EMPLOYMENT TRIBUNALS

Claimant: Mr M Kumi

Respondent: University College London Hospitals NHS Foundation Trust

Heard at: London Central by video (CVP) **On**: 24 March 2023

Before: Employment Judge E Burns (sitting alone)

Appearances:

For the Claimant: In person

For the Respondent: Mr Platt-Mills

WRITTEN REASONS

INTRODUCTION

1. At the above hearing, I decided that the Claimant's claims should be struck out. The Claimant requested written reasons for my decision in an email dated 27 March 2023.

THE HEARING

2. The hearing had been listed at a case management hearing held on 23 January 2023 by Employment Judge Norris. According to her case management order, the purpose of the hearing was to determine whether the Tribunal had jurisdiction to hear the complaints brought by the Claimant in light of the following, or should the claim be struck out in part or in whole:

   a) The level of detail in the claim form;
   b) The named Respondent; and/or
   c) The applicable time limits?

3. At the start of the hearing, I expressed my commitment to ensuring that the claimant was not legally disadvantaged because he was unrepresented. I also noted that he had previously requested breaks due to a medical condition and I sought to agree the frequency of these with him. He was happy with the frequency of breaks I proposed.

4. Following a period of early conciliation between 27 July and 7 September 2022, the Claimant had presented a claim form on 8 September 2022. He had not provided any details of his claims at all. In section 8.1 of the ET1 form, he had ticked the boxes for race and sex discrimination claims. In section 8.2, where the ET1 form asks claimants to "*Please set out the background and details of your claim in the space below"* and includes the following direction to them:

   "*The details of your claim should be include the* ***date(s) when the event(s) you are complaining about happened***." (original emphasis)

   the Claimant put:

   "*Whistleblowing and detriments,*
   Sex harassment,
   race and victimization".

5. Although the Respondent had written to the Claimant in advance of the case management hearing, he had not responded to that correspondence. Instead, on the morning of the case management hearing, he had submitted a lengthy document said to be a case management agenda containing details of the claims he wished to pursue. Employment Judge Norris treated the document as an application to amend his claim to be considered by the judge allocated to this hearing.

6. Employment Judge Norris also ordered the Claimant to prepare a witness statement for the hearing by 20 February 2023. In addition, the parties had been ordered to agree a bundle for the hearing by 6 March 2023, with the Respondent being required to prepare it. The Respondent was also ordered to prepare a written skeleton argument. This had happened and the Respondent had sent a hearing bundle which ran to 69 pages and which contained the Claimant's witness statement to the Tribunal with a skeleton argument.

7. On 21 March 2023, the Claimant had emailed the Tribunal seeking permission to rely on an updated witness statement and a large number of additional documents. The Respondent objected to the Claimant being allowed to rely on this additional material. I heard submissions from both parties and decided to allow the documents in. I gave oral reasons for my decision.

8. On 23 March 2023, the Claimant had emailed the Tribunal to apply to amend his claim further, by adding a claim under section 26(3) Equality Act 2010. This was despite Employment Judge Norris having recorded in the case management order that he had said he did not want to pursue such a claim.

He told me that this was an error and that he had not understood the question Employment Judge Norris had asked him. I confirmed that I would deal with this application as an additional application to amend.

9. We then proceeded to hear the Claimant's evidence. Based on what the Claimant said in his evidence, following an adjournment, the Respondent made the following applications:

   (a) the Claimant's claim should be struck out under Rule 37(1)(a) on the basis it was vexatious; or

   (b) the Claimant's amendment application should not be permitted to proceed which would leave the claim as having no detail at all and be such that it should be struck out under Rule 37(1)(a) as having no reasonable prospects of success.

10. The Claimant was given a full opportunity to respond to the applications. I then retired to consider my decision and delivered it orally. The Claimant asked me for advice about the steps he could take regarding his unhappiness with the *Nandos* claim (see further below). I explained that this was not advice I could give him, and encouraged him to seek legal advice.

FINDINGS OF FACT / THE CLAIMANT'S CLAIMS

11. As this was a preliminary hearing, I made limited finding as of fact. In this section, I record the ones I did make, on the balance of probabilities where required. I also record other relevant matters that the Claimant told the Tribunal, but which were disputed.

