Case Number: 1404274/2021

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Martyn Pitman	**v**	**1. Hampshire Hospitals NHS Foundation Trust** **2. Lara Alloway**

On 4 April 2023
Before: Employment Judge Rayner

Southampton ET, by VHS

Appearances

For the Claimant: Mr. Mark Sutton KC
For the Respondent: Mr. Jack Mitchell, Counsel

Judgment

1. The Claimant does not need to amend his claim.
2. If this is wrong and an amendment is required, it is granted in the terms applied for.
3. The Claimants claim that he was subject to detriment for having made alleged disclosure 2, being the alleged disclosure made disclosure verbally to Alex Whitfield on 7 November 2019, is struck out on the grounds that it has no reasonable prospect of success.
4. The Respondent's Application to strike out the remaining protected disclosures is dismissed.
5. The Respondent's application for a deposit order in respect of the claims is dismissed

Reasons

6. This Preliminary Hearing has been listed at the direction of Employment Judge Roper at an earlier case management hearing which took place on 5 January 2023. The following matters were identified for determination at today's hearing:-

   (i) whether C is entitled to rely upon Disclosures 1, 2 and 5.

   (ii) whether any or all of C's claims should be struck out as having no reasonable prospect of success (under Rule 37 of the Employment Tribunal Rules of Procedure);

   (iii) Whether any or all of C's claims should be subject to a Deposit Order as having little reasonable prospect of success (under Rule 39 of the Employment Tribunal Rules of Procedure);

   (iv) to review the directions relating to the full hearing and in particular the number of witnesses likely to be called and its duration.

7. The Claimant brings claims that he has been subject to detriment for making public interest disclosures by the Respondent.

8. The purpose of today's hearing was to consider whether or not the protected disclosures recorded in the case management order are the ones which he can rely on, without the need to make an application to amend. The Respondent asserts that some of the protected disclosures were not pleaded and that therefore such an application is required.

9. If such an application is required, then I am asked to determine that application.

10. In his claim form and particulars of claim the Claimant has set out in some detail both the background and the chronology of the matters which led to him bringing his claim to the employment tribunal.

11. In paragraphs 31 to paragraph 40 under the heading *claims*, the Claimant has set out a variety of disclosures which he says were qualifying disclosures and the detriment which he says he was subjected to by the Respondent since making those disclosures.

12. From reading the claim form, it is reasonable to assume that the detriment the Claimant relies on as having been caused by the disclosures he says he made, is the information which he has set out at paragraph 31 onwards.

13. The Respondent defended the claim and provided a detailed response both to the matters set out at paragraph 31 onwards but also to the narrative about the background and chronology set out from paragraphs 1-30.

14. The Respondent then asked for further and better particulars of the Claimant's claim and asked specific questions about the alleged disclosures set out from paragraph 31 onwards.

15. The Claimant provided further and better particulars.

16. In advance of the case management hearing which took place before Employment Judge Roper on 5 January 2023, the parties had started to draft a list of issues. The Claimant had provided an initial draft which had been emailed to the Respondent and the Respondent had made some comments on that draft . This document was emailed to the employment tribunal by the Respondent solicitors who said of it,

In respect of the attached List of Issues, as referred to at 4.1 in the agenda, the document is the latest version of a travelling draft between the parties

containing amendments on behalf of the Respondents. The draft document was initially provided to us by the Claimant, however, we note that the Claimant's representative has today filed with the Tribunal a substantially amended and different draft of the List of Issues, deleting numerous issues.

17. Counsel for the Claimant referred us to this document at the start of his submissions. The document had not been included in the bundle of documents which was provided for the purposes of this hearing. It is a document which sets out the Claimants list of issues in the case and includes a number of protected disclosures with which the Respondent takes issue.

18. That bundle, which is some 500 pages was initially produced by the Respondent solicitors in advance of the hearing of the 5th of January. That hearing had initially been intended to deal with the Respondent's application for strike out of certain aspects of the Claimant's claim. I accept that it was not an agreed bundle and I also accept that the documents contained within it may not give an entire picture or indeed the whole context in respect of either the disclosures made or the detriments the Claimant relies upon.

19. After some discussion with both counsel today, it was agreed that the document referred to by the Claimant would be added to the bundle on the basis that both parties accepted that it was not an agreed list of issues, but that it did set out the Claimant's view of what the issues in the case were, as at 5 January 2023 and that the document was one of which the Respondent was aware at that point in time.

