EMPLOYMENT TRIBUNALS

Claimant: Mr A Smirnov

Respondent: Worley Europe Limited (1)
AIG Europe Ltd (2)

Heard at: London South Employment Tribunal by video
On: 15 December 2022

Before: Employment Judge L Burge

Appearances
For the Claimant: In Person
For the First Respondent: Mr Rogers, Solicitor
For the Second Respondent: Ms Waters, Solicitor

OPEN PRELIMINARY HEARING JUDGMENT

It is the Judgment of the Tribunal that:

1. The Tribunal does not have jurisdiction to hear the Claimant's claims of disability arising from discrimination, as they were brought outside of the applicable time limits and it is not just and equitable to extend time;

2. The Tribunal does not have jurisdiction to hear the Claimant's claims of harassment and victimisation as the requirements of s.108 are not met; and

3. The Claimant's whistleblowing claims are struck out because they have no reasonable prospect of success.

REASONS

The hearing

1. The Claimant had not produced a witness statement about time limits but gave oral evidence on why he put his claim in when he did and his means. He also gave submissions, as did Mr Rogers and Ms Waters. The Claimant provided written submissions as did Mr Rogers/Ms Waters.

2. A bundle of 184 pages was provided by the Respondent. The Claimant also provided a copy of his application to the County Court dated 15 March 2020.

3. The Issues for the current Tribunal to determine were agreed to be contained in the Respondents' strike out application dated 10 September 2021 that the Claimant's claim has no reasonable prospects of success including on the following grounds:

    (a) Time - the Respondents say the claim is out of time.

    (b) Estoppel – the Respondents say the Claimant is estopped as he brought a claim on the same facts in the county court in 2020. Further details of the estoppel point were set out in the List of Issues.

    (c) S108 Equality Act 2010 – where the Claimant's claims relate to post termination discrimination, the Respondents say that the allegations do not satisfy subsections 1(a) and (b) of s108.

    (d) Public disclosure – the Respondents say the Claimant could not reasonably believe that the disclosures were in the public interest.

    (e) Agency – the Respondents say that the Second Respondent, as the insurer of the first respondent, is not an agent for the purposes of the legal issues raised in this claim.

    (f) Victimisation – the Respondents deny that the protected acts relied upon by the Claimant are "protected acts" for the purpose of s27 of the Equality Act 2010.

Findings of fact

4. The Claimant worked for the First Respondent as a Senior Energy Consultant from 8 September 2014 until he was dismissed on 5 December 2014. During some of that period he was also off sick with a serious illness that required hospitalisation.

5. Around 5 years later, in 2019, the Claimant requested a Subject Access Request from the First Respondent. The Claimant received some documents and one document he received in January 2020 was a word document containing notes of his dismissal meeting which he alleges he did not receive in 2014 when he was dismissed.

6. A few months later, on 20 September 2020, the Claimant wrote to the First Respondent saying that "there were substantial grounds for a claim". There was no mention of the Equality Act. There was a reference to an allegation that could have constituted an allegation of discrimination as he was a "31 year old male".

7. On 12 November 2020 the Claimant issued a claim in the County Court.

8. In the particulars of claim dated 29 November 2020 the Claimant sated that the claim was for Breach of Contract and Protection from Harassment Act 1997. There is no mention of the Equality Act other than:

> *"Finally, it is clear to me that a major part of their conduct was for the reasons of me being a "Russian" 31 year old male with a disability. This was shown in the intensity of the investigation into my mobile phone use and also through the way I was dismissed by the company. Sadly, at the time, I was too unwell to initiate employment tribunal proceedings against the Defendant for breaches of the Equality Act."*

9. The First Respondent having failed to enter a defence, Judgment in Default was issued on 22 January 2021.

10. Weightmans LLP, a firm of solicitors, represented the First Respondent in the county court proceedings. Weightmans LLP submitted an application on 29 January 2021 on behalf of the First Respondent to set Judgment aside and attached a witness statement. The witness statement was from a Partner at Weightmans LLP that set out the background to the claim, that no particulars had been served on the First Respondent and that it was not until bailiffs had attended the First Respondent's premises that they knew of the existence of the Judgment in Default.

