Case: 1800872/2022

EMPLOYMENT TRIBUNALS

Claimant: **Ms N Montana**
Respondents: **(1) Care Quality Commission**
(2)Gill Nicholson
(3) Ian Trenholm
(4) Rebecca Lloyd-Jones
(5) Kate Terroni
(6) Alison Chilton
(7) Peter Wyman
(8) Gina Georgiou
(9) Jacqueline Jackson
(10) Kirsty Shaw
(11) Karen Burrow
(12) Sally Cheshire

AT A PRELIMINARY HEARING

Heard at: **Leeds by CVP video conferencing** **On: 9 December 2022**
Before: **Employment Judge Deeley**

Representation
Claimant: In person, assisted by Ms R Ward
Respondents: Mr T Brown, counsel

RESERVED JUDGMENT

1. The following complaints are dismissed on withdrawal by the claimant during the preliminary hearing on 9 December 2022 under the Employment Rights Act 1996 (the "**ERA**"):
   1.1. Health and safety related detriment (s44 ERA);
   1.2. Automatically unfair dismissal related to Health and Safety (s100 ERA);
   1.3. Victimisation (related to disability); and
   1.4. a complaint of failure to provide a written statement of reasons for dismissal (s92 ERA).

2. The following complaints of protected disclosure detriment under s47B ERA shall proceed against the respondents named in the table below only:

Dates	**People involved and job titles**	**What happened (i.e. what was said, to whom, in writing/in a meeting/by phone etc.)**	**Type of complaint alleged**
12 November to 8 February 2022	Gina Georgiou	See paragraphs 9 of the claimant's ET 1 attachment, particularly paragraph 9.1.10.	Whistleblowing detriment (against Ms Georgiou only)
Shortly before 17 November 2021	Alison Chilton	Alison Chilton prepared a letter terminating the claimant's employment which involved *"The deliberate construction of untruthful grounds to be intentionally relied upon"*.	Whistleblowing detriment (against Ms Chilton only)

3. To the extent that the claimant has brought any other protected disclosure detriment complaints under s47B ERA against any of the respondents to this claim, such complaints are struck out.

4. The applications made on behalf of the First Respondent for strike out and/or a deposit order in relation to the claimant's complaints of:
   4.1. protected disclosure detriment; and
   4.2. automatically unfair dismissal (relating to protected disclosures) are rejected.

REASONS

The reasons for this judgment are set out in the Annex to this document.

_____
Employment Judge Deeley
28 December 2022

JUDGMENT SENT TO THE PARTIES ON
9 January 2023

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ANNEX (extracts from preliminary hearing summary/case management orders of 28 December 2022, as amended on 6 February 2023)

Background

9. This section summarises my understanding of the background to these claims, after discussions with the claimant and the respondent during the Preliminary Hearing. No findings of fact were made during the Preliminary Hearing.

10. This claim has previously been case managed by:
    10.1 Employment Judge Knowles at a hearing on 25 April 2022;
    10.2 Employment Judge Davies on the papers on 3 August 2022; and
    10.3 Employment Judge Lancaster on 2 September 2022.

11. The background to this claim is set out in Employment Judge Knowles' preliminary hearing summary.

Claims and Issues

12. The claimant submitted a claim form on 20 February 2022, following ACAS early claim conciliation against the Care Quality Commission (the "**CQC**") from 29 December 2021 to 21 January 2022. The claimant also named eleven individual respondents and produced ACAS early claim conciliation certificates for each of those, the dates of which differed slightly from the dates on the certificate relating to the CQC.

13. References in this Judgment to the "**ERA**" are to the Employment Rights Act 1996. References to the "**EQA**" are to the Equality Act 2010.

14. Prior to this hearing, the following complaints were dismissed on withdrawal:

    14.1 **Holiday pay** – Employment Judge Knowles at the preliminary hearing on 25 April 2022 (see paragraph 21);
    14.2 **Disability discrimination based on mental health impairment** – Employment Judge Davies on 3 August 2022;
    14.3 all complaints based on **philosophical belief** – Employment Judge Davies on 3 August 2022.

15. The claimant had also stated at the start of this hearing that she wished to bring a complaint of a failure to provide a written statement of reasons for dismissal. However, she withdrew that complaint on the basis that she did not meet the requirements of s92(2) ERA – i.e. the respondent provided a written statement of the reasons for dismissing the claimant without the claimant having to request the same.