12. The Claimant has been working for around thirty years. Prior to 2018 he had never pursued an employment Tribunal claim. Since 2018, however he has brought seven claims (including this one) against a number of different respondents. This is the latest claim chronologically, but he is in the process of bringing a further claim against a new respondent that has not yet been issued.

13. At the start of the hearing, three of the Claimant's claims had been settled; three (including this one) were ongoing and one (claim number 2207303/2021, referred to herein as the *Nandos* claim) had been decided against him. The Claimant could not remember the precise number of claims he had presented and the dates of presentation, and so with the agreement of the parties I looked this information up on the Tribunal's case management system during the hearing. I did not look at any other information relating to the claims. The exception to this was the *Nandos* case. The Claimant had sent the bundle and witness statements for this case to the Tribunal together with the judgment and written reasons as part of his additional material.

14. The significance of the *Nandos* claim to this claim is threefold.

15. First, in that claim, the Claimant had also presented an ET1 which simply gave types of claim without any details. The claim was allowed to proceed,

although the Claimant acknowledged that a Judge had explained to him at a case management hearing that an ET1 ordinarily needs more detail. A difference between that claim and this one was that the Claimant had been a direct employee of the respondent in the *Nandos* case and had submitted an internal grievance prior to pursuing litigation. The respondent had therefore had prior awareness of his allegations before the commencement of the litigation.

16. The second way in which the *Nandos* claim was significant was because the timing of the *Nandos* hearing and the preparation for it coincided with the Claimant submitting the ET1 for this claim. I deal with this further below.

17. Finally, it was also significant because the Tribunal had made a specific finding in the *Nandos* claim that the Claimant had "*engineered his claim from the start*." The finding, in essence, was that the whole purpose of the Claimant accepting a job with the respondent in that case, was to gather evidence that he could use to a make claim. He did this by covertly recording his colleagues and waiting until they said or did something that could found an employment Tribunal claim. His motivation was found to be financial gain.

18. Returning to this claim, it was not in dispute that the Claimant provided cleaning services to the Respondent between 21 March and 27 April 2022. According to the Claimant he was engaged by Anderselite Limited and supplied to the Respondent via React Specialist Cleaning. Mr Platts-Mills was unable to confirm this on behalf of the Respondent, but had no reason to doubt that the Claimant's understanding was not correct.

19. What was very much in dispute was what the Claimant alleged had occurred during his engagement. The Claimant's allegations were that:

    12.1 on 28 March 2022 there had been an incident of sex-related harassment when Michael (hospital cleaning manager, employed by the Respondent) made a comment to the Claimant such that he had admired him since the day he had started;

    12.2 a second incident of sex-related harassment had occurred on 12 April 2022, when Aliyah (hospital cleaner, employed by the Respondent) made a comment to the Claimant about him being Michael's husband;

    12.3 on 13 April 2022, the Claimant claimed to have made a qualifying protected disclosure to nurses on the ward he was cleaning. This involved a hazardous substance being put on chairs. According to him, he escalated his concern to more senior nurses that day with the result that some nurses were not permitted to return to work after this. The Claimant made a covert audio recording of himself making the qualifying protected disclosure. The recording was covert because he did not seek the permission of anyone he was speaking with to the recording.

12.4 on 14 April 2022, the Claimant claimed to have been subjected to detriments by nurses on the same ward because of the qualifying disclosure he made the previous day. The detriments were that the nurses complained to him that he had not put away some chairs and had left a lot of dust in a couple of places. Subsequently, he claimed one of nurses reported him to Michael for not cleaning properly.