20. The relevance of that document, says the Claimant counsel, is that it does provide detail about the disclosures the Claimant relies upon. This document identifies clearly that as well as the disclosures set out under the heading ***claims*** within the particulars of claim, that the

Claimant is intending to rely on three other matters as being protected disclosures.

21. The Claimant asserts that these three matters are adequately set out within the pleaded case and capable of being identified as disclosures on which the Claimant is relying. The Respondent asserts that they have not been pleaded as protected disclosures and as such an amendment is required, and that no such application to amend has been made and were it to be made the Respondent would object to it.

22. For the purposes of today's hearing I have been provided with detailed and helpful skeleton arguments both from the Claimant and from the Respondent. I am grateful to both counsel. I have also been provided with a bundle of authorities.

23. The starting point for consideration of the first question arising from the case management order of Employment Judge Roper is whether or not the Claimant is able to rely on the three disputed disclosures or not.

24. Paragraph 16 of the Claimant's skeleton argument states as follows;

It is understood (CMD§60) that the challenge to these disclosures is based on an issue as to whether they were identified specifically as disclosures in the Claim and,
whether their identification subsequently, prevents the Claimant from relying on
them.

25. It goes on to state that the Claimant's position is that if an application to amend is necessary, it seeks to amend its claim to include the detriments set out and recorded in the CMO of 5 February 2023. This records to the satisfaction of the Claimant the basis of each disclosure.

26. Whilst this application to amend lacks the formality of having been made in advance of the exchange of skeleton arguments, it has made

it on notice to the Respondent and in advance of a hearing at which it can be determined. It does therefore satisfy the rule of procedure of the ET.

27. I am being asked to determine whether the case as pleaded sets out sufficient information about disclosures so that the clarification now provided could be regarded as a relabelling exercise, or if not, whether there is sufficient information within the claim form, or other circumstances which mean that the court ought to grant an amendment to add in the three disputed disclosure's to the Claimants claim.

28. Both Claimant and Respondent have made forceful and detailed arguments in respect of the three disputed disclosures.

29. Submissions for the Respondent rely upon the Claimant's formal pleadings having identified specific disclosures which were being relied upon as **claims**. The Respondent asserts that this must mean that any other information was not being relied on as a claim and therefore was not pleaded as such.

30. The Claimant asserts in their skeleton argument with that they have set out in detail the facts and context on which they rely, which includes, in the body of the 1claim form or the particulars of claim, reference to those three disclosures of information.

31. I have therefore considered the Claimants pleaded case in some detail.

32. First it is right that the claim does make reference to information and discussions about all three of the disputed alleged disclosures.

33. I agree with the Respondent's criticism that the pleaded case is not particularly clear but on a fair reading, it is possible to understand that the Claimant is asserting that he disclosed information to the individuals he has identified on the occasions he identifies. In so afar

as it is unclear whether or not he relies on all the disclosures in the ET1 or only the ones in the section **Claims**, he has subsequently clarified that he considers that these were also causative of the detriment which he suffered.

34. I have therefore considered whether or not these pleaded facts are sufficient to enable a relabelling exercise to take place. In essence the is this a case where facts already set out are being brought from the background to the foreground and re labelled as disclosures.

35. One criticism made by the Respondent is that the information provided within the claim form does not identify what was said on each occasion. This is correct.

36. However, the Claimant asserts in response that it does not have to be set out at that stage. All that is required, the Claimant says , is for the elements of section 47 ERA 1996 to be set out. This requires an assertion by the Claimant that

    a. he has disclosed information
    b. which is in the public interest
    c. and that he has been subjected to detriment because of making those disclosures.

37. Both parties have referred me to a wealth of case law which sets out what is required in order to prove a whether or not a public interest disclosure has been made and that the public interest disclosure made is causative of detriment .

38. The question I have to determine is whether or not the elements of the clam of whistleblowing have been set out in the claim form or not. The case law on proving claims at the later stage are not of great assistance in answering that question.

39. I have also been referred to both **Selkent** and **Vaughn v Modality** in respect of the necessary considerations and legal principles when considering whether or not an application to amend is required, or whether a matter is a relabelling exercise, and if and application is required, the circumcentres in which it should be granted and the factors that an ET should consider.