11. On 2 February 2021 the Claimant emailed Weightmans LLP, explained that he had served two copies of the particulars and that

> *"Either Worley accidentally misplaced these documents or something more concerning took place. I am cc'ing Weightmans' complaints partner, as this is a serious matter - I've signed at least 3 statements of truth, confirming that I delivered (or will deliver) detailed particulars of claim and my understanding is that I can be bankrupted or go to prison for lying about this (AIG case you cited). It is also unclear as to why I would need to do lie about submitting detailed particulars, as I feel that my claim is quite strong. Of some relevance is that I have a wife and 4 month old daughter and I am a successful consultant, so it is unclear why I'd take such a massive personal risk over this."*

12. The letter ended "Therefore, I would very much like to know what you intend to do next, as it is an extremely serious allegation against me and if not retracted, I will take strong steps to defend my position."

13. On 3 February 2021 the partner at Weightmans LLP emailed saying that he was the Partner with conduct of this matter on behalf of the First Respondent and their Insurers, the Second Respondent. The partner confirmed that he had not previously seen the particulars of claim but that he would make further enquires of this client.

14. The Claimant responded to the Partner on 4 February 2021 setting out, at length, how he had sent the particulars of claim and also said that the minutes of meeting from December 2014 were a "complete misrepresentation of what took place at the meeting", that the statement that he was given a right to appeal in December 2014 was technically true but that he thought it was dishonest, and that it was not possible for him to have ordered bailiffs to go to the First Respondent's offices.

15. The following day, on 5 February 2021, Weightmans LLP wrote back to the Claimant on numerous issues including thanking the Claimant for alerting them to the fact that he had not sent the bailiffs and updating him on the investigation which was almost complete:

> *"So far though the Court have confirmed no one has requested enforcement of the judgment to them.*
>
> *That would involve payment of a fee.*
>
> *What we understand happened, before we were instructed, is that someone claiming to be a bailiff did attend at [the First Respondent's] premises on 27 1 21 seeking to enforce [the Claimant's] judgment. You may not be aware but judgments are put on a publically [sic] available register. Payment of the Judgment was made via an account said to be controlled by Northampton County Court. I await to hear if it has been possible to stop the payment/ recover it. In short on what we currently hold a fraud has been committed. We appreciate that this is a separate matter to your ongoing claim."*

16. Two witness statements were sent by the First Respondent on March 3 2021. The first was from an employee at the First Respondent explaining how the particulars had been received but due to an error had not been actioned. The second was from a Partner at Weightmans LLP setting out the background, the First Respondent's legal position, the investigation that had taken place, that the particulars had been received and that the bailiffs had telephoned and had been fraudulent.

17. The Claimant's view (as set out in his statement to the County Court dated 15 March 2021) of the First Respondent's original application was:

> *"It accused me of failing to send particulars of claim and asked for the court to set the judgment aside. It also had a wild accusation, that I sent a team of "bailiffs" to come to the Defendant's office, demanding money. I was extremely concerned and took this as an accusation that I committed an imprisonable criminal offense of fraud and perjury. Angrily, I contacted the contact persons at Weightmans LLP (Yasmin Tahir), as well as*

Weightmans' complaints partner, (James Holman), telling them that I had sent particulars of claim (twice) and showing the receipts. I expressed my anger at the carelessness of Weightmans' witness statement. I thought that if proven wrong, I'd be facing a prison sentence and personal bankruptcy and was so extremely distressed."

18. The Claimant's statement continued to set out at length why the Respondent's notes of his dismissal meeting from 2014 were in his view fraudulent and he said that if the First Respondent did not retract it, he would "challenge its authenticity under CPR rule 32.19" because it was unsigned, it was dated 3 December 2014 but was modified on 10 December 2014, he had no recollection of receiving it and he had engaged a forensic analysis expert to conduct a formal analysis on it. The Claimant's statement was submitted to the county court for the set aside hearing, as were the Respondents' application and witness statements.

19. The set aside hearing took place before District Judge Haskey in the Lincoln County Court on 19 March 2021. The Claimant raised the First Respondent's behaviour at the hearing. Deputy District Judge Haskey had the First Respondent's applications and witness statements and the Claimant's application before her. The Claimant thought she did not read them properly. The Claimant got cut off from the hearing. Deputy District Judge Haskey proceeded with the hearing and decided to set aside the default judgment. The Claimant subsequently wrote to the Deputy District Judge to ask for a re-hearing but she refused. The Claimant thought about appealing but did not do so as he was concerned about the costs consequences.