12.5 on an unknown date, but in the next couple of weeks, an incident of race-related harassment occurred when Aliyah said to the Claimant that they should get along because they were the same colour;

12.6 on an unknown date, but in the next couple of weeks, Michael touched the Claimant's arm in the stock cupboard. According to the Claimant this was a sexual advance which the Claimant rejected by turning away;

12.7 on 26 April 2022, Michael and Aliyah met with the Claimant. The Claimant alleges that Michael and Aliyah subjected him to a number of detriments at the meeting. He made a covert audio recording of the meeting. At the meeting, the Claimant accused Aliyah of regularly leaving early and stealing water bottles from the Respondent;

12.8 on 26 April 2022, the Claimant told Kristov (Manager, React Specialist Cleaning Manager) what had happened. According to the Claimant what he said amounted to protected acts and qualifying protected disclosures;

12.9 on 27 April 2022, the Claimant claims he was asked to move to a different ward where the work was harder, as a result of the protected acts and qualifying protected disclosures. He also says that during the course of this day he had an altercation with another member of the respondent's staff, Mr Hassan; and

12.10 on 28 April 2022, the Claimant says he was told not to return to the Respondent by Alex of Anderselite Limited, having first complained to her about what had happened.

20. It is relevant to note that there was a dispute between the parties as to the date of the alleged last act of discrimination. The Claimant says the last act was on 28 April 2022 and relies on a copy of a WhatsApp message said to be from Alex to him dated 28 April 2022 telling him that he could not return to the Respondent. The Respondent says that there were no communications between it and the Claimant on 28 April 2022 and says the last possible date on which any act of discrimination could have occurred was 27 April 2022 as this was the last day that the Claimant performed any services for it. I did not need to resolve this dispute of fact in order to reach my decision, as explained below.

21. On 10 May 2022, the Claimant submitted a grievance to Alex at Anderselite Limited. He provided a copy to the Tribunal. He said that he understood that Alex had escalated the grievance to a more senior manager, but as far as

he was aware nothing further had happened with it. It is relevant to note that the grievance included a proposal for resolution that involved the Claimant being paid a significant sum of money. The Claimant did not send a copy of the grievance to the Respondent.

22. The EC conciliation process took place between 27 July and 7 September 2022 and on 8 September 2022, the Claimant presented his claim. He was aware that he did not have to present it on this date and had a month to do so, until 7 October 2022. He told the Tribunal that although he had not been aware of the 'additional month' available after the EC process is concluded when presenting his first few claims, he had come to learn about it and was aware of it by the time he presented this, his seventh ET1.

23. When asked why he had submitted an ET1 form with no detail of his claims, the Claimant gave several reasons.

24. The Claimant acknowledged that he should have read the form more carefully and seen that it asked for details of his claims, but said that he wrongly believed that it was acceptable for him to simply name the types of claims he wished to pursue and then provide further and better particulars at a later date.

25. The Claimant described this as a "mistake", made, in part, because he was an unrepresented litigant, albeit one that had submitted six claim forms prior to this one. He said that he had forgotten that this same issue had been discussed at a case management hearing in the *Nandos* case by the time it came to presenting this claim.

26. The Claimant said another reason was that he was unwell on 8 September 2022 when he presented the claim. His illness was a high fever and high blood pressure. He provided evidence that he had visited a hospital on 9 September 2022 in connection with these symptoms and had been advised to rest and take paracetamol. The evidence records that he did indeed have high blood pressure and a higher than normal temperature on 9 September 2022.

27. The last reason given by the Claimant for his mistake was because he was under stress. This was due to the fact that the hearing in the *Nandos* claim was on 13 and 14 September 2022. He had been served some evidence in August 2022 that he believed should not be allowed to be used at the hearing as it was false. He was involved in ongoing correspondence about this matter as at 8 September 2022 which was causing his stress.

28. In addition, the Claimant says that following the *Nandos* hearing and the decisions that were made there, he has continued to suffer from stress. He provided a sick note that was dated 14 September 2022 certifying him as unfit to work for a month due to stress. He also said that his condition got worse when the written reasons were published and his case received some press coverage. I understood this was his explanation for why he did not respond to the Respondent's correspondence about the claim and did not particularise his claim in advance of the case management hearing. He

presented no evidence in support of the contention that his illness continued and I note that he started a new job in this time.

RELEVANT LAW

29. In this section I summarise the law that I applied when making my decisions.

Pleadings and Amendment

30. Two important principles of Tribunal litigation are:

    (a) A Tribunal does not have jurisdiction to determine claims that are not contained in the facts set out in the claim form.

