EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104936/2022

Preliminary Hearing held by CVP at Dundee on 21 March 2023

Employment Judge McFatridge

Mr M Williams	**Claimant**
Fife Council	**Respondent** **Represented by:** **Mr Milligan,** **Solicitor** **(Instructed by:** **Ms Ryan, HR)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that

1. The claimant's application to amend his claim so as to include a claim of having suffered a detriment as a result of making protected disclosures under section 47B of the Employment Rights Act 1996 is refused.

2. The applicant is permitted to amend his claim of automatic unfair dismissal in terms of section 103A of the Employment Rights Act 1996 by including reference to an alleged protected disclosure made by him on 7 July 2021.

3. The claim of automatic unfair dismissal in terms of section 103A of the Employment Rights Act 1996 having no reasonable prospect of success

is struck out in terms of section 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.

REASONS

Introduction

1. The claimant submitted a claim to the Tribunal and indicated that he had been employed by the respondent from 20 April 2020 to 12 April 2022. He ticked the box in section 8.1 to indicate he was claiming unfair dismissal. He attached a somewhat narrative Paper Apart setting out the history of his employment and in this document he included a reference to whistleblowing and in particular made reference to having raised issues at a disciplinary hearing called against him for other reasons on 27 August 2020 which he considered amounted to protected disclosures. He noted that he had been dismissed on or about 14 March 2022 at a disciplinary hearing to which he had been invited but had not attended. He noted the reason given was an irretrievable breakdown in the working relationship with his line manager but he stated that he disagreed and felt that he could work with her. His claim was taken to be a claim of automatic unfair dismissal and for making protected disclosures under section 103A of the Employment Rights Act 1996. The respondent submitted a response in which they denied the claim.

2. A preliminary hearing for case management purposes took place on 28 October 2022 before Judge Hosie. It was noted that the claimant did not have sufficient qualifying service to bring a claim of ordinary unfair dismissal however his claim was being taken as a complaint of automatic unfair dismissal in terms of section 103A. It was noted that in the claimant's Agenda he appeared to be suggesting an additional claim of having suffered a detriment (other than dismissal) as a result of making protected disclosures under section 47B of the Employment Rights Act. The note of this hearing notes that there was an extensive discussion of the concept of fair notice and the need for the claimant to properly specify his claims. The narrative style of his ET1 was noted and he was referred to the case of ***C v D (UKEAT/0132/19)***. The respondent's representative

noted that if the claimant wished to include a claim under section 47B they would take the view that this amounted to an amendment and it would be opposed. The outcome of this hearing was that the claimant was ordered to provide further and better particulars of claim together with a Schedule of Loss. Specific orders were made for the claimant to provide details of the instances of whistleblowing on which he relied and the detriments which he claimed together with

> "The facts the claimant offers to prove that show or tend to show that the alleged detriment was because of the making of the disclosure."

3. Following this on 23 November the claimant asked for an extension of time to comply to 30 November. The claimant thereafter provided a Schedule of Loss and a partial response to the order relating to whistleblowing but indicated he was seeking a further extension of time to deal with that part of the order which related to protected disclosures. An extension was granted until 6 January. The claimant produced another document on 6 January however it was the respondent's position this still did not meet the requirements of fair notice. A further preliminary hearing took place on 27 February and following this Employment Judge Kemp made a further order for the claimant to provide additional specification of his claim and in particular deal with the outstanding points which had been referred to by the respondent. Employment Judge Kemp then fixed a hearing for 21 March in order to deal with the claimant's application to amend. He left open the possibility that the respondent may wish to have this hearing also deal with an application to strike out the claim and or issue a deposit order. It is clear from the note of the hearing that there was an extensive discussion with the claimant regarding what was proposed. The claimant produced another document on 13 March. The respondent then produced a response setting out their position with regard to it. They confirmed that they did indeed wish to oppose the claimant's application to amend so as to include a claim under s47B and it was also their position that his claim under section 103A had no reasonable prospect of success and should be struck out failing which a deposit order should be made. That hearing took place before me on 21 March. At the hearing the issue of whether or

not the claimant be permitted to amend his claim was dealt with first. The respondent's representative made a submission and I then invited the claimant to respond to this. Initially, the claimant appeared not to understand what was required of him and it will be noted below much of his submission was not relevant to the issue. I decided that the appropriate way to proceed was to put various points made by the respondent's representative specifically to the claimant and invite his response. I then allowed the respondent to briefly comment and gave the claimant the last word. I then adjourned for a time and thereafter issued a short oral judgment to the parties indicating that I was refusing the claimant's application to amend in respect of adding a detriment claim under s47B. I did say that it seemed to me that he also wished to amend his s103A claim so as to include reference to a further protected disclosure he alleged he made in July 2022. I stated that I was prepared to accept his amendment so as to refer to this third alleged protected disclosure in respect of his automatic unfair dismissal claim. I advised the parties that I would send out written reasons in due course and these are noted below. I then asked the respondent's representative whether, given what had transpired, they still wished to make a submission of no case to answer in respect of the s103A claim (as amended). The respondent's representative confirmed that he did and thereafter proceeded to make a submission. Again I invited the claimant to respond to this. In the judgment below I set out the various submissions made by the parties. The respondent's representative had helpfully produced a bundle for the hearing and I have referred to this where appropriate by page number. The only documents which were referred to were pleading documents i.e. the ET1, ET3, together with the claimant's various further particulars of claim and the respondent's responses thereto together with the notes of the two previous case management preliminary hearings.

Amendment application

Respondent's submission

4. The respondent's representative started by setting out why they considered that the claim required to be amended. They set out the history of the claim as noted above. It was their position that the claimant's

most recent document sent to the Tribunal in purported compliance with the earlier orders was set out on pages 48-55 of the bundle. It was their position that the initial claim was a claim purely under section 103A. The claimant was claiming that he had been unfairly dismissed as a result of having made two protected disclosures. One was made to his union on 20 August 2001 and another was raised by him at a disciplinary hearing in respect of another matter on 27 August 2001. It was the respondent's position that these disclosures did not meet the criteria for being qualifying disclosures however they accepted that they required to take the claimant's claim at its highest for the purposes of the hearing today. They noted that in his most recent document the claimant was now seeking to rely on a further disclosure of different information allegedly made on 7 July 2021 at a meeting with Mr Alexander Anderson.

5. In addition to the claim under section 103A the claimant was also now wishing to make a claim of detriment under section 47B. This had not been made in his initial ET1. Certain of the events which the claimant is now stating to be detriments are foreshadowed in the ET1 in that they are mentioned but the respondent's representative made the point that it is one thing to refer to an incident as background but quite another to state that one is basing a claim on it. It was the respondent's position that the latest document clearly set out a different claim from that which had originally been made and the claimant required to formally apply to amend in order to have the Tribunal deal with this claim.