20. The Claimant had contacted ACAS on 8 February 2021 in respect of the First Respondent and the certificate was issued on the same day. The Claimant contacted ACAS on 23 April 2021 in respect of the Second Respondent and the certificate was issued on the same day. The Claimant submitted his claim in the Employment Tribunal on 22 April 2021.

21. The Claimant gave evidence, that is accepted, that he was well again in December 2014 , he immediately made lots of applications for jobs and started new employment in January 2015 but he suffered psychologically from the dismissal for a few months. The Claimant has a post-graduate degree in employment law.

Relevant law

Time Limits for discrimination

22. Section 123 of the Equality Act 2010 ("EqA") provides that no complaint may be brought after the end of:

(2) "(a) the period of three months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section

(a) conduct extending over a period is to be treated as done at the end of that period
(b) failure to do something is to be treated as occurring when the person in question decided on it".

23. An act will be regarded as extending over a period if an employer an "ongoing situation" or a "continuing state of affairs" which can be contrasted with a "succession of unconnected or isolated specific acts": *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530. When considering whether separate incidents form part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents" (*Aziz v FDA* 2010 EWCA Civ 304, CA).

24. s.140B EqA provides an extension of time to ensure that the period between the date when the prospective claimant contacts ACAS and the date when the prospective claimant receives or is treated as receiving the ACAS Early Conciliation Certificate does not count towards the three-month primary limitation period.

25. If the claim is presented after the relevant three months, the tribunal may still have jurisdiction if, in all the circumstances, it is "just and equitable" to extend time. The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time (*Robertson v Bexley Community Centre* [2001] UKEAT 1516/00, [2003] IRLR 434).

26. There is a "very broad general discretion" conferred on tribunals to decide whether it is just and equitable to extend time *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 per Underhill LJ at [37]. The "best approach" is for the Tribunal to "assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular … 'the length of, and the reasons for, the delay'" (paragraph 37).

27. In *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132, the EAT has held that, when considering whether it was just and equitable to extend the time limit for presenting discrimination complaints, or to grant an application to amend to add a further out of time discrimination complaint, the tribunal was entitled to weigh in the balance its assessment that the merits of the proposed complaints were weak.

Strike out/deposit

28. The Respondents argued that the claims should be struck out under Schedule 1, Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") as the Claimant's claims had "no reasonable prospect of success".

29. The central question for the Tribunal was whether the claims have a realistic as opposed to a fanciful prospect of success: *Eszias v North Glamorgan NHS Trust* [2007].

30. In *Abertawe Bro Morgannwg University Health Board v Ferguson* [2013] ICR 1108 the EAT remarked that:

> *"33. We would add this final note. Applications for strike-out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not…"*

31. In *Ahir v British Airways plc* [2017] EWCA Civ 1392 the tribunal's decision to strike out a claim was upheld by both the EAT and Court of Appeal in circumstances where the claimant's case was inherently implausible. Underhill LJ said that a case should not be allowed to proceed on the basis of mere assertion, as follows (at 24):

> *"[I]n a case of this kind, where there is on the face of it a straightforward and well documented explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced."*

32. The striking out process involves a two-stage test: first the grounds for striking out must be established; second, the tribunal should decide, as a matter of discretion, whether to strike the claim out or order that a deposit must be paid: *HM Prison Service v Dolby* [2003] IRLR 694 EAT at [15].

33. Under Rule 39(1) of the Rules, the Tribunal has the power to make separate deposit orders in respect of individual allegations or arguments, up to a maximum of £1,000 per allegation or argument. Rule 39(2) obliges the Tribunal to make "reasonable enquiries into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit."