    (b) A Respondent needs to know the case that they need to meet.

31. There are a number of authorities which deal with the importance of not straying from the pleaded case as contained in the claim form.

32. Relevant authorities include Mr Justice Langstaff (then president of the EAT) in *Chandhok v Tirkey* [2015] ICR 527, EAT and *Chapman v Simon* [1994] IRLR 124 and *Ahuja v Inghams* [2002] EWCA Civ 1292) and *Tough v Commissioners for HM Revenue and Customs UKEAT/0255/19*.

33. Langstaff P observed in the *Chandhok* case, at paragraph 17 that:

    "…..*the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits…..*"

34. He adds at paragraph 18:

    'In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. ***It requires each party to know in essence what the other is saying, so they can properly meet it;*** *….. That is why there is a system of claim and response, and why an employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.' (bold emphasis added)*

35. Mrs Justice Elizabeth Laing in *Adebowale* stated at paragraph 16:

    "*In my judgment the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented), and*

by the EJ. The EJ is, of course, an expert, but (as this litigation shows) should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation. The EJ has the difficult job of managing a case like this, and the EJ's task will not be made any easier if this Tribunal imposes unrealistic standards of interpretation on him or on her."

36. Our system of justice does, of course, include a process whereby the information contained in the claim form and response can be developed. Requests for further information are a regular feature of employment Tribunal litigation. Such further information is intended to elucidate further detail of the claims in the claim form.

37. The basic principles that apply when ordering further information have been summarised by Wood J in *Byrne v Financial Times Ltd* [1991] IRLR 417 at 419: (EAT) as follows:

"General principles affecting the ordering of further and better particulars include that ***the parties should not be taken by surprise at the last minute****; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the order should not be oppressive; that particulars are for the purpose of identifying the issues, not for the production of the evidence; and that complicated pleadings battles should not be encouraged."(again bold emphasis added)*

38. Where an amendment is required, the leading case is *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore* [1996] IRLR 661, in which it was held that when considering an amendment, the following are relevant factors:

- The nature of amendment
- The applicability of time limits
- The timing and manner of the application

39. However, as confirmed in the case of *Vaughan v Modality Partnership* [2021] ICR 535, EAT, having considered the relevant factors, which are not limited to those identified in the *Selkent* case, we must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it and make our decision accordingly.

40. Where the amendment sought does not change the basis of the claim, time limits are not a relevant consideration. However, where a new complaint or cause of action is intended by way of amendment, the applicability of time limits is significant.

41. In *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634, it was confirmed that I am able to allow an application to amend subject to the time limits issue being resolved at the final hearing. I am not obliged to do this, however. It is permissible to allow a claim that has been presented late to proceed by way of an amendment and in doing so, effectively making a decision that the claim can proceed regardless of the fact that it has been

presented late. What is important, however, is to consider the balance of the injustice and hardship to both parties with the matter of whether the claim has been presented late being one factor that is part of that consideration.

42. Another factor that can be considered is the merits of a claim. Where there is a factual dispute between the parties, a Tribunal taking the merits into account must guard itself against the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored.

Time Limits

43. Because time limits are relevant when considering an application to amend, I have set out the law on time limits. Different provisions apply for whistleblowing claims and discrimination claims.

Whistleblowing Claims

44. Although frequently referred to as whistleblowing claims, the accurate statutory language is a claim that a claimant has been subjected to a detriment by her employer done on the ground that she has made a protected disclosure (section 47B of the Employment Rights Act 1996).

45. The term protected disclosure is defined in section 43A of the Employment Rights Act. That section cross refers to sections 43B – 4H3 which set out what types of disclosures qualify and in what circumstances.

46. The normal time-limit for claims brought by workers under section 47B of the Employment Rights Act 1996 is found in sub-section 48(3)(a) of that Act. It essentially says that the Tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

47. The normal three month time limit need to be adjusted to take into account the early conciliation process and the extensions provided for in subsections 207B(3) and (4) of the Employment Rights Act 1996.