40. The relevant principles to consider in respect of an application to amend are set out in Guidance Note 1 to the 'Employment Tribunals (England & Wales) Presidential Guidance – General Case Management (2018)'. The principles, which largely codify previous guidance set out in the case of ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836, state that:

a. In the case of substantial, not minor, amendments, the Tribunal must consider all of the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it (paragraph 3).

b. In deciding whether to grant such an application, the Tribunal must carry out a balancing exercise of all of the relevant factors, having regard to the interests of justice and relative hardship that will be caused to the parties by granting or refusing the amendment (paragraph 4).

41. The relevant factors include:

a. whether the amendment applied for is a minor matter or a substantial alteration, describing a new complaint (paragraph 5.1).

b. If a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended (paragraph 5.2)

c. The applicant needs to show why their application was not made earlier and why it is being made at this time (paragraph 5.3).

42. In ***Vaughan v Modality Partnership*** [2021] ICReffect of allowing or disallowing an amendment would be. In summary:

This judgment may serve as another reminder that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the balancing exercise properly. The balancing exercise is fundamental. The Selkent factors should not be treated as if they are a list to be checked off."

43. I have reminded myself of the principles set out in ***Selkent Bus Company Limited V Moore*****.** In that case the Employment Appeal Tribunal considered what the circumstances that should be taken into account in balancing the injustice and hardship of allowing the amendment against the injustice and hardship or refusing it. The first consideration is the nature of the amendment itself. Is the party seeking to add details to an existing claim, or to s substitute different labels to facts which have already been pleaded, or are they seeking to amend by making an entirely new factual allegation which changes the basis of the existing claim?

44. In this case, the only claim being made by the Claimant is that he has been subjected to detriment because he made protected disclosures.

45. In his pleadings he has set out the factual basis of his claim. The fact that he has not identified under the final heading *claims*, three of the matters which he now seeks to rely upon as being protected to disclosures, does not detract from the fact that he has referred to each of them, and has set out that conversations took place or letters were written at certain times to certain individuals. He has set out facts which are capable of

being disclosures, and he has already made a claim that he was subject to detrimental treatment because of making disclosures. What he seeks to do is to re label them as additional protected disclosures which were causative of the same detriments.

46. Nor is he seeking to add a new public interest disclosure claim, since he is not seeking to add any new detriments.

47. In my judgment, this is not a new claim. It is at most, a relabelling of the facts set out already and does not require a technical application to amend, although it did require clarification from the Claimant.

48. The Claimant has been professionally represented and has chosen to plead his case in a particular and specific way. It is entirely understandable that the Respondent accepted the Claimants pleaded case at face value. The Respondent is not required to second guess the Claimant nor is it required to search through the detailed claim form to see whether or not there might be any other claims looking in the background.

49. The Claimant might have saved a great deal of time and effort had they simply identified that they wished to clarify the claim that they were bringing at an early stage, and identified the three alleged disclosures as being ones which the Claimant wished to rely upon. Nonetheless having now provided that clarification, it is in my judgement that with the provision of additional disclosures by way of clarification, there is no requirement on the claimant to make an application to amend.

50. If I am wrong, I have considered whether the amendment should be allowed in any event.

51. I have considered the practical implications for the Respondent of granting and to the Claimant of not granting the amendment.

52. For the Respondent, there is a practical consequence that they will have to consider what evidence they are able to call to

challenge what has been said, and to whom, and they will face some difficulties in some respects, since two women who have been named have left the organisation .

53. Prior to the hearing the Respondent will need to provide amended pleadings but having already provided a detailed response to the specific disclosures relied upon and the narrative and given the date of the final hearing there is sufficient time to enable the Respondent to do this without impacting upon that final hearing.

54. Similarly there may be some impact on the number of witnesses called and there may be some need for additional documentation there is sufficient time for these matters to be addressed prior to hearing and it is highly unlikely that either will significantly impact on the length of the hearing.

55. For the Claimant, the practical consequence of not allowing the amendment would be to deny him to rely on factual matters which he has set out within the body of an in time claim. this would be a significant prejudice to him.

56. Insofar as an application to amend is required and applying the legal principles set out in ***Vaughan v Modality Partnership*** EAT [2021] ICR . I conclude that the balance of hardship would be against the Claimant in this case where I to refuse an amendment and I therefore grant the amendment insofar as it is required.