6. The respondent's representative made reference to the dicta of Lady Smith in ***Ladbrokes v Traynor*** setting out the requirements that a claimant has to comply with should they seek to amend a claim. The respondent's representative then made reference to the well-known case of ***Selkent Bus Company v Moore*** which sets out the general approach which the Tribunal requires to take.

7. With regard to the nature of the amendment it was the respondent's position that the amendment was a substantial one in that it added an entirely new head of claim which was not simply relabelling facts already pled but amounted to a number of substantial new claims. The claimant was alleging a total of 10 detriments. One of these appeared to relate to

his dismissal but there were still nine entirely new matters, which was more than simply a relabelling. The respondent made reference to the case of ***Conteh v Security (Guards) Ltd UKEAT/0178/17*** as authority for the proposition that a detriment claim is a different claim to one of automatic unfair dismissal. It was his view that although the matters now said to be detriments set out as numbers 2, 3, 4, 5, 6, and 8 are referenced one way or the other in the ET1 these matters were set out as essentially background to the claimant's dismissal whereas now they were said to be freestanding detriments. Detriment 1 essentially pleading entirely new facts and detriment 7 was a new cause of action based on a new protected disclosure. Detriment 10 was a new cause of action which indeed appeared to post-date the raising of the claim. It was therefore the respondent's position that in deciding whether or not to exercise the Tribunal's discretion I should note that this was not a mere relabelling but a substantive amendment of the claim.

8. With regard to the issue of time limits it was the respondent's position that practically all of the detriments were time barred as at the date the original ET1 was lodged. It was the respondent's position that detriments 1 and 2 had taken place on 27 August 2020, detriment 3 was undated but appeared to relate to October 2020, detriment 4 was on 25 November 2020, detriment 5 was 9 April 2021, detriment 6 was 20 March 2021, detriment 7 appears to be around 7 July 2021 since he states that this happened after the meeting with Sandy Alexander where he says he made further disclosures. Detriment 8 is unclear but it would appear that Mr Smith led the SSSC when writing to them on 6 May 2021 however generous to the claimant it would appear that the claimant became aware of this in February 2022. Detriment 9 is the dismissal. Detriment 10 does not have a specific date although the claimant says he found out about this in September 2022 it would appear that any action appears to have taken place before this and indeed goes back to Mr Smith's referral in May 2021.

9. Even if the claimant had mentioned these detriments in his ET1 then the Tribunal would not have jurisdiction to deal with them since they took place more than three months prior to the date early conciliation commenced. It

was the respondent's position that early conciliation had commenced on 7 July 2022 which meant that everything prior to 8 April 2022 was outwith the three-month time limit. The claimant had not pled any facts or averments so as to indicate that it had not been reasonably practicable for him to comply with the initial three-month time limit and there could be no question of extending the time limit in those circumstances. The respondent's representative pointed out that the claimant was not alleging a course of conduct as such but had alleged nine separate detriments. Furthermore, looking at the timing of the amendment the claimant had not in fact ever made a formal application to amend his claim albeit the fact that he was seeking to lodge these further particulars would indicate that he now wished to do so. It was the respondent's position that the date of the amendment was essentially today's date (21 March). He pointed to the history of the claimant's failure to provide the Tribunal with the additional information required. It was their position that the timing of the application did not favour the claimant even if there were any parts of the detriment claim which were not time barred.

10. The respondent also made the point that we had only got to the stage we had got to today after very significant case management by the Tribunal. It was their position that if the detriment claim were allowed then the Tribunal would require to further case manage the issues before the case could be ready to go to a hearing. The claim was not clearly presented. The respondent would require to ask the claimant for further particulars of the claim before they could meaningfully respond to it.

11. With regard to the balance of prejudice the respondent accepted that there would be a prejudice to the claimant if he was not permitted to pursue a claim of whistleblowing-related detriment. It was their position that such detriment would be relatively slight given that (subject to the strike out application which was still to be heard) the claimant would also still have his claim of automatically unfair dismissal. Furthermore, it was the respondent's position that the disadvantage to the claimant if he were not permitted to amend his claim would also be slight given their clear position that such a claim had no reasonable prospect of success in any event. The respondent's representative indicated that he did not want to

foreshadow all of the arguments which he would be using in respect of his application for strike out but his clear position was that whilst the claimant had narrated that he had made protected disclosures and had set out various matters which he considered to be detriments he had not averred any facts from which one could infer a linkage between the two. He notes that within the claimant's own pleadings he states in the summary section "I do not know if the detriment was due to the qualifying disclosures made on 27/08/2020 or 07/07/2021, or both." With regard to the issue of the level 2 warning there is simply a bald statement that this was disproportionate to the alleged wrongdoing but no specific averment that links this to the protected disclosures. There were no cogent facts pled which would link the detriments to all or some of the alleged disclosures. The respondent's position was that if the amendment were granted the prejudice to the respondent would be substantial. The scope of the hearing and the amount of preparatory work required would be considerably extended. At the moment the respondent were faced with a claim of automatically unfair dismissal. This would involve looking at the processes which led up to the decision to dismiss. A limited number of actors were involved in this. If the amendment were accepted then the scope of inquiry would be considerably broadened and this would result in additional expense to the respondent.

12. When invited to comment on the claimant's submissions the respondent pointed out that the claimant had no answer to the time bar point. He also referred to the statement made by the claimant in submission that the real problem in this case had been that an untrained personnel officer had been involved in the original disciplinary hearing and his comment that if this individual had done their job properly then parties would not be where they were now. This was entirely inconsistent with the claimant's stated position that he had suffered detriment as a result of making protected disclosures. He also made the point that even on the claimant's own case he had not raised any of his concerns with the respondent prior to the disciplinary hearing. It therefore followed that the events which led to him being invited to the hearing could not have had anything to do with the alleged disclosures made.

Claimant's submissions

13. The claimant initially did not seek to address any of the points made by the respondent in detail other than to say that he disputed them. He indicated that he wanted the second incident of alleged whistleblowing (or third) alleged to have taken place in July 2021 to be taken into account. He indicated that it had taken a long time to obtain legal advice and that in fact he had only managed to obtain a one hour consultation with an advocate during the last few weeks. He then went on to describe various aspects of his complaints about the respondent's treatment of him and repeated his position. He noted that the Care Inspectorate had made an unannounced inspection of the respondent and had uncovered poor and unacceptable practice. He stated that he had looked at the inspection report on the website and it would appear that Gavin (Smith) had not been supervising his immediate manager Muriel (Bradford). He said that this had gone on from the time the respondent took over Gilven House which was where he worked. He stated he was responsible to the SSSC. He said the report indicated that no complaints had been upheld since the last inspection and he considered this was incorrect. He referred to the second complaint against him having been proven to be a tissue of lies. He considered that he had been treated appallingly.