48. Sub-section 48(3)(b) of the Employment Rights Act 1996 goes on to say that a Tribunal may still consider a claim presented outside the normal time limit if it is satisfied that:

- it was not reasonably practicable for the claim to be presented within the normal time limit, and
- the claimant has presented it within such further period as the Tribunal considers reasonable.

49. This is a two stage test. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the Claimant. It is a very strict test.

50. The factors that can be taken into account will vary from case to case (*Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470). A serious incapacitating illness of an employee is one of the factors that can be considered.

Discrimination Claims

51. The normal time-limit for discrimination claims is found in section 123 Equality Act 2010. According to section 123(1)(a) the Tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

52. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

53. The section contains some additional provisions dealing with when acts of discrimination are deemed to have taken place which are not relevant here. The important provision is that a Tribunal can allow a late claim if the claim was brought within such period as the employment Tribunal thinks is just and equitable as provided for in section 123(1)(b). This is referred to as a just and equitable extension.

Strike Out

54. The Tribunal's power to strike out claims and responses is found in Rule 37(1) of the Tribunal Rules. The relevant parts of Rule 37(1) for the purpose of this hearing say the following:

"At any stage of the proceedings, either on its own initiative or on the application of a party, a 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;"

Rule 37(2) says:

"A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

55. The overriding objective in Rule 2 of the Tribunal Rules is also relevant at all times when considering strike out applications. It says:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

56. The term "vexatious" as used in Rule 37(1)(a) describes a claim or defence that is not pursued with the expectation of success, but to harass the other side or out of some improper motive (*ET Marler Ltd v Robertson* [1974] ICR 72). An alternative term that captures the same meaning is an abuse of process.

57. When it comes to striking out claims on the grounds that they lack prospects of success, the appellant courts have repeatedly warned employment tribunals of the dangers of doing this in discrimination claims, particularly where "*the central facts are in dispute*" e.g. in *Anyanwu v. South Bank Student Union* [2001] ICR 391 at [24] and [37] and *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126 at [29].

58. However, while exercise of the power to strike out should be sparing and cautious, there is no blanket ban on such practice.

59. The question of striking out discrimination claims was considered by the Court of Appeal in *Ahir v. British Airways Plc* [2017] EWCA Civ 1392, where Underhill LJ stated at [16]: "*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment.*"

60. Rule 39 of the Tribunal Rules says:

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has <u>little reasonable prospect of success</u>, 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."

61. The purpose of a deposit order is to identify at an early stage claims with little prospect of success so as to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim failed.

Their purpose is not to make it difficult to access justice or to effect a strike-out by another route (*Hemdan v Ishmail and anor* 2017 ICR 486, EAT).

62. Similar considerations apply to those required as in a strike out application under rule 37(1)(a) where a claim is said to have no prospects of success.

63. When determining whether to make a deposit order, I am not restricted to a consideration of purely legal issues. I am entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07).

64. The same caution should be exercised in discrimination claims where there are disputed facts as when considering applications for a strike out under rule 37 (*Sharma v New College Nottingham EAT 0287/11* applying *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*). The test of 'little prospect of success' under rule 39 is however plainly not as rigorous as the test of 'no reasonable prospect' under rule 37 and the consequences of a deposit order are not as severe as a strike out order. It therefore follows that a Tribunal has a greater leeway when considering whether to order a deposit.

ANALYSIS AND CONCLUSIONS

First Strike Out Application

65. I considered this application first, but rejected it.

66. The Respondent's application was founded on the premise that like the *Nandos* claim, the Claimant had engineered this claim in order to obtain financial gain. The Respondent pointed to what it said was "a remarkable similarity" between the weak allegations involved in the *Nandos* claim and the current claim. It suggested that the Claimant's modus operandi involved starting a new job and making covert recordings of his colleagues, in the hope that they would say or do something which would from the basis of a potential claim. It also suggested that the number of claims the Claimant had brought in recent years was further evidence of this.