34. In considering whether to make deposit orders, the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. In *Van Rensburg v The Royal Borough of Kingston Upon Thames* [2007] UKEAT/0096/07, Elias P held:

> *"…the test of little prospect of success…is plainly not as rigorous as the test that the claim has no reasonable prospect of success… It follows that a 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 the party being able to establish the facts essential to the claim or response";

35. In *Hemdan v Ishmail* [2017] IRLR 228, Simler J described the purpose of a deposit order as being:

> *"…to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."*

S.108 Equality Act – former employees

36. S.108 EqA provides:

> *"108 Relationships that have ended*
>
> *(1) A person (A) must not discriminate against another (B) if—*
> *(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and*
> *(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.*
>
> *(2) A person (A) must not harass another (B) if—*
> *(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and*
> *(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.*
>
> *(3) It does not matter whether the relationship ends before or after the commencement of this section.*
>
> *…*
> *(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.*
>
> *(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A."*

37. Guidance on S.108 was given by the Employment Appeal Tribunal in *Ford Motor Co Ltd v Elliott and ors* 2016 ICR 711, EAT, a case where former employees brought age discrimination claims for the failure to pay a lump sum which had been paid to existing employees in respect of pensions. The EAT held that:

> *"…under paragraph (a), the question was not, as the judge had directed himself, whether there was a close connection between the claimants' relationship with the company as former employees and that as current pensioners, but whether the alleged discrimination, namely the difference between the lump sum payments made to active employee members of*

the scheme and the amount paid to pensioner members, arose out of and was closely connected to the employment relationship which used to exist between the claimants and the company…"

38. Despite s.108(7) EqA, the Court of Appeal in *Rowstock Ltd and anor v Jessemey* 2014 ICR 550, CA, held that the EqA must nevertheless be read so that post-employment victimisation is prohibited.

Whistleblowing

39. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H Employment Rights Act 1996 ("ERA"). A qualifying disclosure is defined by s.43B:

> *(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."*

40. S. 47B ERA

> *"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."*

41. 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.'*

42. 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.

43. In *Onyango v Berkeley (t/a Berkeley Solicitors)* 2013 ICR D17 the Employment Appeal Tribunal was guided by the fact that the applicable definitions of 'worker' and 'employer' in S.230(3) ERA include those who used to be in a contractual relationship.

Discussion and conclusions

Time limits

44. The Claimant was dismissed in December 2014. He had a post graduate degree in employment law. He was applying for jobs straight away and started work in January 2015. He should have complied with the 3 month time period for bringing a claim, plus extension for ACAS conciliation. The Claimant says he did not because he was psychologically damaged for a few months. Also that he did not receive the notes of the dismissal meeting until January 2020, but he did not act then as he thought that as the document was in word, not pdf, he could not action it. This is rejected as inherently implausible, the Claimant is an intelligent man with a post graduate degree in employment law.

45. The Claimant submitted that it was only when he received the pdf as part of the county court proceedings that he considered bringing an Employment Tribunal claim. However, I conclude that he knew that he should have brought a claim within 3 months of dismissal, he said "[s]adly, at the time, I was too unwell to initiate employment tribunal proceedings against the Defendant for breaches of the Equality Act." The Claimant submitted to the Tribunal "I did not think this issue could possibly come up because I knew I was out of time at the time".

46. The Claimant should have brought his claim of discrimination arising from disability in early 2015. There was no continuing act, he made a SAR some five years later and then issued proceedings in the county court later that year.

47. The Tribunal has a very broad general discretion to decide whether it is just and equitable to extend time (*Adedeji*). There would be serious forensic prejudice to

the Respondent if they had to now defend a claim that ought to have been brought in 2015. The Claimant bears the burden of persuading me that it is just and equitable to extend time but I conclude that he has not done so. The Tribunal therefore has no jurisdiction to hear his complaint of discrimination arising from disability.

s.108 EqA

48. The alleged discrimination was:
    a. the Solicitors' application in the civil proceedings to set aside default judgment (Harassment);
    b. the Solicitor attaching the alleged notes of the dismissal meeting from 2014 (Harassment);
    c. the Solicitor emailing the Claimant in connection with the civil proceedings and setting out the Respondent's reason for terminating his employment in 2014 (Harassment);
    d. Ignoring pre-action protocol in respect of the Civil Claim (Victimisation);
    e. Failing to file an acknowledgment of service (Victimisation);
    f. The First Respondent misplacing or ignoring the two copies of the particulars of claim in respect of the civil claim (Victimisation);
    g. The Respondent telling the civil court that the Claimant never sent the particulars of claim and failing to promptly notify the Court when they found the Particulars (Victimisation);
    h. The First Respondent falsely telling the Court that the Claimant sent Bailiffs to collect payment with respect to the default Judgment and failed to notify the Court that this was untrue (Victimisation);
    i. The First Respondent falsely claiming that C was given a right to appeal their decision to dismiss him under their employment procedures, which C failed to exercise (Victimisation);
    j. The First Respondent providing the court the Respondent's meeting notes (Victimisation);
    k. The First Respondent telling the court that the Claimant was terminated for performance (Victimisation);
    l. The Respondents running up huge legal fees in respect of the civil claim in order to force the Claimant to withdraw his Civil Claim (Victimisation);
    m. The First Respondent's application to the court dated 29 January 2021 to set aside the default judgment contained false accusations and accused the Claimant of several criminal offences (Victimisation); and
    n. The Respondents took over a month to find the particulars of Claim and inform the Court about finding them with the effect that the Court made a judgment based on a false witness statement (Victimisation).

