…

Drawing inferences.

92. ***Kuzel v Roche Products Ltd*** Mummery LJ: a Tribunal assessing the reason for dismissal can draw '*reasonable inferences from primary facts established by the evidence or not contested in the evidence*'.

93. In the words of Lord Justice Mummery in ***ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA:*** '[T*]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.*

Detrimental Treatment

94. ***Ministry of Defence v Jeremiah 1980 ICR 13, CA*****,** Lord Justice Brandon said that

'detriment' meant simply 'putting under a disadvantage'.

Burden of Proof

95. Section 48(2) of the Act provides:

> "*48. Complaints to employment tribunals*
> *…*
> *(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

96. I have considered guidance on the application of section 48(2) ERA and in particular paragraph 8 of the Judgment of Elias LJ in the Court of Appeal [2012] IRLR 64. **Court of Appeal in NHS Manchester v Fecitt [2012] IRLR 64,** the tribunal must determine whether the protected disclosure in question materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower and in addressing section 48(2)ERA;

"*8. In cases where the whistleblower is complaining that the employer has subjected him to a detriment short of dismissal, section 48(2) provides that the onus is on the employer to show the ground on which any act, or failure to act, was done."*

97. I have directed myself in accordance with the approach of Recorder Underhill QC, as he then was, in ***London Borough of Harrow v Knight [2003] IRLR 140*** , paragraphs 20-21, a case cited without disapproval by Elias LJ in Fecitt;

"20…Against that background, Mr. Patten submits that all that s. 48 (2) does is to make it clear to employers that they have to be prepared in the Tribunal to say why they acted in the respect complained of, with the result that if they fail to do so they may find inferences drawn against them (though only if such inferences are justified by the facts as a whole).

21. We find Mr. Patten's submission persuasive, but we do not believe that on this appeal we are obliged to resolve the question of the effect of s. 48 (2) ".

98. There may be no or little, direct evidence as to a person's motivation however it may be appropriate for a tribunal to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. The EAT summarised the proper approach to drawing inferences in a detriment claim in ***International Petroleum Ltd and ors v Osipov and ors EAT 0058/17*****:**

- *the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made*
- *by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) — see London Borough of Harrow v Knight 2003 IRLR 140, EAT*
- *inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.*

Causation

99. The correct approach to the words '***on the ground*** that' in S.47B was considered by the Court of Appeal in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372,*** *CA*, Elias LJ's formulation was as follows;

41. …The fact that it was the claimants, the victims of harassment, who were redeployed was obviously not a point lost on the Tribunal. It was evidence from which an inference of victimisation could readily be drawn. But the Tribunal was satisfied that the Employer had genuinely acted for other reasons. Once an employer satisfies the Tribunal that he has acted for a particular reason — here, to remedy a dysfunctional situation — that necessarily discharges the burden of showing that the ***proscribed reason played no part in it.*** *It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the Igen principles. Here the Tribunal was satisfied that in redeploying Mrs Fecitt and Mrs Woodcock the Employer had acted in order to resolve the dysfunctional situation. I see no basis for going behind that finding which is essentially one of fact for the Employment Tribunal.*

45. In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

Tribunals' own stress

100. In terms of the issue of causation, section 47B requires an examination of the thought processes of the alleged wrongdoer, a person cannot act 'on the ground' of a protected disclosure if he or she does not know about the disclosure.

101. I have considered however the guidance in *Ahmed v City of Bradford Metropolitan District Council and ors EAT 0145/14* the Supreme Court's decision in *Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC*, (albeit that it concerned automatically unfair dismissal under S.103A rather than detriment under S.47B) and *Malik v Cenkos Securities plc EAT 0100/17* , where Mr Justice Choudhury at the EAT considered that it was impermissible to import the knowledge and motivation of another party to the decision-maker for the purpose of establishing liability under S.47B.

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

102. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

103. Rule 37 provides as follows:

"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:

(a)That it is scandalous or vexatious or has ***no reasonable prospect of success.***

(b)That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c)For non-compliance with any of these Rules or with an order of the Tribunal;
(d)That it has not been actively pursued;
(e)That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"

104. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to be appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

"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 words "no" because it shows 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 the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

105. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

"(1)Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

106. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

Case law

107. The EAT in **Hasan v Tesco Stores Ltd UKEAT/0098/16** held that when considering whether to strike out a claim, a tribunal must (a) consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (first stage); and (b) having identified any established ground(s), the Tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (second stage).

108. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested. As a general principle, therefore discrimination cases should not be struck out except in the very clearest circumstances. **In Anyanwu v South Bank Students' Union [2001] IRLR 305**.