67. The Claimant strongly denied that he had engineered this or any of his previous claims for financial gain. He was adamant that he had pursued such claims because he had been wronged and was entitled to do so. He added that he always gave the relevant respondents the opportunity to resolve his concerns prior to issuing proceedings by submitting a grievance asking for appropriate compensation. The reaction to the grievance was what prompted him to decide whether or not to proceed with a claim, and in particular if the individuals lied in response to the allegations he was making. He told me he was always prepared to negotiate.

68. I agreed with the Respondent that there were similarities between this claim and the *Nandos* claim, including that the claims had both arisen after a short period of employment, the allegations involved were weak and the

Claimant's use of covert audio recordings. I also considered it was suspicious that prior to issuing proceedings the Claimant had submitted a grievance asking for a significant amount in compensation, above the normal levels of compensation for a claim of this nature.

69. I also agreed with the Respondent that a claim that is engineered purely for the purpose of generating a settlement would be an abuse of process. In my judgment, this would be the case even if the claimant was able to support the claim with some evidence of mild wrongdoing a respondent because the reason for pursuing the claim would not be disingenuous.

70. With regard to my view on the weakness of the claims, I set out my views as this is relevant to both applications. I had several concerns about the Claimant's prospects of success. In particular, it appeared to me, based on what the Claimant told the Tribunal, that:

- the allegations of sex-related and race-related harassment were based on innocuous comments and actions and the Claimant would struggle to establish they had the proscribed purpose or effect set out in section 26(2) of the Equality Act 2010;

- the detriments he was subjected to were also based on innocuous comments and actions and that he would struggle to establish a causative link between them and any qualifying protected disclosure;

- he would struggle to establish that the person from the respondent who decided to end his assignment was aware of his protected acts as these had been communicated to people who were not employed by the respondent; and

- he would struggle to establish that the reason for the termination of his assignment was the reasons he alleged rather than his behaviour at the meeting where he had alleged that Aliyah was leaving early and stealing bottles of water and the subsequent altercation with Mr Hassan the following day.

71. I noted, however, that this was a case where there were disputes of fact and that context in discrimination cases is always very important. My view was that this was not a case where I would have felt able, because of the disputed facts, to strike the claims out as having no reasonable prospects of success. In my judgment, however, this was a case where it would have been open to me to conclude that the claim had little reasonable prospects and to make a deposit order based on the likelihood of the claimant being able to establish some key matters he would need to establish to succeed.

72. Returning to the first strikeout application, I decided that notwithstanding the apparent similarities between the *Nandos* claim and this claim, there was insufficient evdience before me that the Claimant had engineered this claim. In reaching this decision, I took into account that the nature of the Claimant's work (cleaning) means that it is not unusual to have several employers and a series of short term engagements. It is also likely that a cleaner will witness

incidents that might give rise to legitimate health and safety concerns. Given that I did not have details of the other claims, so as to establish a more significant pattern of engineered claims by the Claimant, and in light of the disputes of facts in this claim, I decided that the threshold for concluding the claim was vexatious was not met.

Second Strike Out Application

73. I next turned to the second strike out application. In considering this, I first considered the nature of the amendment application that was before me. This was important because I wanted to be clear about the applicability of time limits when considering it.

74. Although he did not say as much, I treated the Claimant as arguing that the causes of action he wished to pursue were clear from the labels that he used in the claim form. In addition, I treated him as arguing that therefore the additional information he provided on 23 January 2023 should not be treated as him seeking to bring new cluses of action, but should instead be treated as merely provided further factual details.

75. With regard to the amendment application of 23 March 2023, he did acknowledge that this was a new cause of action, but relied on the argument that it was so closely linked to the existing claims it should be permitted.

76. I rejected the Claimant's argument that setting out the types of claims was enough to get the claims started.

77. In my judgment, although the ET1 form as completed by the Claimant states the types of claims being brought, the use of the mere labels without any detail whatsoever was not sufficient in this case to establish the claims as having been made on the date the ET1 form was presented. I consider he needed to say something more than he did. It need not have been a great deal more, but I consider a ET1 form needs to set out how a claimant says he was wronged by the respondent.

78. Relevant to my decision was, as he said to me, the Claimant could have simply attached the grievance he had prepared on 10 May 2022 as this contained the essence of his complaints. However he had not done so, nor had he sent this document to the Respondent in this case.