16. The claimant withdrew the complaints set out below during this hearing and they have been dismissed on withdrawal with the consent of both parties:

    16.1 **Health and safety related detriment** (s44 ERA);
    16.2 **Automatically unfair dismissal related to Health and Safety** (s100 ERA);

16.3 **Victimisation (related to disability)**; and
16.4 a complaint of **failure to provide a written statement of reasons for dismissal** (s92 ERA).

17. Employment Judge Lancaster struck out the following complaints after a preliminary hearing on 2 September 2022:

17.1 **indirect disability discrimination** (s19 EQA);
17.2 **Failure to make reasonable adjustments** (s20 EQA);
17.3 **Automatically unfair dismissal on the basis that the claimant asserted a statutory right** (s104 ERA); and
17.4 **Disability-related harassment save as set out at paragraph 3 of his Judgment dated 2 September 2022** (s26 EQA).

18. The claimant's remaining complaints are:

18.1 **PIDA detriment** (s43B ERA) – **two complaints only** consisting of:
18.1.1 **one complaint against Alison Chilton**;
18.1.2 **one complaint against Gina Georgiou**;
as set out in the List of Issues at the Annex to this document.

18.2 **Automatically unfair dismissal related to PIDA** (s103A ERA) against the CQC only (as the claimant's employer);

18.3 **Ordinary unfair dismissal** (s98 ERA); and

18.4 **Disability-related harassment (s26 EQA) limited to the three complaints set out by Employment Judge Lancaster** in his Judgment of 2 September 2022. **The harassment complaints are brought against the CQC only** (as previously recorded by Employment Judge Davies). (The respondent does not accept that the claimant's condition that she describes as multiple allergies amounts to a disability for the purposes of s6 EQA. The parties confirmed that all case management orders relating to disability status have been complied with).

19. <u>The list of issues at the Annex sets out the claimant's complaints that will proceed to a final hearing.</u> <u>This shall be treated as the complete list of issues that the Tribunal will decide at the final hearing of this claim, unless the Tribunal at that hearing decides otherwise.</u>

Applications during this hearing

20. Employment Judge Lancaster arranged this one day hearing to consider the points set out at paragraph 3 of his case management orders of 4 September 2022:

"3.1 Does the Claimant require leave to amend her claim in respect of any allegations of protected disclosure detriment (section 47B Employment Rights Act 1996) or health and safety detriment (section 44 Employment Rights Act 1996) and/or automatically unfair dismissal under section 103A or 100?

3.2 If so should leave to amend be granted?

3.3 Should any of the complaints under sections, 44, 47B, 100 or 103A be struck out as having no reasonable prospect of success or, alternatively, be made subject to a deposit order because they have little reasonable prospect of success?

3.4 If disability is still in issue what further directions should be given for determination of the questions as to whether or not the Claimant meets the definition of a disabled person under the Equality Act 2010; in particular should there be a further preliminary hearing to decide this issue?

3.5 Is the Claimant still pursuing an application for an order under rule 50 of the Employment Tribunals Rules of Procedure 2013? If so what are the precise terms of the order sought and on what grounds?

3.6 If so, should any order under rule 50 be made?

3.7 What are the outstanding issues in the case?

3.8 What further case management directions should be given, including if appropriate for the listing of a final hearing?"

21. I also note that the claimant has an outstanding application for costs. This was not dealt with during this hearing.

22. The claimant confirmed during this hearing that:
    22.1 she wished to withdraw the complaints set out earlier in this document; and
    22.2 she did not wish to make an anonymity application under Rule 50.

23. The respondent also confirmed that it disputes that the claimant's condition of 'multiple allergies' amounted to a disability for the purposes of s6 of the Equality Act 2010.However, the respondent that no further orders were required in relation to this issue because the claimant had already complied with the previous case management orders.

Relevant law for applications

24. Many of the considerations under the parties' applications overlapped (e.g. the prospects of the complaints). I heard submissions dealing with the points raised by the parties together, because it would have been artificial to try and separate out the various applications.