109. I have considered the guidance of Mrs Justice Simler (President) **Ms A Hemdan v Ms Ishmail and Mr H Al-Megraby: UKEAT/0021/16/DM** and in particular paragraph 12 of the judgment.:

12. …The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence…

Financial means

110. The Claimant gave evidence about his financial situation. He was not cross examined by either Counsel on the evidence about his means.

111. His undisputed evidence which I accept, was that he is not currently working, he has limited capability to work because of his ill health. The only household income is Universal Credit of £700 per month. His rent is £440 per month, he pays no Community Charge but his bills he estimates to be about £200 per month so after bills and rent that leaves him with approximately £100 per month disposable income. He has no savings.

Analysis

Claims against R2

Fabricated and/or used evidence that he knew to be false to justify the termination of the Claimant's engagement with R1 and/or ask or instruct R1 to terminate the Claimant's engagement.

112. Both Respondent's focussed in their applications not on the prospects of the alleged disclosures meeting the statutory test pursuant to section 43B ERA but on the issue of causation and burden of proof.

113. The burden is on the Claimant to establish the detriment on a balance of probabilities . It is not in dispute that the Claimant's engagement with R1 was terminated but the detriment of which he complains (against R2) is not the mere termination of the engagement by R1 . The Claimant did not make submissions or direct me to any evidence to support his allegation that R2 fabricated or knew evidence was false or that R2 asked or instructed R1 to terminate his engagement with R1.

114. Before the Tribunal have to determine the issue of motive or reason, the Claimant must on a balance of probabilities, establish the acts complained ie the detriments alleged.

R2 asked or instructed R1 to terminate the engagement

115. The Claimant does not identify who is alleged to have given this instruction or when.

Fabricated and/or used evidence that he knew to be false to justify the termination of the Claimant's engagement with R1

116. The Claimant in his submissions accepted that he had no evidence at this stage that R2 was involved in the process.

117. The Claimant puts his case on the basis that some staff of R2 "*may"* have been involved but he does not identify who that may have been, whether managers or shopfloor staff.

118. Taking the Claimant's case at its highest, his evidence as I understand it, is that he believes that someone working for R2, *'may'* have been involved in putting the note in the package or fabricating the customer complaint but he does not know who. He relies on the making of his complaints about R1 not allowing him to take his annual leave (and complaints about their annual leave policy) as the reason, but fails to explain why R2 would be upset about his complaints given that it is R1 who is liable for the payment of annual leave under his engagement with them, not R2.

Causation

119. Dealing with the causation issues; the Claimant in his submissions does not identify any evidence that anyone working for R2 knew about the disclosures. He does not identify any specific person who he alleges was aware of the protected disclosures he made.

120. This is a serious allegation against R2 for which the Claimant offers no supporting evidence.

121. I am mindful that R2 could have simply produced a copy of the customer complaint, even in redacted form today and they have not. It was also not produced to the Claimant on his evidence, during the internal proceeding. However, the email at page 235 refers to an investigation and Mr Osman, Section Manager of R2, accepts that the CCTV does not show the Claimant putting a note in the package. That finding by Mr Osman would not be consistent with the fabrication by R2 of evidence to implicate the Claimant.

122. The Claimant also submits that other agency staff could have used his scanner. If another agency worker was responsible for inserting the note, the Claimant would have to establish that they had been instructed to insert the note by R2. The Claimant however does not make that allegation.

123. The Claimant submits that they were looking for an excuse to terminate his employment, however that is not the same as fabricating evidence.

124. I am persuaded that even taking the Claimant's case at its highest, the bare allegation that someone unspecified within R2 (he does not allege that it was the Apprentice Mr Haynes) was prepared to fabricate a complaint and make a false allegation of an offensive note being sent to a customer because of protected disclosure the Claimant had made about how R1 operates its holiday policy, is a claim which has no reasonable prospects of success. The allegations against R2 amount to little more than conjecture without a plausible motive. In his statement, the Claimant states; " *Let me also remind that I do not accuse [R2] of complicity in this criminal offence. I do suppose that it might be difficult or even impossible to commit this offence without [R2's] staffs support*".

125. Turning to the allegation that R2 instructed R1 to terminate its engagement with the Claimant; the Claimant does not contend that there is any evidence to support it.

126. R2 made it clear (p.216) that they would expect if the investigation by R2 proved that the Claimant had packed the package, to end his assignment with R2 but there is no reference to insisting that his engagement with R1 directly is terminated, that may be the natural consequence but the evidence in the documents does not support that allegation. The investigation and decision to terminate was carried out by Ms Gecaite on behalf of R1 and that does not appear to be in dispute.