Strike out application

57. The Respondent asserts that the Claimant's claim has no reasonable prospect of succeeding and should be struck out. The Respondent sets out the strike out applicant on 4 grounds as follows:

Ground 1

(i) certain of the alleged disclosures included in the List of Issues [as summarised at Order 62.2.1.1] have not been pleaded (namely disclosure Nos: 1, 2, and 5) and no application to amend is before the Tribunal;

Ground 2

(ii) the alleged disclosures are not capable of amounting to qualifying disclosures for the purposes of s.43B ERA;

Ground 3

(iii) certain of the alleged headings of detriment are time-barred by virtue of s.48(3)(a) ERA and no evidence has been adduced to support an extension of time under s.48(3)(b) on the ground that it was not reasonably practicable to present such complaints in time.

Ground 4

(iv) dependant upon the Tribunal's ruling in relation to (i) and (ii) above, certain headings of detriment fall to be struck out insofar as they are said to be based on disclosures which have themselves been struck out.

58. Counsel has provided extensive legal argument of the legal tests which the tribunal will need to apply in order to determine whether or not the Claimant has made public interest disclosures.

The legal principles relevant to the question of strikeout.

59. The relevant parts of section 43B(1) provide as follows:

"43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure " means any disclosure of information which, in

the reasonable belief of the worker making the disclosure, is made in the public interest

and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be

committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal

obligation to which he is subject,

(c) …..,

(d) that the health or safety of any individual has been, is being or is likely to be

endangered,

(e) …., or

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

56. The relevant principles relating to the application of this provision for present purposes can be summarised as follows:

a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, Tayside Public Transport Company Limited v Reilly [2012] IRLR 755 at paragraph 30.

b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success" : see, for example, paragraph 26 of the Judgment of the Court of Appeal in the Ezsias case (supra).

c. The court or tribunal should not conduct a mini- trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of Ezsias.

57. In a protected disclosure claim, the disclosures need not be factually correct, nor amount to a breach of a legal obligation, criminal offence or endangerment of health and safety, provided that the Claimant reasonably believed them to be so, see ***Babula v Waltham Forest College [2007***] IRLR 346.

58. The requirement is for the disclosure of information; i.e. conveying facts. It is not enough to make an allegation, see ***Cavendish Munro v Geduld*** UKEAT/0195/09. The mere expression of an opinion does not tend to show that the Respondent is likely to be in breach of any legal obligation, see Goode v Marks & Spencer Pic UKEAT/0442/09.

59. Williams v Michelle Brown AM UKEAT/0044/19/OO, His Honour Judge Auerbach identified five potential issues where an ET is required to decide whether an utterance by a worker amounted to a "qualifying disclosure" as defined:

60. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

61. In an application to strike out on the no reasonable prospect ground, the ET may be able to take a less rigorous approach, given that it is only concerned with whether an ET could properly find that there was a qualifying disclosure. But even in the context of a strike out application it is important for the decision maker to be clear as to what the legal issues will be a trial, what the competing cases are in relation to those issues and how they will be determined.

62. The first section 43B(1) question: what information , if any, was disclosed?

63. The first stage is to identify the information disclosed by the worker which is said to amount to the qualifying disclosure. This is crucial because section 43B(1) requires the tribunal to go on to consider whether the Claimant's beliefs about that information fell within the section and, if the conclusion is that there was a qualifying disclosure, whether the disclosure of that information was a, or the, reason for the treatment complained of, depending on whether the complaint is victimisation contrary to section 47B of the 1996 Act, or automatic unfair dismissal contrary to section 103A.

The leading authority on the first section 43B(1) question is Kilraine v London Borough of Wandsworth [2018] ICR 1850 CA,

The Court of Appeal held in ***Kilraine*** that an allegation may or may not disclose information; the question whether it does, requires the ET to look at what was said by the worker in the context in which it was said: see paragraphs 30 to 34 of the Judgement of Sales LJ in particular. I observe that this is of particular relevance in this case, where the Claimant relies heavily on the context within which he says he made his statements.

64. As to whether there are any qualitative requirements in relation to the information which is said to have been disclosed, Sales LJ said at paragraph 35 :

"*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content*

and specificity such as is capable of tending to show one of the matters listed in subsection (1).”

65. . That, then, is the test to be applied in deciding the first of the five section 43B(1) questions. on an application to strike out, an ET is entitled to look at a written communication which is said to satisfy section 43B(1) and consider whether that communication has a sufficient factual content and is sufficiently specific to be capable of satisfying the other requirements of section 43B(1).