25. The law that I considered in reaching my conclusions set out below included the matters referred to below.

Whistleblowing - detriments and dismissal

26. S47B(2) states that the provisions of section 47B (i.e. the right not to be subjected to a detriment because an individual made a protected disclosure) does not apply where the detriment in question amounts to a dismissal. However, this provision does not apply to dismissal-related detriment complaints brought against fellow workers (*Timis v Osipov* [2018] EWCA Civ 2321). The Court of Appeal's judgment at paragraph 91 stated:

"(1) It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). All that section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.

(2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, section 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply."

Applications to amend

27. The Tribunal's power to consider amendments to a claim is set out in the Employment Tribunal Rules 2013 which are contained in Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the "**Rules**"). The overriding objective of the Rules is set out as follows:

"2. Overriding objective

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

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

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

28. The specific rules which contain the powers are Rule 29 which permits the Tribunal to make case management orders and Rule 41 which allows the Tribunal to regulate their own procedure in the manner they consider fair, having regard to the overriding objective set out above. Amendments are thus a matter of judicial discretion.

29. The starting point when considering the issues raised by claims is the Employment Appeal Tribunal's guidance in the case of *Chandok v Tirkey* [2015] ICR 527 at paragraphs 17 and 18 (with my emphasis underlined):

"17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, <u>the starting point is that the parties must set out</u>

the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence….

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

30. I have also considered the guidance on amendment applications set out in *Selkent Bus Co Ltd v Moore* [1996] ICR 836, subsequent caselaw and Guidance Note 1 to the Employment Tribunal's Presidential Guidance on General Case Management (2018). I note that the Court of Appeal judgment in *Adedeji v University Hospitals Birmingham NHS Trust* [2021] EWCA Civ 23 stated that the Tribunal is not required to refer to the list of factors set out in s33(3) of the Limitation Act 1980 as a checklist.

31. The guidance provided by Mummery LJ in *Selkent* included the following (with my emphasis underlined):

"(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

32. The time limits relating to whistleblowing detriment and automatically unfair dismissal complaints are set out in the ERA. The time limit of three months and the 'not reasonably practicable' test are in similar terms under s48 ERA (in relation to detriment complaints) and under s111 ERA (in relation to unfair dismissal complaints):

"s48(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented –
(a) Before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failure, the last of them, or
(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

48(4) For the purposes of subsection (3) –
a) Where an act extends over a period, the 'date of the act' means the last day of that period, and
b) A deliberate failure to act shall be treated as done when it was decided on…"

"s111(2)…an [employment tribunal] shall not consider a complaint under this section unless it is presented –
a) Before the end of the period of three months beginning with the effective date of termination, or
b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

33. The test as to whether it was not reasonably practicable to present a complaint within the three month time limit is a strict one. "Reasonably practicable" has been held to be synonymous with "reasonably feasible" (see, for example, *"Palmer v Southend on Sea BC* [1984] ICR 372; *Walls' Meat Co. Ltd v Khan* [1978] IRLR 499).

34. I note that where a claimant is generally aware of his rights, ignorance of the time limit will rarely be acceptable as a reason for delay (see, for example, *Trevelyans (Birmingham) Ltd. v Norton* 1991 ICR 488, EAT).

Strike out (Rule 37)

35. The Tribunal has the power to strike out all or part of any claim on grounds, including if the complaint is scandalous, vexatious or has on reasonable prospect of success under Rule 37.

36. In ***Cox v Adecco and ors [2021] ICR 1307*** the EAT stated that, 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. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are: "*Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is*".

37. In ***Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*** the Court of Appeal upheld a decision of the EAT (Elias J, sitting alone) which had allowed a claimant's appeal against an order of an Employment Tribunal striking out his unfair dismissal claim. Maurice Kay LJ said at paragraph 29:

> *"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."*

Deposit order (Rule 39)

38. The Tribunal has the power to make a deposit order in relation to any specific allegation or argument in a claim if it has little reasonable prospect of success. The Tribunal must make reasonable enquiries into the paying party's ability to pay the deposit when deciding the amount of any deposit (up to £1000).

Applications re claimant's alleged protected disclosures and alleged detriments

39. I heard submissions from both parties on the matters and applications by each party set out at paragraphs 3.1 to 3.3 of Employment Judge Lancaster's case management orders. There was a delay to the start of those submissions due to some confusion over the documents that had been provided to the respondent's representative. However, the respondent's submissions totalled around 30 minutes (including their response to the claimant's submissions). The submissions of the claimant and Ms Ward totalled around one hour and ten minutes. In addition, the claimant and Ms Ward had submitted a 10 page letter dated 7 December 2022 and a 27 page updated table with their comments on the respondents' position on their further particulars of claim on 4 December 2022 (the "**Claimant's Tables**").