14. I tried to put the claimant back on track on several occasions however he continued in this vein for some time. Eventually I decided that the way to proceed was to put to him the various points which had been made by the respondent's representative. With regard to the issue of whether he needed to amend or not the claimant did not make any meaningful submissions. Given that I agreed with the respondent that there is no claim under s47B in the original ET1, I decided that it was appropriate to work on the basis that the claimant was now seeking to add a claim of detriment under section 47B to his claim and I considered he required to apply to amend in order to do so. I would therefore work on the basis that an application to amend had been made. The claimant stated that when he completed his ET1 he had not known what he needed to include. He then said that knowing what he knows now he feels he should have gone

to the Police about certain of the incidents he refers to. He referred to having understood the SSSC had been advised of various matters.

15. I asked him why he was making the application to amend now rather than earlier in the process such as immediately after the first preliminary hearing where Employment Judge Hosie had explained to him the concept of fair notice and indeed referred to the claimant apparently seeking to add a claim of detriment. He indicated that he had been attempting to obtain legal advice and as noted above had only managed to do so on a very limited basis within the last two weeks. I put to him the respondent's assertion that the detriments which he alleged were actually time barred by the time he submitted his ET1. The claimant stated at that stage that we should forget the detriments. Despite this I decided that it would be appropriate to ask the claimant further questions with a view to deciding whether the amendment should be allowed. The claimant continued to discuss his complaint in general terms rather than address the issues. He indicated he felt he had been subject to a scam complaint. As to the linkage between the way he had been treated and the qualifying disclosures he stated that rather than being punished for the actions he had taken he ought to have been exonerated and in fact commended. He made the point that he would not be where he was but for the fact the respondent had appointed an untrained personnel officer to deal with the original disciplinary who had not completed 'the 2016 ACAS training'. He considered matters had gone off the rails. He stated that working in Housing Support he aimed for evidence based best practice. He felt he had been undermined by management. He believed that certain of the individuals involved deserved imprisonment. He indicated that in his view it had been verified by the Care Inspectorate that the unit had not been run properly. He noted that the staff running the unit had SVQ 4 and in his view the qualification should not have been given to them. He said that in the name of justice we should uphold his claim. He referred to the fact that in his job application for the role he had set out his experience and the way he would approach things. He believed that he had been penalised for approaching things in this way and for his practice. He referred to the links which he believed existed between health and housing. He advised us of a story he had told management relating to a

friend with HIV whose blood count had improved considerably once their housing situation was resolved. He indicated that the respondent had told him that he was not doing social work or advocacy. He believed that it was correct to challenge management but this was very difficult. He had years of experience in tenant involvement. He said that he needed to include the second whistleblowing on 7 July because the whistleblowing on 27 August had been done in the wrong way.

16. Having invited the respondent's representative to comment I then gave the claimant the last word. He essentially repeated more of his complaints against the way the respondent conducted the department in which he had worked and set out his view that they had behaved inappropriately. He made the point that he considered it would be in the public interest for his amendment to be accepted. He then repeated that he was "not worried about the detriments". He wanted the case to go forward. He referred to a case he had mentioned in his further particulars which I now understand to be a judgment issued by the Employment Tribunal at Southampton dated 17 January 2022 in the case of Macanovic v Portsmouth NHS Hospital Trust (case no. 1400232/2018). It was his view however that whilst in that case there had been a professional disagreement that was not the case here since he believed it was clear that Fife Council were simply in the wrong.

Discussion and decision

17. Following the parties' submissions on the issue of amendment I adjourned for 15 minutes and then issued my findings orally. As noted above I confirmed that the claimant's application to amend his claim by adding a claim under section 47B was refused. I was however prepared to allow the claimant to amend his section 103A claim so as to include reference to the alleged whistleblowing in July 2021.

18. With regard to the addition of the section 47B claim I agreed entirely with the submissions made by the respondent. This was a substantial amendment to the claim adding an entirely new cause of action. Although certain facts were alluded to in the ET1 these were set out by way of background and the ET1 did not state that these were to be regarded as

claims of detriment. Even reading the ET1 broadly one could not foresee that such a claim was being made. With regard to the timing of the claim I considered that the point made by the respondent's representative in relation to time bar was a cogent one. Even if the claimant had included these alleged detriments in his ET1 then eight of them would have been out of time given that detriments 1, 2, 3, 4, 5, 6, 7 and 8 were all made well prior to April 2022. The claimant has not averred any reason why it was not reasonably practicable for him to submit his claim earlier than the date he submitted his ET1. With regard to detriment 10 it is entirely unclear what this actually is. The claimant appears to be saying that the SSSC have linked a complaint he has made with an earlier complaint made about him. There doesn't appear to be any action of the respondent taken at this time (September 2022).

19. The time bar point is a key point in relation to the issue of whether or not to allow the amendment. The secondary issue regarding the timing of the application is the delay between the claimant indicating in general terms to EJ Hosie that he may wish to include a claim of detriment when completing the Agenda for the first preliminary hearing and 13 March 2023 when the claimant eventually produced the further and better particulars of his claim. I consider this to be a fairly lengthy delay and the claimant's only explanation was that he had a difficulty obtaining legal advice. I note that EJ Hosie gave the claimant fairly clear instructions as to what he had to do. On the other hand I am cognisant of the fact that the claimant only obtained legal advice recently and had this been the only problem with his application to amend I would not have refused the application on account of this only.