66. However this is not all the ET can look at. Sales LJ held that even when deciding whether “information” was disclosed, evidence as to context is relevant and therefore admissible. Thus, at paragraph 36 he stated:

“36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters.” (emphasis added)

67. At paragraph 41, he went on to say

It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the Cavendish Munro case

68. However, there is a need for care: Information can be disclosed within an allegation. The concept of “information” is capable of covering statements which might also be characterised as allegations. The correct question is to ask whether the disclosure contained information of sufficient factual content and specificity that it is capable of showing one of the matters listed in section 43B(1). This is a matter of evaluative judgment in light of the facts and the

context in which it was made, see Kilraine v London Borough of Wandsworth [2018] ICR 1850 CA.

Alleged Disclosure 2

69. The first disclosure which the Respondent applies to strike out is alleged disclosure 2. The Claimant alleges that he made a disclosure verbally to Alex Whitfield on 7 November 2019. The assertion is that in the course of the discussion he proposed to Miss Whitfield that a committee be set up to consider the validity of complaints against doctors before proceeding to a formal investigation.

70. The Claimant asserts that he has made a protected disclosure that

    a. a person has failed is failing or is likely to fail to comply with a legal obligation to which he is subject43(1)(b) ERA)and full/or that

    b. the health or safety of any individual has been or is being or is likely to be endangered 43(1)(d) ERA.

71. the Claimant's argument in respect of this disclosure is that the context of his suggestion was what he considered to be a vexatious grievance, resulting in an investigation into the Claimant, arising from retaliation for genuine safety concerns raised by him.

72. Taken at its highest, the Claimants allegation is that he made a suggestion for a committee to consider the validity of complaints against doctors and that the context of his suggestion was his concerns about a vexatious grievance.

73. The context of this is evident from the Claimant's claim to the employment tribunal. He alleges that he was dissatisfied with allegations made against him and the investigation of those allegations. He therefore asserted that a committee should be set up to investigate such matters. It is difficult to understand

how this statement, or suggestion alone can amount to can amount to a disclosure in the public interest that the Respondent is failing to comply with a legal obligation (indeed I do not understand from the Claimants pleaded case or from the lengthy skeleton argument what the legal obligation relied upon is said to be,) or that such a suggestion can amount to the disclosure of information tending to show a potential threat to somebody's health and safety.

74. I have reminded myself both of the seriousness of strike out and also of the need to take the Claimant's case at its highest when considering strike out. In this case it is my judgement that the Claimant has no reasonable prospects of proving that the suggestion that a committee be set up to investigate satisfies the requirements of section 43 ERA on the grounds he has asserted, even when looked at in context. **I therefore strike out this part of the Claimant's claim.**

Alleged disclosure 3.

75. The Claimant asserts that he made a disclosure in his letter of the 4th of September 2020. I have been referred to a copy of it in the bundle. Much of the letter concerns the Claimant's own internal appeal and is not relevant. The part that the Claimant relies upon reads follows

…critical aspects of Kevin Harris's investigation statement and signed transcript were fabricated to cover up his, now clear and undeniable, managerial incompetence in failing to take any appropriate action when very serious concerns had been raised with him and the then Head of Midwifery back in 2018. In so doing, this pre-meditated decision meant that Kevin Harris (and Janice McKenzie) not only directly jeopardised patient safety in our department but also corrupted investigation and threatened career. The deliberate inertia of both of these individuals directly contravened their professional responsibilities as senior NHS Managers as stipulated in their respective GMC / NMC

guidelines. I stated that I remained deeply concerned, provided with this information in your position as Chief Medical that you seemed reluctant or even unwilling to either investigate this or to indeed take the requisite, appropriate action

76. The context of this letter is that the Claimant had previously made a number of complaints which have been investigated. His allegation appears to be that KH fabricated a statement, covering up his management incompetence and thereby jeopardised patient safety.

77. Is this statement one which contains no disclosure of specific factual content capable of amounting to a qualifying disclosure, as submitted by the Respondent. Are the comments made simply assertions rather than providing any specific factual information?

78. I remind myself that a disclosure may well refer back to a previous document or another document. It must be looked at in context. I have not had the benefit of reading all the documentation and I have not had the benefit of hearing all the evidence.

79. I remind myself that when considering whether or not to strike out an allegation at an early stage on the grounds that it has no reasonable prospects of success I must take the case at its highest, and whilst I agree with the Respondent that the Claimants reliance upon this individual disclosure alone would pose significant problems, I cannot determine without hearing evidence that in context it may not be shown to be a disclosure of information. I cannot conclude that there are no reasonable prospects of this Claimant establishing that he made a protected disclosure on that date in that letter. The Respondents application to strike out alleged disclosure 3 is therefore refused.