127. The burden on is on the claimant, on a balance of probabilities, to establish the acts complained of, the detriments, and even taking the Claimant's case at its highest, I find that there is no reasonable prospect of success.

128. Within his oral submissions, the Claimant submitted that if a strike out order was made striking out the claims against R2 , he would "*not have any objection*" .

129. There are grounds under in rule 37(1) (a) to strike out the claims against R2, however it is then necessary to decide whether to exercise the discretion to strike out, given the permissive nature of the rule.

130. The central complaints are against R1, to whom he directly made the disclosures and who made the decision to terminate his engagement. I consider that it is appropriate to exercise the discretion to strike out the claims. It will release a respondent from proceedings which will otherwise put it to significant expense in defending a claim for which I have found there to be no reasonable prospects of success.

Conclusion

I conclude that the claims against R2 have no reasonable prospects of success and the discretion should be exercised to strike out the claims under rule 37 and the claims are therefore struck out.

131. I turn now to the claims against R1;

<u>Claims against R1</u>

Holiday pay claim and unlawful deductions of wages claim

132. It was not possible on the documents in the bundle today to establish whether or not the Claimant had in fact been paid the days owed to him. The Claimant's case taking it at its highest, is that the further days were owed which R1 appears to accept, and not paid . The documents produced by the Respondent's do not establish that it was paid.

133. I consider that taking the Claimant's case at its highest, there are reasonable prospects. This claim should be able to be resolved relatively quickly with further information disclosed in due course about what was paid in respect of the Claimant's holiday entitlement.

Conclusion

No order is made in respect of these claims which will proceed. The application made

under Rule 37 and 39 is refused.

Section 47B ERA Claims

That R1 terminated the Claimant's engagement on 21 May 2021

134. R1 avers that it changed its holiday policy in January 2021, recognising that there was an issue about the ability of staff to take their full annual leave. This would appear to be a response to the very concerns that the Claimant was raising through his alleged protected disclosures. While it would appear that R1 may have changed its policy and taken on board the concerns, that does not necessarily mean that the Claimant having raised it on a number of occasions and being quite persistent in terms of his pursuit of those issues, (threatening legal proceedings in his email of the 22 December 2020 (p.172) if nothing happens) was not seen as a troublemaker or a nuisance and his complaints did not materially influence the decision to find him guilty of the alleged misconduct and to terminate the assignment.

135. Taking the Claimant's case at its highest, there was CCTV which did **not** show him inserting the note into the package when he packed it and opportunities for a number of other individuals involved in the packing process, (he alleges circa 7 people), to have inserted the note into the package.

136. Although there is reference to an investigation having been carried out and findings, there was no documents produced by R1 today which records the investigation which was carried out or indeed the findings made, only a resulting email (p.186). This email sets out the evidence but omits reference to the CCTV evidence which shows the Claimant packing the items but did not show him inserting the note.

137. I take into consideration the proximity in time of the disclosures in May 2021 to Mr Plumb and the decision on 21 May 2021 to terminate the Claimant's engagement.

138. I also take into consideration, the way in which the suspension appears to have been treated, bearing in mind these cases are fact sensitive and of course inferences may be drawn from primary findings of fact. R1 is yet to respond to the Claimant's allegation that there was a failure to inform the Claimant that he was placed on suspension and failed to pay him for that period.

139. While on the face of it, the allegation of misconduct was serious and there was evidence to implicate the Claimant. I have not been provided with all the relevant documents relating to the investigation and the motive of the decision maker and her findings, have yet to be tested.

140. The detriment of dismissal is not in dispute.

141. R1 did not seek to make submissions on the merits of the alleged protected disclosure meeting the statutory test under section 43B ERA. The disclosures were made direct to employees of R1.

142. Pursuant to section 48 (2) ERA, it is for R1 to show the ground/reason for the treatment once the protected disclosures, knowledge and detriment have been established.

143. The threshold under 47B ERA claim, is only that the protected disclosures materially influenced the treatment. The thoroughness of the investigation and the seriousness of any potentially failings and what if any inferences should be drawn (alongside inferences that may be drawn from any other primary findings of fact) and what was considered by the decision maker, can only be properly tested at the final hearing.

144. I am not persuaded that this is claim, taking it at its highest, is bound to fail: **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6).