20. With regard to the balance of prejudice between the parties I entirely agreed with the respondent's assessment of this. There is little prejudice to a claimant if he is prevented from pursuing a claim which is doomed to failure. The fact of the matter is that the claimant has entirely failed to refer to any facts linking his alleged detriments to the protected disclosures he has made. On the other hand, I take on board the respondent's point that if the hearing were widened to include the issue of detriment then the scope of the hearing and consequently its length and expense would be

considerably extended. For this reason, I was not prepared to grant the claimant's application to amend his claim to include a claim of detriment under section 47B. I did however consider that I required to independently look at the claimant's averment that he wished to rely on a further protected disclosure made by him on 7 July 2021 in respect of his section 103A claim as well any putative section 47B claim. In this case I felt that it could properly be said that the claimant was providing further and better particulars of his claim under section 103A. This was not an entirely new cause of action. The claimant was pleading additional facts not contained in the ET1. That having been said it is not particularly unusual for an unrepresented claimant to be asked to provide further details of the alleged whistleblowing disclosures which they have made. The claimant has cogently described what he allegedly said to Mr Anderson. With regard to the timing of the application no time bar issue arises per se. Again I am concerned that the claimant has raised this matter for the first time in March 2023 having been advised by Employment Judge Hosie at the first preliminary hearing of the requirement for fair notice. That having been said I would be prepared to extend some leeway to the claimant given his difficulties in obtaining legal advice. I decided that at this stage dealing purely with the question of whether or not the claimant should be permitted to amend his section 103A claim to include reference to the alleged July 2021 disclosures I decided that it would be appropriate to exercise my discretion so as to allow it at this stage. Any issues regarding the amended claim having no reasonable prospect of success could be dealt with subsequently. Should the respondent wish to continue with their application for strike out of the section 103A claim this would be on the basis that the pleaded claim included reference to the alleged whistleblowing disclosure on 7 July 2021 as well as the earlier alleged disclosures.

21. Having advised the parties of my decision the respondent's agent indicated that despite me having allowed the amendment in respect of the July disclosure he wished to proceed with the application for strike out which failing a deposit order which he had advised the Tribunal of previously. I indicated that I would proceed as before with each party making their submissions in turn.

Respondent's submissions re strike out

22. The respondent confirmed that they noted that the amendment had been allowed and that the additional protected disclosure alleged to have taken place in July 2021 could be regarded as part of the claimant's case that he could rely upon. The respondent's representative confirmed that it was still his position that the claim of automatic unfair dismissal had no reasonable prospect of success. He confirmed that he was making his application for strike out in terms of Rule 37(1)(a) of the Employment Tribunal Rules. He stated that the respondent's primary position was that the claim had no reasonable prospect of success. It was however their secondary position that, if I were not persuaded that it had no prospect of success, the claim had little reasonable prospect of success and a deposit order should be made.

23. The respondent's representative noted that he appreciated strike out was a draconian step particularly in cases relating to whistleblowing or discrimination. It was not something which could be considered in a majority of cases. It was however his position that it was appropriate in this case. He referred to the case of ***Mr T A Balls v Downham Market High School and College UKEAT/0343/10*** as authority for the proposition that the Tribunal must adopt a multi-factorial approach and base their decision on all available material that is relevant to the issues. He accepted that the case of ***Cox v Adecco Group UK & Ireland and others UKEAT/0339/19*** made it absolutely clear that if the claim turns on disputed facts then it is highly unlikely that strike out would be appropriate. He referred to paragraph 28 of that judgment as setting out the approach a tribunal should take. In this case the respondent's position was that the claimant had now set out the terms of his claim and the Tribunal required to consider whether the claimant could succeed on the basis of the claim which has been set out, taking it at its highest.

24. The respondent set out the law which is set out in section 103A. The claimant can only succeed if he can show that the making of the protected disclosures was the reason or principal reason for his dismissal. The reason for dismissal is what was in the employer's mind at the time. The respondent's representative indicated that in a case where the employee

did not have two years' qualifying service, as was the case here, the burden of establishing the reason for dismissal lay on the claimant. It was for the claimant to persuade the Tribunal that the reason or principal reason for the dismissal was the protected disclosures made. There were now three protected disclosures alleged. The first one on 20 August 2020 was allegedly made to the claimant's union representative, the second one on 27 August 2020 was made during the course of a disciplinary hearing which had been instigated against the claimant for other reasons and the third one which had been allowed today was on 7 July 2021 made to Mr Anderson. The respondent's position was that they did not accept that protected disclosures had been made on these occasions but nevertheless he accepted that the respondent required to proceed on the basis that they had been made as described by the claimant and were protected for the purpose of the strike out application. The claimant had received a level 2 warning following the disciplinary hearing on 27 August 2020. The disciplinary hearing had been called in respect of matters which were unrelated to the protected disclosures and the calling of the claimant to the disciplinary hearing could not as a matter of simple logic be linked to the disclosures he made at that hearing. Subsequent to that the claimant's employment was terminated by D Cotter on 15 March 2022 at a disciplinary hearing which the claimant did not attend. The respondent's representative pointed out that Mr Cotter was not at the disciplinary hearing nor was he aware of the disclosures nor is it averred in any way that he was so aware. The respondent's position is that the dismissal was based on a breakdown in the claimant's relationship with his line manager and that his approach to his line manager was undermining and dismissive. The respondent's position was that the claimant was offered redeployment to another post within the council at that stage but declined.

25. It was the respondent's position the burden of proof was on the claimant. So far all the claimant was saying that he made disclosures and was subsequently dismissed. He had been asked to set out those facts which he considered showed the two were linked. There needed to be more than a simple assertion. He pointed out that the claimant had been given a number of opportunities to set out the facts which he was relying upon. He had initially been asked to provide this information at the first

preliminary hearing and given two further extensions of time to do so. Finally he had been given an opportunity to do so by Employment Judge Kemp.

26. The claimant's latest position was set out in the document he produced on 13 March and in particular is set out on page 53. In the view of the respondent even if the claimant proved every single fact alleged in this section then there was absolutely nothing to suggest a linkage between the protected disclosures alleged to have been made and his dismissal. The claimant refers to him having been given a level 2 warning and this not being proportionate. The proceedings were instigated before the first two protected disclosures were alleged to have been made. They were unconnected with the protected disclosures which were eventually made. The disclosures allegedly made at the meeting in July were made to an entirely different person. The claimant did not attend his dismissal hearing. The claimant refers to Ms Bradford who was his line manager but she was not the decision maker nor was she the subject of the disclosures. The dismissal took place 18 months after the first disclosure. The disciplinary warning which the claimant had been given in August 2020 was not relied upon in any way in connection with his dismissal in March 2022. The claimant himself says it had expired. The only linkage is the claimant's belief that they are linked. The claimant has not alleged any other facts. What is clear from the claimant's statement is that the claimant is unhappy at various actions of the respondent. This is not sufficient grounds. The claimant also previously indicated during submissions on the issue of amendment that if the investigation of the August 2020 disciplinary allegations had been done properly and the respondent had behaved reasonably in relation to this then we would not be here today. In the view of the respondent this crucially undermined the claimant's position which was that his dismissal was linked to disclosures made subsequent to this.