40. I noted that in relation to certain points, the claimant and Ms Ward appeared to be confusing:
    40.1 the factual allegations; and
    40.2 documents that can be relied on as evidence that supports the claimant's case for those allegations.

    They appeared to be under the impression that if a document was not named as part of a factual allegation, then it could not be relied on as evidence. I clarified during the hearing that all documents relevant to the issues to be decided during the hearing should be included in the hearing file and that the witnesses (including the claimant) should provide witness evidence in relation to these documents.

Additional protected disclosures – is leave to amend required and, if so, should it be granted?

41. The thirty-three page attachment to the claimant's ET1 contained the following pleadings:

    Paragraph 4 on page 2

    "4. My dismissal circumstance is complex:

    4.1. I blew the whistle on the 12, 14 and 15 November 2021 on work place concerns pertaining to SI 891 2021.

    4.2. In the absence of a formal meeting with my employer, I was issued a 17 November 2021 notice of dismissal on the grounds of non-compliance with a legal requirement this being SI 891 2021. The notice period was 12 weeks with my last day of service being the 08 February 2022."

    Paragraphs 1 and 2 on pages 19-20

    "State the other type of claim(s) that you're making

    1. Employment Rights Act 1996 Part V Protection from suffering detriment in employment Section 47B Protected Disclosures Section 47B:

    1.1. I made a written formal protected disclosure on the 12,14 & 15 November 2021 submitted by a number of emails and believe I have suffered detriment for doing so.

    1.2. I made a written aggregate whistleblowing and or protected disclosure on the 20 December 2021 18:21 by emailed letter and believe I have suffered detriment for doing so.

    …[The claimant did not refer to any other protected disclosures in paragraph 1 at page 19].

    2. Employment Rights Act 1996 Part X Unfair dismissal Chapter I Right not to be unfairly dismissed Section 103A Protected Disclosure.

    2.1. I made a written formal protected disclosure on the 12,14 & 15 November 2021 submitted by a number of emails and believe I have suffered unfair dismissal for doing

so. I was served a 17 November 2021 notice of dismissal just days after blowing the whistle.

2.2. I made a written aggregate whistleblowing and or protected disclosure on the 20 December 2021 18:21 by emailed letter and believe I have suffered unfair dismissal for doing so. I was served a 21 December 2021 summary dismissal in less than 24 hours after blowing the whistle.

…[The claimant did not refer to any other protected disclosures in paragraph 1 at page 20]."

Paragraph 4.5 at p21

"4.5. Whistle blowing Detriment to be considered:

4.5.1. No formal HR Meeting

4.5.2. Notice of dismissal letter dated 17.11.2021 challenged as fraud by misrepresentation. My employer failed to revoke this despite my challenges. I believe this to be intentional detriment for having blown the whistle

4.5.3. Right of appeal to my notice of dismissal proffered, and then denied. I believe this to be intentional detriment for having blown the whistle

4.5.4. Summary dismissal issued 21.12.2021 within 24 hours of my further escalation of whistle blowing concerns in my letter dated 20.12.2021 to my employer. I believe this to be further aggregate whistle blowing detriment. I cannot see any other reason why my employer would refuse me an appeal process to my notice of dismissal and then refuse to accept my Covid Pass confirmation.

4.5.5. My employers refusal to accept my NHS Covid Pass confirmation of exemption letter. Despite pointing out to my employer that this process commenced prior to the summary dismissal being issued on 21.12.2021, which I offered to provide proof of. I also explained the reasons why this had not been presented to them earlier due to the Christmas and New Year period."

42. The respondents accepted that the claimant alleged that she had:
    42.1 made protected disclosures on 12, 14 and 15 November 2021; and
    42.2 made an additional protected disclosure on 20 December 2021;
    (the "**Existing Alleged Disclosures**").

43. The claimant (or Ms Ward on behalf of the claimant) submitted that the alleged disclosures (other than the Existing Alleged Disclosures) on which the claimant wished to rely consisted of:
    43.1 a letter dated **25 October 2021**, which she stated raised serious concerns regarding the exemption form and other matters; and
    43.2 disclosures on **5, 9, 10, 22 and 26 November 2021**.
    43.3 an email dated **6 December 2021** (sent at 11.35pm on that date);
    (the "**Additional Alleged Disclosures**").