Alleged disclosure 4

80. The Claimant alleges that his email of the 26 February 2021 to Steve Erskine, Jane Tabor + Gary McRae contains a qualifying disclosure tending to show a breach of a legal obligation and or a real danger to health and safety.

81. The Claimant asserts the legal requirement relied upon was the Respondent's alleged express or implied duty to comply with its own national guidance when dealing with workplace issues. I have been referred to the email which states, as relevant, as follows.

I would welcome the opportunity to meet with you virtually to feedback my experiences and reflections over the last 2 years, having been subjected to a Trust Disciplinary Investigation throughout this protracted time period. I also have recommendations that I wish to make that are relevant both to the Trust's handling of my but also I believe, are potentially critical for the future health and wellbeing of every member of the HHFT workforce.

82. There is no disclosure of information within this e-mail about any failure on the part of the trust to comply with the legal obligation set out by the Claimant in the further and better particulars. The assertion that the Claimant has feedback to make which he thinks is critical is not, in my judgement, capable of amounting to a disclosure of information tending to show a breach of that legal obligation.

83. The Claimant also relies upon the disclosure of information tending to show a danger to the health and safety of others.

84. The Claimant makes a statement that he considers his suggestions or recommendations are critical for future health and well-being. The information disclosed is that the Claimant has suggestions to make. It is not suggested that the healthful safety of any individual has been; is being or is likely to be endangered.

85. Taken at its highest the suggestion can be read that the Claimant believes there to be unspecified future potential risks to the health and safety of others and he has suggestions for averting those risks. This is a statement about managing future risks. I understand from the information I have before me that this statement is made in the context of a long running dispute between the Claimant and the Respondent; part of which is about management of the health and safety of staff.

86. However in respect of both claims the Claimant asserts that he reasonably believed this was a disclosure of information, that a person had failed was likely to fail to comply with the legal obligation or in respect of the health and safety matter. The letter has a context, and I cannot say at this stage whether or not the context within which it is made might be sufficient for it to satisfy the requirements of section 43B.

87. This is a case where it will be necessary for the tribunal to hear all the evidence before deciding whether or not these comments are capable of, and do amount to protected disclosures.

88. I therefore dismiss the Respondent's application to strike out this part the Claimants claim.

The Time point

89. The Respondent has included in its application for strike out aground which was not identified in the original case management order of Employment Judge Roper to be dealt with at today's hearing.

90. Having heard submissions from the parties it is my judgement that the matter of time limits is better determined at final hearing. It would be necessary to determine the point at which each of the detriments was alleged to have taken place. Those findings of fact are properly matters for determination at final hearing.

Deposit Order

91. The Respondent applies for deposit orders in respect of the claims brought by the Claimant which they assert have little reasonable prospect of succeeding.

92. Both the Claimant and the Respondent urged me to draw conclusions about factual matters raised by the Claimant. I have heard detailed submissions from both of them and have been referred to a number of documents a chronology of events and a quantity of law and legal principles

93. With no disrespect to the detailed submissions which I have heard in essence the difference in approach is that I am urged by the Respondent to analyse each individual allegation to see whether or not it has merit by itself. On the other hand, the Claimant position is that his claims can only be understood in the context of the whole, because what he said had a context, which was known and understood by those he says subjected him to detriment.

94. The detailed analysis of the Claimant's case put forward by Respondent counsel suggests that there are indeed weaknesses in the claims brought by the Claimant in some respects. However I remind myself of the guidance ***in Kilraine*** that an allegation may or may not disclose information; the question whether it does, requires the ET to look at what was said by the worker in the context in which it was said.

95. In respect of the disclosures which I have not struck out, I am not able to say that they have little reasonable prospect of succeeding so that a deposit order would be appropriate. in information that I have before me it is possible for the Claimant to establish that he was providing information in context about one of the matters that he relied upon.

96. I therefore declined to make a deposit order in respect of any of the remaining alleged protected disclosures and dismiss the Respondents application in that respect.

Case Management Orders

97. In light of the decision set out above I have reviewed the case management orders made by employment judge Roper and some amendment is required. first the Respondent will be given leave to file an amended ET3 if so advised and secondly the time frame within which witness statements were to be exchanged and any relevant documents provided will be adjusted.

98. A separate case management order will be sent out to the parties.

Employment Judge Rayner
Date: 15 June 2023

Judgment sent to the Parties: 29 June 2023

FOR THE TRIBUNAL OFFICE