27. The respondent's representative noted that the Tribunal is under an obligation to give a claimant, particularly an unrepresented claimant, a full opportunity to state his case. The respondent's representative indicated that matters had been explained to the claimant extremely carefully by

Employment Judge Hosie. He could be in absolutely no doubt what was required. It had then been explained equally carefully to the claimant by Employment Judge Kemp. With regard to the facts which the claimant alleged showed a linkage between the disclosures made and his dismissal the claimant has set out his position in page 53 onwards. The first of these refers to what the claimant considers to be the disproportionate disciplinary sanction applied to him in August 2020. It was the respondent's position this had nothing whatsoever to do with his dismissal. The second was that the claimant alleged that he had suffered some kind of detriment as a result of being accused by Gavin Smith of "exploiting clients in the minutes of the 27th August 2020 hearing". The respondent's agent noted that he struggled to make sense of the remaining parts of pages 53-55 and could really see nothing there which would allow the Tribunal to hear evidence as to facts which allegedly showed a linkage between the disclosures made and the dismissal.

28. Even taking the case at its highest there was nothing the claimant offered to prove to show that the decision was taken because of the protected disclosures. Whilst the Tribunal required to base their decision on the claimant's claim it was noteworthy that the respondent's position was that there was a whole raft of things going on in the period between August 2020 and the claimant's dismissal in March 2022 which the claimant has really not engaged with at all. Given that the further alleged disclosure in July 2021 was now part of the claimant's case there was still absolutely no linkage with that. If the hearing were to proceed then it was hard to see how the claimant could give or lead any evidence based on those pleadings which would show or tend to show a link between disclosures made in August 2020 and July 2021 to the decision to dismiss him which was made by an entirely different person in March 2022.

29. The respondent's representative then briefly made reference to the respondent's position that if strike out was not granted then a deposit order should be made on the basis that the claims had little reasonable prospect of success in terms of section 39(1). The respondent did not at that stage have information regarding the claimant's means but considered that even

given that he is still unemployed the amount of any deposit order should be more than negligible and in their view at least £250.

Claimant's submission

30. Once again I should say that it was very difficult to keep the claimant on track and deal with the issue currently before the Tribunal. The claimant on various occasions sought to effectively give evidence tending to show that he was a very good Housing Officer and that in his view the respondent's department fell down in a number of respects. The claimant's position was that he considered that the outcome of the first disciplinary was disproportionate. He considered this was linked to his dismissal because there was a relationship between the earlier disciplinary and how he was subsequently treated. He said he was subject to defamation by a Carolanne Turner and Anne Marie Sweeney. He stated that mud sticks. He believed that the false accusations had stuck within the council. He then made the point that "Muriel" his manager had a "get out of jail free card" and that he was now aware that she had not been receiving regular supervision from Gavin and in his view this meant that this enabled him to work with Muriel. It was his position that the breakdown in relationship occurred before he saw the Care Inspectorate report and became aware that Gavin Smith was not supervising Muriel. He stated that he could work with Muriel now that Gavin Smith (who I understand to be Muriel's manager) had had responsibility for homeless services taken away from him.

31. When I tried to get him back on track he stated that a reasonable council would not have behaved in the way that the respondent had done. His position was that 'as soon as he blew the whistle he was out of the door'. He noted that at the time of his appeal hearing his reflective practice had been challenged. He noted that Muriel had not been at the disciplinary in August 2020. He stated that in November 2020 Muriel had raised an issue with him by her first words at a meeting being the word "dosage". This was a reference to what he described as the 'spurious reason' why the claimant had been called to the disciplinary in August. He considered that this was evidence that the incident regarding aspirin was a significant event to her. He stated that central to his claim was the Care Inspectorate

report that detailed unacceptable behaviour at Gilven House. He considered that Fife Council had deficiencies in its skill set so his view was that it was inconceivable that they would sack someone with his skills. He stated that new models of accommodation support required to be developed. He considered the Care Inspectorate report had vindicated his actions. He asked the rhetorical question "Why would they want rid of me bearing in mind my successful record?" He considered they had acted without evidence. In his view giving someone information about the risks of aspirin did not amount to the giving of advice. He believed Mr Smith had told the SSSC that the claimant had been giving advice when he referred the claimant to the SSSC some nine months after the claimant had received a level 2 warning in respect of the aspirin incident. The claimant referred to the well-known cases of Baby P and Victoria Climbié. He said there was a cover up of bad practice. He said that Gavin Smith had at one stage told him that he knew too much. He referred to having given information about illegal activity to Mr Anderson which was the third disclosure. It was his position that the respondent were horrified by his person-centred approach. He noted that Gilven House had previously been run as a Christian hostel with room checks and zero tolerance for drugs. He referred again to the level 2 warning he had received in August and noted he had only been there six weeks at this point. He stated that there had been a bullying meeting in November and a slightly better one in December. He said that he was very good at his role in Housing Support. He indicated that in his view the respondent had an outdated approach and were not used to service user involvement. He indicated he believed they still followed the concept of the "deserving poor". He stated that at one stage Gavin Smith had told him to "leave the Dundee Drug Report at home". This was a reference to an approach to drug abuse followed in Dundee. He felt that he had set out his person-centred approach in his application form and felt it was strange that the respondent had employed him on this basis but had then changed their minds about this when he acted in the way he said he would. He attributed this to the whistleblowing. He felt that he could have offered further support to the respondent and offered his views on various matters. He said that Mr Smith had told him that there was an opportunity for him to provide his views as to the way the respondent worked once a year. The claimant

stated that in his appeal to Mr Enston he had set out a number of factors as to why he should not have been dismissed. He accepted he had not referred to the whistleblowing at that stage and said that at that stage he had not received legal advice. He stated that he was eight days' short of having two years' qualifying service.

32. The claimant again referred to the meeting of 27 August 2020. He said that the minutes accused him of exploiting clients. He complained about not having received a copy. He said he found it difficult to look at the lies which had been told about him.

33. I asked the claimant to provide information in relation to his means. He indicated that he was unemployed and his sole income was a carer's allowance of £68 per week. He had around £redacted in savings.

34. I invited the respondent's representative to make a response and his only submission was to say that the claimant had now been given yet a further opportunity to demonstrate the link between his dismissal and the alleged protected disclosures and had once again failed to do so. I then gave the claimant the last word. He referred to the case of ***Macanovic*** and stated that this showed that an employer has a duty of care to someone who has blown the whistle and that person cannot be dismissed. He referred to the case of ***Ibrahim*** which he indicated implied that an employer should ensure that an employee was free from defamation. He said that he had been defamed by Carolanne Turner and Donna Marie Sweeney and also Gavin Smith following on what he described as the fatally flawed report in August 2020. He said the experience had been very upsetting. He again criticised the respondent's general approach. He made reference to a previous occasion when he had told his line manager and her manager about an incident which occurred during a previous employment when he worked in Dundee. He had a client who was a homeless person in a hostel who had been offered accommodation. That person had just suffered a bereavement. He was told by his line manager to nevertheless make arrangements for this client to visit the accommodation they had been offered. He was told that Dundee Council operated a blanket policy whereby people were not allowed to turn down or indeed accept an offer of accommodation unless they had seen the accommodation. The

claimant decided that rather than take the client to show the property he would take the client to Shelter and for them to instigate an appeal against the council's policy which he as an experienced Housing Officer knew was probably subject to challenge.