145. Turning to whether whether it has little reasonable prospect, while there are obvious difficulties with the case, given the evidence of the Claimant packing the items and the seriousness of the alleged offence, I also take into account the Claimant's arguments around the failure to take into account various other factors; the involvement of other workers in the process, the CCTV which showed him packing the item but not placing the note in it and the inferences which it may (or may not) be reasonable to draw from other acts, such as the treatment around suspension and/or non-payment of holiday (if established).

146. I am not persuaded at this stage, that there is little reasonable prospect of success.

147. There are material issues of fact which can only be determined by an Employment Tribunal after the evidence has been ventilated and tested and only then can a proper determination be made as to the reason or motive for the decision to terminate the engagement.

Conclusion

The application under Rule 37 and/or Rule 39 is refused.

Fabricated and/or used evidence that it knew to be false to justify the termination of the Claimant's engagement.

148. With respect to this allegation, there is a material difference between alleging that R1 used the situation as an excuse to dismiss the Claimant (and perhaps therefore failing as a result to carry out a fair process and/or choosing not to take into account material evidence which undermined the case against the Claimant) and an allegation that R1 fabricated evidence. It is not clear what evidence it is alleged R1 fabricated other than an allegation that there may not have been a complaint at all from the customer, however, that was reported by R2 and not R1 according to the documents, which the Claimant did not dispute.

149. In the circumstances however, I do not consider that there will be any material saving as to costs or tribunal time, in striking out this allegation because it overlaps with the allegation surrounding the termination of his employment and the evidence relied upon.

150. With regards to the fabrication of evidence or the awareness that evidence was 'false' , I am also mindful that the documents which exist and relate to the investigation process were not for reasons not explained, disclosed during these proceedings. The Claimant clearly considered that there has been a failure to deal with him fairly and has concerns about the evidence that has been relied upon.

151. R1 has not disclosed the extent of the evidence it relied upon or its findings, and therefore I am not minded to strike out the claim at this stage. There is however serious

issues with this allegation that there has been an actual fabrication of evidence by R1 and/or R1 used evidence that it knew to be false to justify the termination of the Claimant's engagement and I consider that the Claimant should provide further and better particulars of these allegations at this stage. That is addressed in the separate Orders which I have made.

152. The making of a deposit order is however, a matter of discretion and it does not follow automatically from a finding that there is little prospect of success. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case, which includes for parties to focus on the real issues in the case, the extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources.

153. I determine however that it is in accordance with the overriding objective to make an Order under Rule 39 in respect of this claim. The Claimant must pay a financial deposit to proceed with this particular allegation and I have made a case management order for him to provide further particulars of this allegation.

154. As Mrs justice Simler explained in Hemden, although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued. The Claimant should be aware however, that if he pursues this allegation and is unsuccessful there is a risk of costs being awarded, in terms of the costs R1 will incur in defending this allegation.

155. Taking into account the Claimant's means and the guidance of Mrs Justice Simler in **Ms A Hemdan v Ms Ishmail and Mr H Al-Megraby: UKEAT/0021/16/DM**: the amount of the financial deposit to be paid.

In those circumstances with a monthly disposable income of £100, I make an order that to pursue this particular allegation, that R1 fabricated and/or used evidence that it knew to be false to justify the termination of the Claimant's engagement, the Claimant is Ordered to pay the sum of £50.

Suspension

156. With regards to not being paid for the period of suspension, Mr Mayberry submits that R1 suspension was *"nothing outside of the ordinary"* and part of the process, however the document setting out the Terms of Engagement in the bundle (p.80) makes no reference to a policy around suspension. In fact, it does not set out any process that will be followed where there are allegations of misconduct by the Hirer (R2).

157. Taking the Claimant's case at its highest, his evidence is that he was told that he would not be suspended because R1 would have to pay him for that period. The statement of Mr Plumb is that the normal process is to suspend and that the Claimant was suspended. Mr Plumb does not allege that it is their normal policy not to pay during suspension or inform workers they are on suspension.

158. Mr Mayberry was not able to take me to any document within the bundle which confirmed the Claimant was informed that he was put on suspension and nor was he able to take me to any document that showed that the Claimant had been paid during his suspension. R1 does not submit that the Claimant was paid.

159. Taking the Claimant's case at its highest, he made protected disclosures and although he was told he was not being suspended because R1 would have to pay him, he was suspended and he was not paid.

160. R1 submits that there is no evidence of a causal connection between the lack of payment and the alleged protected disclosures that he made. However, section 47B requires an examination of the thought processes of the alleged wrongdoer and In cases where the whistle-blower is complaining that the employer has subjected him to a detriment short of dismissal, section 48(2) provides that the onus is on the employer to show the ground on which any act, or failure to act, was done: **Fecitt**

161. I am not persuaded that the claim taking it at its highest at this stage, has no or little reasonable prospect of success taking into consideration the burden of proof and the absence of documents to explain the treatment.