44. The respondents submitted that any other alleged disclosures should be subject to an amendment application, even if they were referred to as part of her particulars of claim because:

44.1 the details of an individual's claim should be readily understandable by the Tribunal;

44.2 the claimant had stated clearly at paragraphs 4.1 and 19 of her claim form that she relied on protected disclosures that she stated that she made on 12, 14 and 15 November and on 20 December 2021;

45. The respondent opposed any application to amend on the basis that:

45.1 the claimant was aware of all communications that she made to the respondent as at the date of presenting her ET1;

45.2 there was no disadvantage to the claimant if she was not allowed to rely on any other alleged protected disclosures because she could still pursue her whistleblowing complaints by relying on the Existing Alleged Disclosures.

Conclusion on additional protected disclosures

46. The claimant had previously referred to the Additional Alleged Disclosures as part of her timeline of events in her ET1 Attachment. I therefore treated this application as a 'relabelling' application to which time limit issues did not apply.

47. However, I concluded that the claimant would need to apply to amend her claim to include any protected disclosures, other than the Existing Alleged Disclosures because the claimant's pleaded claim in her ET1 attachment stated multiple times that she relied on protected disclosures made on 12, 14, 15 November 2021 and on 20 December 2021.

48. I decided to reject the claimant's application to amend her claim to include protected disclosures, other than the Existing Alleged Disclosures because:

48.1 although the claimant referred to the matters that took place on 25 October, 5, 9, 10, 22 and 26 November and on 6 December 2021 in her ET1 attachment, these things were not stated to be protected disclosures. By way of contrast, the claimant stated expressly that the Existing Alleged Disclosures were protected disclosures;

48.2 the claimant is a litigant in person, however she is educated and articulate. Both her and Ms Ward were able to provide detailed legal submissions in her pleadings, during correspondence and during this hearing, including referring to specific provisions of the ERA and other legislation in detail in the last 12 pages of her 33 page ET1 attachment;

48.3 much of the claimant's correspondence with the respondents during the period from 25 October 2021 to 20 December 2021 repeated the same or similar points. For example, Ms Ward described the claimant's correspondence of 12, 14 and 15 November 2021 as raising concerns formally under the respondent's whistleblowing policy that had previously been raised informally on 25 October, 5 November and 9 November 2021. The claimant can refer to correspondence that does not form the Existing Alleged Disclosures in her evidence at the final hearing of this claim;

48.4 whilst some of the claimant's detriment complaints set out in the Claimant's Tables are said to have started before the first Existing Alleged Disclosure was

made on 12 November 2021, the claimant states that all such detriments continued after 12 November 2021. The claimant's dismissal on notice (and her subsequent termination with payment in lieu of notice) took place after 12 November 2021. Please refer to the conclusions on the claimant's detriment complaints set out below;

48.5 if the claimant were permitted to rely on the Additional Alleged Disclosures, the respondent would be put to significant additional time and expense in defending the claim. By doubling the number of protected disclosures relied upon, the hearing time would inevitably be extended in order that the Tribunal could evaluate whether the Additional Alleged Disclosures amounted to protected disclosures and the impact that these may have had on any detriments or on the claimant's dismissal. The balance of hardship is therefore in favour of refusing the claimant's amendment application.

Additional detriments - is leave to amend required and, if so, should it be granted?

49. The detriments on which the claimant wishes to rely are set out at pages 7 to 21 of the Claimant's Tables. The claimant set out ten rows of detriments in the Claimant's Tables, but many of them appeared to overlap substantially and I have summarised them as follows:

Detriment row numbers in Claimant's Tables at p7-21	**Detriments alleged (labelled by the Tribunal as detriments A-F)**	**Cumulative date ranges set out in the Claimant's Tables**
1, 2, 3, 4, 5 and 8	A - **No formal meeting** with manager, HR & union representative and/or with HR only	25 October 2021 to 17 November 2021
6 and 7	B - Not acknowledging, not accepting, not rejecting the claimant's own personally written clinical reasons for medical exemption set out in her **25 October 2021 document**	25 October to 17 November 2021
9	C - "**Deliberate construction of untruthful grounds" relating to claimant's dismissal**	12 to 17 November 2021
10	D - **Gina Georgiou appointed to manage the claimant's correspondence** (which she states amounted to protected disclosures) of 5, 12, 14 and 15 November 2021 when Ms Georgiou was already the lead for VCOD [***Vaccination as a Condition of Deployment***] **and dismissal processes**	12 November 2021 to 8 February 2022
Page 27 – not on any rows	E - a letter from the claimant dated **30 December 2021** to the Head of HR at the CQC, listing the whistleblowing detriments that she stated she suffered (see page 27 of the	N/A