35. The appeal was successful. He said that his line manager had said that what she took from this story was that the claimant had unreasonably refused to follow the instructions of his line manager at the time. He finished by saying that in his view the only possible explanation for his dismissal could be the whistleblowing allegations that he had made.

Discussion and decision

36. I considered that in this case I required to consider carefully the various admonitions given in the case of ***Cox v Adecco*** and in particular the approach set out in paragraph 28 and it is as well to set that out in full here.

> "From these cases a number of general propositions emerge, some generally well understood, some not so much.
>
> (1) No-one gains by truly hopeless cases being pursued to a hearing;
>
> (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
>
> (3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
>
> (4) The claimant's case must ordinarily be taken at its highest;
>
> (5) It is necessary to consider, in reasonable detail, what the claims are issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
>
> (6) This does not necessarily require the agreement of a formal list of issues although that may assist greatly but does require a fair assessment of the claims and issues on the basis of the

pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents on which the claimant sets out the case. When pushed by a Judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the Tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the Tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

37. The first thing I am required to do is to seek to understand the claim the claimant is making. In this case I note that the claimant has had several attempts to set out his position and indeed I allowed the claimant a fairly free rein at the hearing to say anything else he considered relevant. Had he disclosed additional facts at the hearing then, given the strictures contained in the ***Cox v Adecco*** case I would have been prepared to allow the claimant yet further time to set out these additional factual allegations in writing but I have to say that nothing the claimant said at the hearing in my view added anything to what was contained in his various written statements of claim.

38. Starting with the claimant's ET1 the claimant sets out a number of factual averments regarding his employment. He states that he commenced employment on 20 April. He goes on to say

> "It became apparent to me quite soon that staff and management had a different understanding of the Housing Support role."

Much of the rest of what he says is little more than providing confirmation of this and setting out a number of examples where the claimant believes that his approach was a better and more correct one than that of the respondent. He refers to having been cautioned at supervision against arranging a referral for a homeless client with a specialist multiple sclerosis nurse. He says that he was criticised as being too medically focussed. All of this appears to pre-date any disclosures. He then goes on to state that he was suspended on 5 June 2020 facing a charge of causing harm to a client. This related to the claimant giving advice re taking aspirin and the claimant's view that this may be inappropriate and the claimant should consult her GP. The claimant sets out at length why he considers that he was right and the respondent's approach was wrong. He also refers briefly to a second allegation being made against him in relation to him causing anxiety to a claimant with MS. It was his position that this allegation was based on lies and that there was thereafter a fatally flawed investigation which resulted in him being called to a disciplinary hearing on 27 August.

39. It is his position that he made the first of his protected disclosures to his trade union official on or about 20 August. He states he disclosed that Housing Support staff were carrying out inappropriate actions and engaging in unacceptable behaviour in particular relating to a statement that a breast examination of a homeless woman had been carried out and that a photo of a suspected vaginal cyst of a homeless woman had been taken. It is to be noted that subsequently the claimant has, in his further particulars stated that he "did not suffer detriment as a result of disclosing to Kenny McCallum on 20 August 2020". He also makes an allegation that another patient had been told to "show their arms and legs" presumably to check for needle marks. He states that his union official agreed these were serious matters and that he would raise these and that

it was a matter for the SSSC although there is no averment that his union representative did anything with this.

40. He then describes the August 2020 hearing and being given a level 2 warning for not having followed the correct protocol. He confirmed he did not appeal the ruling, wanting to move forward and back to work. He then says that he was placed on paid special leave. He met with Gavin Smith and Ms Bradford in November 2020. He describes this as being a very difficult meeting with his line manager Muriel Bradford undermining him on several occasions. He says that he was instructed that Housing Support Officers don't do advocacy and are not social workers. He says that he sent an email to Mr Smith. There is then a further meeting which goes well. He says however that the minutes of the 2020 meeting are produced and that these undermine his reflective practice statement and contains serious omissions and inaccuracies. He refers to a discussion about him requiring to make his own alterations to the minutes and indicates he is unhappy about this.

41. He says that Mr Smith discusses with him what would appear to be a settlement agreement. It is the respondent's position that this is a protected conversation.

42. He states that he is then said that he meets with Mr Anderson for three hours in July 2021. In November 2021 he is told that the respondent are contemplating disciplinary action. Further settlement offers are made and referred to. He states one of these is an offer of redeployment. He states that he now finds that he was referred by the SSSC by Gavin Smith in May 2021. He considers this to be a vexatious referral. He then states that at this time he finds out the Care Inspectorate inspected Gilven House in July 2021 and made various adverse comments. He believes that their recommendation supports actions that he had previously been criticised for doing. He also notes that it states that Mr Smith had not been supervising Ms Bradford and that this failure contributed to Fife Council failing to bring Gilven House up to Council standards. He believes that this was the reason the respondent decided not to proceed with a disciplinary against him.

43. The claimant then says that he refused the offer to move since he felt that he was entitled to protection under the Public Interest Disclosure Act 1998. He then goes on to clarify that his disclosures were in his view protected and says why. He says he was concerned there would be a cover-up. He was invited to the meeting in March 2022 but did not attend. He refers to obtaining a sickness note from his GP. He states that the meeting was then rearranged for 14 March where he was dismissed with paid notice. He refers to appealing this and meeting with Mr Enston around 30 March whilst he was still unwell. He notes that due to untaken annual leave his date of termination was 12 April, eight days short of two years' employment. He notes that in his appeal he stressed that despite he and his manager having serious professional disagreement over the role of Housing Support Officer he considered that he could work with her as she had not been properly supervised by Gavin Smith. He noted that he had never been offered mediation and would have been happy to undertake this. He said he had been in post for about six weeks in 2020 before being suspended and had been given the wrong induction pack and a poor induction. He says it seems most odd to sack someone who was trying to operate as required. He then went on to say

> "I find the dismissal most unfair. I helped uncover unacceptable practice and to allege that working relationships had broken down in a context where the manager (Muriel) herself failed in her role is a most unjust outcome. I feel punished for pointing out failure."