49. My first task is to look at whether the above alleged discrimination and victimisation was closely connected to the employment between the Claimant and the Respondents. While the Claimant was an employee of the First Respondent for just under 3 months in 2014, the allegations of discrimination relate to the civil litigation that the Claimant had commenced in the county court in November 2020. The Claimant raised these complaints in an application prior to the hearing to determine whether or not the default judgment should be set aside. In submissions to the Tribunal the Claimant said that he thought he had

valid claims. He had raised the First Respondent's behaviour at the set aside hearing in the county court on 19 March 2021 but that Deputy District Judge Haskey had not listened, he had been cut off during the hearing and the Deputy District Judge had decided to set aside the Respondent's default judgment without him being present. The Claimant had complained to the Deputy District Judge and asked for a re-hearing but she refused.

50. The Claimant thought about appealing but concluded that he did not want to run the risks of an adverse costs order. He withdrew his county court claim and then commenced proceedings in the Employment Tribunal. My conclusion is that these allegations were not closely connected with the employment between the Claimant and the First Respondent, they are closely connected with his county court litigation. Further, the Claimant was never an employee of the Second Respondent.

51. The second part of the test is whether the discrimination alleged was such as to contravene the EqA. What the Claimant describes are Solicitors defending litigation on behalf of their clients. The original application for set aside dated 29 January 2021 did say that the particulars had not been received that bailiffs sent by the Claimant had attended premises. Following investigations, the subsequent witness statements dated just over a month later, 3 March 2021, provided to the Claimant and the court, then changed that position acknowledging that it had been an administrative error on the part of the First Respondent as particulars had been sent, and that "As a result of enquiries made and including the help of the claimant" it is concluded that a fraud has been committed by the "bailiff" who had deceived the First Respondent into paying the amount specified in the default Judgment.

52. The crux of the alleged discrimination and victimisation is that the first application was wrong – the Claimant had sent the particulars and he had not sent the bailiffs. The witness statements then clarified the position – that it had been their mistake and that the First Respondent had been defrauded by someone pretending to be a bailiff. The Claimant says that he was hurt and very worried about the consequences of the first application. This does not mean that it is discrimination "relevant to" his disability (harassment). It further does not equate to being victimised for having made protected acts.

53. The Claimant's allegations in relation to the appeal in 2014, the meeting notes from 2014 that he had received in early 2020 and telling the court that the Claimant was terminated for performance appear to be an attempt to bring into time claims that, by the Claimant's own belief, were grossly out of time. Simply making these assertions when defending litigation does not amount to discrimination under the EqA, whether harassment or victimisation.

54. The "protected acts" did not mention the Equality Act at all, they were documents setting out what his county court claims were:
    (a) The Claimant's document 'Without Prejudice. Pre-Action Protocol. Anatoli Smirnov v Worley Europe Ltd' dated 29 September 2020;
    (b) The Claimant's civil claim for breach of the Protection of Harassment Act 1997 and breach of contract issued on 12 November 2020; and

(c) The Claimant's particulars of claim dated 29 November 2020.

55. The Claimant submitted that s.27(2)(d) EqA included "making an allegation (whether express or implied) that A or another person has contravened this Act". However, these documents made allegations that other Acts had been breached, not the Equality Act. In oral evidence to the Tribunal the Claimant said "I did not think this issue could possibly come up because I knew I was out of time [to bring Equality Act proceedings]". In his particulars of claim (the third document alleged to be a protected act) he says "Sadly, at the time, I was too unwell to initiate employment tribunal proceedings against the Defendant for breaches of the Equality Act." He is explicitly saying that these are not complaints of Equality Act, they relate to breach of contract and breach of the Protections form Harssment Act 1997.