79. I therefore concluded that time limits should form a relevant consideration when deciding the amendment application. I further decided that I should treat the first application amendment as having been made on 23 January 2023 and the second on 23 March 2023. This was why did not need to decide the date of the last act. Although it would have been relevant if I had been considering if the claim itself was in time, using 8 September 2022 as the relevant dates, it ceased to be relevant when consider an amendment application of 23 January 2023.

80. The additional consequence of my decision that ET1 contained insufficient detail of the claims as to establish the claims as having been presented on 8 September 2022 was that, if left unamended, the claim would be struck

out because it would have no prospects of success. The prejudice to the Claimant if I did not allow his amendment application, even in part, was that he would be left with no claim.

81. With that in mind, I next went through the factors that I considered were relevant to my determination.

82. I considered the Claimant's reasons why he presented such a basic claim form.

83. I was not persuaded that his illness on 8 and 9 September or the stress associated with the *Nandos* case were the genuine reasons as to why he failed to provide more detail in his claim form. His reliance on his health somewhat contradicts his argument that he did not realise he had to say more in his claim form. If I am wrong about this, however, and his illness and stress were contributory factors in some shape or form, I do not consider they justify his conduct. He knew there was no need for him to rush to get the claim form submitted on 8 September 2022 and could have taken his time over it. The Claimant says he has been unwell ever since the *Nandos* hearing, but has not provided any evidence to support his contention that this prevented him from providing the detail about his claims until 23 January 2023.

84. As noted above, he told me he made a mistake because he was an unrepresented litigant who thought he could do what he had done. The fact that he had done the same before and effectively 'got away with it', no doubt led him to believe that he could do it again.

85. In the Claimant's favour was that he made the application at an early stage in the proceedings, at the first case management hearing, before disclosure or preparation of witness statements.

86. However, a significant distinguishing factor for me was that the Claimant did not send the Respondent a grievance prior to pursuing his claim. In the *Nandos* case, for example, the Respondent was aware of the substance of the Claimant's claims because he had submitted a grievance prior to the claim form. In this case, the claim came out of the blue for the Respondent because the grievance was sent to a different organisation. The Respondent was unable to investigate the case or interview the witnesses until the end of January 2023, nine months after the allegations were said to have taken place.

87. Finally, I considered the time limits factor. I considered this from the perspective of what the position would be if the claim had been presented on 23 January 2023 and the likelihood of the Claimant being granted an extension of time. Although a slightly artificial exercise this enabled me to assess the consequences in terms of justice and hardship for both parties of the Claimant's approach in this case.

88. Had I been the judge, considering an application for an extension of time to present the whistleblowing claims as a new claim made on 23 January 2023,

I would not have granted it. Nothing the Claimant said about his reasons for proceeding as he did would have led me to find that it was not reasonably practicable for him to have presented a claim with more detail in it on time. This led me to the view that allowing the amendment would cause the Respondent a significant hardship because it would have to defend a claim that it would not have had to defend if presented properly.

89. The just and equitable extension for the discrimination claims would have given me more discretion, than the strict test applicable to the whistleblowing claims. However, I do not consider I would have been minded to grant an extension on just and equitable grounds. In the circumstances of this case, I would have decided that the length of the delay was not justified.

90. The final factor I considered was the merits of the claims. I have explained my view on the merits above. As stated above, I was cautious not to take too robust a view, in light of the factual disputes at the heart of the claim, but still nevertheless felt the merits were weak.

91. Taking all of the above into account, and weighing up the potential injustice and hardship to both parties, I decided that the balance was in favour of not granting the amendment. This was because I considered the hardship and injustice to the Respondent of having to defend such a late and weak claim that had come out of the blue, outweighed the injustice to the Claimant of not being able to proceed with it.

92. The consequences of my decision on the amendment application, was that I considered the unamended claim had no reasonable prospects of success and I therefore concluded the hearing by confirming it was stuck out as a result.

Employment Judge E Burns
3 April 2023

Sent to the parties on:

03/04/2023

For the Tribunals Office