44. As noted above the claimant attended the first preliminary hearing and I have referred to the note issued following this hearing. The claimant is advised to provide further and better particulars. The claimant produces this in the form of a statement lodged at 33-39 and also a document entitled "Claimant Compliance 3v, 3vi, 3vii" at 40-44. The first document essentially repeats the narrative contained in his ET1 with some additions. He confirms the level 2 warning was to be placed on his personnel file for 12 months. He refers again to the various meetings although it is clear that the thrust of these meetings is the claimant's view that he wishes to do the job according to his approach and not that of the respondent's and that he believes that he is correct and the respondent wrong. He refers to

a further meeting in February 2021 at which he was mega-stressed and where it goes very badly. He states that he is given a letter setting out concerns in March 2021. He is threatened with a second disciplinary relating to a loss of trust and confidence in him and undermining his manager. In this document for the first time he refers to his meeting with Mr Anderson on 7 July 2021 which lasted three hours. He says he refers to the further disclosures stating

> "These related to a Data Protection Act breach in relation to an allegation that someone put client information on a WhatsApp chat group."

He also refers to possible housing benefit fraud in that some residents were apparently not in residence and living most of the time with their boyfriends. He also referred to what was called the possible illegal eviction of a homeless woman with MS who stayed out too many nights at the time of Covid lockdown. He questions was this homophobia.

45. He says that Mr Anderson's investigation does not proceed to a disciplinary. He goes into further detail about discovering the Care Inspectorate report and what this says. He refers to a meeting in January 2022 where he is still discussing the disciplinary hearing in August 2020 and says that had it been a court of law then the two members of staff already alleged would be facing imprisonment for perjury. He refers to rejecting an offer to move to another department. He states that he believes that he is protected under whistleblowing legislation. He refers to discussions with the SSSC and having made a Freedom of Information request. He notes that Mr Smith alleged to the SSSC that the claimant had provided advice to a service user about taking aspirin, had provided advice to a service user about their MS and had been aggressive and disruptive towards his manager. He notes that the SSSC have decided this does not affect his fitness to practice. He refers to being invited to the meeting in March and not attending.

46. As noted above the claimant had been asked specifically to provide answers to questions and provided a further document entitled "Claimant's Compliance with Judge Hosie's Orders". The first points relate to the

alleged protected disclosures. This is where the claimant makes it clear that he is wishing to make a claim of detriment. The claimant then goes on to provide an answer to question 3(vii) where he is asked to set out the facts the claimant offers to prove that show or tend to show that the alleged detriment was because of the disclosure. The claimant then states that he is an experienced Housing Support Officer. He then notes what he considers to be the poor record of the respondent. He makes various criticisms of Gilven House. He criticises the fact that the respondent doesn't have a Suicide Prevention Officer. He states that his application for Housing Support Officer detailed his work history including examples, he said he obtained the post on the basis of this together with interviews. He says that the first investigating officer had not completed post-2016 ACAS training and failed to establish the credibility of witness statements. He stated that he had been subject to a vendetta. He stated the dishonesty of Carolanne Turner and Donna Marie Sweeney had gone unpunished and there had been a cover-up. He refers to the case of ***Macanovic*** mentioned above and talks about that case. He believes that where there is a deeply held difference of opinion on clinical practice between senior staff and members of a clinical body it can be extremely difficult to manage working relationships in any subsequent internal processes. He notes that this gives rise to a risk of whistleblowing detriment. He then summarises saying he is a well-qualified Housing Support Practitioner. He believes that his client-centred approach was not liked by the respondent. He states

> "It could be argued that I have the skillset required to operate under Housing First when many around me were getting it badly wrong thus why sack me unless it's because of my whistleblowing .."

47. The claimant then went on to produce a further document on 13 March. This was after he had the benefit of very limited legal advice from an advocate. It was this document that the respondent's representations focused on. He considers that it was clear that Gavin Smith challenged his reflective practice statement at the meeting on 27 August by asking if he had confidence in social work. He says that the punishment was disproportionate and was not a fair outcome. He states that the minutes

of the disciplinary hearing refer to him “exploiting clients”. It is his position that this demonstrates Gavin Smith’s biased against him was caused by the act of whistleblowing. In section 3.5 he repeats this saying essentially that the level 2 warning was disproportionate. He says that being accused of exploiting clients in the minutes where there was no evidence of this showed a link to his protected disclosures. Once again, he states that he is an experienced Housing Officer with a good record whereas Fife Council Housing Department do not have a good record. He refers again to them not having a Suicide Prevention Officer. He refers again to his application for a job setting out his experience and general approach.

48. In considering these documents I have to bear at the front of my mind that the claimant is not a trained lawyer. It is clear that much of what the claimant says is irrelevant and repetitive. What I took from the claimant’s claim, taking it at its highest is that

(1) The claimant is an experienced Housing Officer with views which he describes as client-centred.

(2) He obtained a post with the claimant and when applying for the post he had clearly set out his client-centred views and experience.

(3) From the beginning of his employment he noted that there was a difference in what he considered to be the correct approach to that of the respondent.

(4) Very early on in his employment he is referred to a disciplinary hearing in respect of allegations that he provided advice to a service user about taking aspirin, provided advice to a service user about their MS and had been aggressive and disruptive towards his manager. These charges clearly pre-date any alleged protected disclosures.

(5) At a meeting with his union representative on 20 August he discussed issues where he considered various of his colleagues were guilty of wrongdoing. The allegations made were quite specific. They were:-

a) relating to a record showing that a claimant had had a breast examined,

b) an allegation there was a photograph of a vaginal cyst,

c) an allegation that a client had been asked to show their arms and legs to show free of needle marks.

(6) The claimant does not make any averment about what his union official did with this information and in particular whether he mentioned this to the respondent at any stage.

(7) In any event, that is probably of limited importance since the claimant then goes on to say that he made exactly the same disclosures during the course of the disciplinary hearing.

(8) The claimant receives a level 2 warning at this hearing.

(9) The claimant's stated position at today's hearing is that things went wrong at the hearing because the investigating officer had not been properly trained and did not test the accuracy of witness statements. If so, then this has nothing whatsoever to do with the disclosures which were made.

(10) The claimant then goes on to set out in a timeline which would have to be clarified in that he is then absent from work for a time whilst issues are being sorted out. It is clear that the claimant is not prepared to accept the level 2 warning. The claimant considers that he was in the right and the respondent were completely wrong to give him a warning.

(11) The claimant's assertion is that he was given a disproportionate punishment because he had made these protected disclosures at the hearing. He does not refer to any comment of Mr Smith or his line manager Ms Bradford at any point in relation to the subject matter of his disclosures. Instead, it is clear that all of the discussions are around his general approach to practice and the incidents which led the respondent to call him to the meeting.