56. I conclude that the Claimant therefore also does not satisfy the requirements of s.27(2) EqA as the discrimination alleged was not such as to contravene the EqA.

Whistleblowing

57. The Respondents apply for strike out on the basis that at the time the Claimant made the disclosure, he did not reasonably believe that his disclosures were in the public interest. The test is whether he believed at the time the disclosure was in the public interest and whether that belief was reasonable. While the worker must have a genuine and reasonable belief in it being in the public interest, this does not have to be his predominant motivation in making it.

58. The first alleged protected disclosure was that on 3 February 2021 the Claimant told the Respondents that he had not sent the bailiffs. "Needless to say that I didn't order any bailiffs and from a personal perspective would consider it criminal to order bailiffs to visit whoever is risking their life sitting in the office in the middle of a pandemic". In March 2021 the Claimant had written "I thought that if proven wrong, I'd be facing a prison sentence and personal bankruptcy and was so extremely distressed." I conclude that the Claimant was concerned for himself, that the allegation was that he would consider it criminal to order bailiffs, his concern was personal, about the allegation that he himself had committed (in his view) criminal actions. The Claimant did not have a genuine and reasonable belief in it being in the public interest and so this was not a protected disclosure.

59. The second alleged protected disclosure was that the Claimant informed the Respondents on 2 February 2021 that he sent two copies of particulars of claim and that therefore the allegation that he never sent particulars of claim was false. In that email he said "Either Worley accidentally misplaced these documents or something more concerning took place", "my understanding is that I can be bankrupted or go to prison for lying about this" and "Therefore, I would very much like to know what you intend to do next, as it is an extremely serious allegation against me and if not retracted, I will take strong steps to defend my position." I conclude that the Claimant's concerns were personal. The Claimant did not have a genuine and reasonable belief in it being in the public interest and so this was not a protected disclosure.

60. The third alleged protected disclosure was that the Claimant told the Respondents that the minutes of the termination meeting were falsified. Again, the Claimant's concern was purely personal. He alleged the minutes of meeting were a misrepresentation of what happened at the meeting, he had no recollection of them, his personnel file had no scan of it, it was never emailed to him and the properties say it was last modified on 10 December 2014, 7 days after the meeting. The Claimant ended "The two possibilities I see are either you used a document, which is outside of my personnel file or you used the docx document as evidence. If there are other explanations, then I'd very much like you to tell me what they are." Again, I conclude that the Claimant did not have a genuine and reasonable belief in it being in the public interest and so this was not a protected disclosure, his concern was personal.

61. There is another aspect of this complaint that has no reasonable prospect of success. The Claimant's alleged detriment, as discussed at the previous Preliminary Hearing and in correspondence between the parties was that that the solicitor did not retract the Respondents' statement which was appended to their application for Set Aside of the Default Judgment. However, the Respondents did clarify the position in later witness statements which were also before the court. I explained to the Claimant that he needed to show the link between the protected disclosures and the detrimental treatment. The Claimant took time to reflect on it over lunch but said that the statement had caused him upset and worry, he thought they should have retracted it and that he wanted to continue with this claim, he did not see that he would struggle to show that the detrimental treatment was "on the ground that" he had made the protected disclosures. Even if I am wrong about the Claimant not having a reasonable belief that his disclosures were in the public interest, I would have struck out the whistleblowing claim because there is no reasonable prospect of the Claimant being able to show that the solicitor did not retract the application "on the ground that" the Claimant had told the Respondents that he had not sent the bailiffs, he had sent two copies of the particulars of claim and that the minutes of his dismissal notes were falsified. The Claimant's case is inherently implausible.

62. Having concluded that grounds for strike out have been established, I also exercise my discretion to strike out the claims. This is one of those rare cases where strike out is appropriate, for all the reasons set out above. I therefore do not need to go on to consider the other grounds for strike out, as set out in the Respondents' application.

63. The Claimant's claims are therefore struck out in their entirety and the hearing listed for 3 – 7 July 2023 is vacated.

EJ L Burge

17 December 2022