Conclusion

The application under Rule 37 and/or Rule 39 is refused.

R1 Prevented the Claimant from Taking Annual Leave

162. The Claimant complains about the policy that was in place and being refused annual leave throughout June up to November 2020. As the refusal to allow him to take leave on dates he requested it up to November 2020, was prior to the protected disclosures on which he relies, there is no reasonable prospect of the Claimant establishing that the refusal to grant him leave in those months, was on the grounds of the alleged disclosures which post-date those requests.

163. The Claimant alleges that he had been told on 30 November that he was entitled to and he had accrued 1 week and 2 days annual leave and that he would be paid for the holiday if he did not take it. He then raised the alleged protected disclosures from 21 December 2020 but that 2 days of his entitlement *'disappeared*'.

164. As set out above, the documents produced at this hearing do not establish whether or not those 2 days have in fact been paid. If they have not, as alleged, then pursuant to section 48(2) ERA, there is a detriment and if the Claimant establishes that he made protected disclosures, (as R1 does not dispute that 2 days leave was due albeit it alleges it was paid), the burden will be on it to explain its actions.

165. I am satisfied that there is no reasonable prospect of success in respect of the complaint that R1 prevented the Claimant from taking annual leave prior to 21 December 2021 and therefore there are grounds to strike out that part of the claim under Rule 37(1)(a).

166. I have considered whether the discretion should be exercised to strike out the claim. I am satisfied that it is, in that it will assist the parties to focus on the issues in the case and save some time and costs at the hearing.

Conclusion

I conclude that the claim that R1 have prevented the Claimant from taking annual leave prior to 21 December 2020 has no reasonable prospects of success and are struck out under Rule 37. The claim in respect of holiday requested after 21 December 2020 is not subject to an Order under Rule 37 or 39.

R1 provided incorrect information about the Claimant's annual leave entitlement.

167. The Claimant says the incorrect information was provided by Ms Katarzyna, Rick and Billy Land verbally on several occasions and from November 2020 onwards in writing. I accept the submissions of R1 that there can be no reasonable prospects of the Claimant succeeding in complaints under section 43B ERA about the information he was given about his annual leave which predate the first disclosure on 21 December 2020 however, although the queries may have been common place and R1 denies that he remained entitled to further annual leave but that it was paid, it was not possible establish at this hearing, what his entitlement was and whether in fact his correct entitlement was paid.

168. I am satisfied that there is no reasonable prospect of success in respect of the complaint that R1 provided incorrect information about his annual leave prior to 21 December 2021 and therefore there are grounds to strike out that part of the claim under Rule 37(1)(a). I am also satisfied that it is in accordance with the overriding objective to strike this part of the claim out because it will assist the parties to focus on the issues in the case.

169. I am not satisfied without further evidence being heard, that it can be said that the complaints that the Claimant was given incorrect information after 21 December 2020 has no reasonable prospect of success or has little reasonable prospect of success without a proper determination of what information was provided and why.

Conclusion

I conclude that the claim that R1 provided incorrect information about the Claimant's annual leave entitlement, in respect of information provided, prior to 21 December 2020 has no reasonable prospects of success and are struck out under Rule 37. The allegations in respect of alleged incorrect information provided after 21 December 2020 are not subject to an Order under Rule 37 or 39.

Summary

170. For the avoidance of doubt the claims which are **to proceed** are the following claims **against R1:**

1. The claim of unlawful deduction from wages under section 13 and 23 of the Employment Rights Act 1996 in respect of holiday pay.

2. Claim for breach of regulation 13 and 13A of the Working Time Regulations 1998.

3. That he was subjected to the following detriments contrary to section 47B of the Employment Rights Act 1996:

3.1 That R1 provided incorrect information about the Claimant's annual leave entitlement **from 21 December 2020**

3.2 That R1 have prevented the Claimant from taking annual leave **from 21 December 2020.**

3.3 That the Claimant was not paid during a period of Suspension

3.4 That R1 terminated the Claimant's engagement on 21 May 2021

Deposit Order:

3.5 That R1 fabricated evidence or used evidence that it knew to be false to justify the termination of the Claimant's engagement, is subject to a deposit order.

171. All the claims against **R2** are struck out. R2 is no longer a party to these proceedings.

_____
Employment Judge Broughton

Date: 2 August 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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