(12) The claimant is then subject to a further disciplinary investigation which is conducted by Mr Anderson. At this stage the matter under investigation appears to be a breakdown in his relationship with his manager and his undermining conduct towards his manager. Again, there is nothing that the claimant has alleged about any conversations linking these allegations to the original whistleblowing. The claimant's position is that during the course of this disciplinary he made further disclosures to Mr Anderson. He says the meeting lasted three hours and during it there was some eyerolling from

Mr Anderson. In any event, it is the claimant's own position that nothing came of this disciplinary investigation.

(13) At the meeting with Mr Anderson he alleges he made protected disclosures in relation to

a) a data protection breach

b) a possible housing benefit fraud

c) possible homophobia relating to disparate treatment of a resident.

(14) The claimant then refers to being invited to a further meeting which he does not attend.

49. I note that at an earlier stage in the proceedings Employment Judge Hosie explained to the claimant the concept of fair notice. If the claim proceeds to a hearing then in general terms the claimant will only be able to lead evidence in relation to facts of which the respondent already have notice of. The difficulty for the claimant is that even if the claimant were to successfully prove each and every fact which he has alleged then he cannot see how a Tribunal could make a finding in his favour.

50. The claimant has referred to the ***Macanovic*** case. In that case there was a clear link between what the Tribunal found to be protected disclosures and the breakdown in relationships. In this case there is nothing from the claimant at all dealing with such a link. In my view, looking through what the claimant has said with anxious scrutiny, what he is clearly saying is really no more than expanding on what he says in the third line of the paper apart to his ET1 namely

> "It became apparent to me quite soon that staff and management had a different understanding of the Housing Support role."

The claimant's own narrative suggests that this was the reason for any breakdown in relations with his line manager which occurred. The claimant has not averred anything in the way of conversations, emails, discussions or instructions from management which in any way refer back to the subject matter of any of his disclosures. I formed the view that the claimant saw the disclosures as simply being a mechanism which would give the tribunal jurisdiction to hear an ordinary unfair dismissal claim. He does not at any point link his dismissal back to the actual disclosures made

in any way. Despite being given every opportunity to do so he does not refer to the subject matter of the disclosures (privacy of residents, data protection breaches, housing benefit fraud, disparate treatment of residents etc) being referred to by the respondent at any point. On the contrary he says that the subject matter of the disciplinary hearing in August 2020 remained at the forefront of his mind during the whole of the rest of his employment and indeed that it was the dispute regarding the general approach which should be taken to his job which was at the route of the ongoing employment dispute. The overwhelming impression from having listened to his submissions was that he actually agreed with the respondent that the reason for his dismissal was the fact that he had a fundamental dispute with his manager about the way he did his job and that he considered her to be wrong and he to be right. His own case was that the 'aspirin' issue was a key issue in the mind of his manager. The aspirin issue predated his disclosures and had nothing to do with his disclosures.

51. From his pleaded case it would appear that it became obvious at the outset of his employment that the claimant's understanding of his role and that of the respondent were different. The respondent almost immediately bring the claimant to a disciplinary hearing in order to advise him of what they require and persuade him that what he has done is not what they are employing him to do. This is done prior to him making any disclosures. At the hearing he says that there are other people doing things wrong. There is absolutely nothing to suggest that this fact has influenced the respondent in any way. From the claimant's own case it is clear that what does exercise the respondent is that the claimant is clearly of the mind that he was taken to the disciplinary hearing entirely unjustifiably and that his approach is correct and that of the respondent is wrong. The respondent's position is that the claimant undermined his line manager. If the case proceeds to a hearing no doubt the hearing would spend a considerable time dealing with the respondent's case but at the moment I am not concerned with this. I am simply concerned about what the claimant is offering to prove in order to overcome the evidential burden which is on him. I should say I do not entirely agree with the respondent's representative that there is a legal burden of proof on the claimant. There

is however an evidential burden on him in that he requires to show on the balance of probabilities that the reason or principal reason for dismissal is the whistleblowing disclosures that he made.

52. In this case the claimant's own evidence is that there was a very strong difference of opinion between the parties about how the service should be run and how he should do his job. With regard to the second set of disclosures the claimant is not offering to prove any facts as to what Mr Anderson did with this information. The claimant's own position is that no disciplinary hearing came from it. He is not alleging that anything was said to him or the matter of these disclosures raised at any point subsequent to that. The claimant's entire case appears to be based on the premise that he was a good Housing Officer and should not have been treated in this way. He believes that the respondent behaved unreasonably. Had the claimant sufficient qualifying service then this is something the Tribunal could have become involved in. As it is however the Tribunal only has jurisdiction to hear a case if the claimant can prove facts from which the Tribunal could possibly draw the conclusion that the reason or principal reason for the dismissal was the making of protected disclosures. In this case despite being given every opportunity to do so I do not believe the claimant has set out these facts.

53. Essentially the claimant's position is that the respondent behaved so unreasonably in bringing him to a disciplinary and thereafter so unreasonably in dismissing him that there must have been some other underlying reason and that must be the making of protected disclosures.

54. Many employees with less than two years' qualifying service feel that their dismissal was extremely unfair. The definition of a protected disclosure is fairly widely drawn and, particularly in certain jobs, some employees probably find themselves in the position of making protected disclosures several times a week. In a job such as the claimant's which is in a highly regulated area any discussion of where things have gone wrong may well qualify as a protected disclosure. It cannot be the case that anyone who has made such disclosures is effectively exempt from the two year time limit. It cannot be the case that all they need to say is look my dismissal

was so unreasonable there must be some nefarious underlying motive and that must be because I made disclosures.

55. I have to say I come to this conclusion with considerable hesitation. Had the claimant, during the course of the hearing mentioned anything which amounted to alleging any incident which referred back to the disclosures then, as noted above, I would have allowed the claimant to further particularise his claim. Society rightly wishes to protect all whistleblowers.

56. What we have here however is a situation where the claimant from day one has been in dispute with his employer about the nature of his job. He wanted to do his job one way and his employer wanted him to do the job a different way. On the basis of what the claimant says their desire had nothing whatsoever to do with him making protected disclosures. The claimant's own position is that they simply adopted a different approach. It may well be that the respondent were wrong and the claimant is right. The Employment Tribunal is not however set up to make that decision. The decision I had to make is whether, if the claimant was able to prove all aspects of his case as set out in his pleadings then would he have no reasonable prospect of success. My view is that that is the case. I would refer to the first point made in to Cox v Addecco case that it is of no benefit to anyone if a hopeless case is pursued to a hearing. For this reason I will strike out the claim in terms of section 37(1)(a) on the basis that it has no reasonable prospect of success.

Employment Judge : Ian McFatridge
Date of judgment : 30 March 2023
Date sent to parties : 15 May 2023