Detriment row numbers in Claimant's Tables at p7-21	**Detriments alleged (labelled by the Tribunal as detriments A-F)**	**Cumulative date ranges set out in the Claimant's Tables**
	Claimant's Tables)	
Page 27 – not on any rows	F - an email from the claimant to the CQC dated **10 February 2022** referring to acquiescence and estoppel (see page 27 of the Claimant's Tables).	N/A

50. The respondent's submissions in relation to the protected disclosures above apply to the detriment allegations. In addition, the respondent submitted that:

    50.1 the claimant's claim was in essence one of unfair dismissal and the detriments that she alleged were part of this – e.g. an absence of meetings on particular dates, a failure to acknowledge certain points in the detailed correspondence sent by the claimant to the respondents;

    50.2 if the claimant succeeded in her complaints, the most significant part of any financial compensation would flow from her complaint of unfair dismissal, rather than any detriment complaints given their proximity to her dismissal and the fact that the claimant continued to be paid during this period. Any additional compensation for detriment would be limited to injury to feelings only;

    50.3 it would be disproportionate to permit the claimant to pursue additional complaints that lacked detail. In particular, the claimant had not explained why she states that each of the eleven individual respondents were responsible for detriments that she states were linked to the disclosures that she states that she made;

    50.4 the claimant had no real prospects of successfully establishing that the detriments that she complained about were because of any protected disclosures. Mr Brown stated that:

        50.4.1 the CQC had a policy of dismissing any individual who declined to be vaccinated and either:
            a) did not have a clinical exemption; or
            b) declined to participate in the medical exemption process.

        50.4.2 the claimant was aware of at least one other person who was dismissed in circumstances where they had not made a protected disclosure because her Employment Tribunal claim was originally joined with that individual's Employment Tribunal claim.

51. The claimant (and Ms Ward on her behalf) submitted that:

51.1 the claimant should have had a formal HR Meeting within a six week period of the CQC's vaccination policy being announced on 28 September 2021 (i.e. by 11 November 2021) in line with all other CQC employees;

51.2 the claimant's detriment complaints raised serious concerns regarding the CQC's handling of the situation around the introduction of the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021. Ms Ward described the risks of vaccination as a 'life and death situation'. In particular, the CQC was not a 'registered person' for the purposes of the 2008 Act and failed to consider the claimant's self-certification form and/or medical exemption information;

51.3 the reasons provided for the claimant's dismissal with notice on 17 December 2021 were 'fraudulent'. The CQC's stated reason of the claimant's own 'wellbeing' for terminating the claimant's employment with immediate effect and pay in lieu of notice on 21 December 2021 was not correct; and

51.4 the CQC refused to provide the claimant with the right of appeal following her summary dismissal on 21 December 2021, despite the claimant having taken steps to obtain a Covid pass;

51.5 the eleven named individual respondents were 'all complicit' in the claimant's detriments because they had received the claimant's correspondence and failed to take steps to deal with the concerns that she raised.

Conclusion on additional detriments

Detriments A-D

52. The claimant had previously set out part of the factual background of the Additional Alleged Detriments as part of her timeline of events in her ET1 Attachment.

52.1 the claimant's complaints of whistleblowing detriment at paragraph 4.5 of her ET1 attachment referred to Detriments A and C;

52.2 the factual allegations relating to Detriments B and D were included in the claimant's ET1 attachment, albeit these were not labelled as being whistleblowing detriment.

53. However, the claimant had failed to explain in her ET1 Attachment:
53.1 why she believed Detriments A to D took place because she made protected disclosures; and
53.2 why she believed each of the individual respondents (as opposed to the CQC itself) was responsible for each of Detriments A to D.

54. I therefore concluded that the claimant would need the Tribunal's permission to amend her claim to include complaints of protected disclosure detriment relating to Detriments A to D.

Detriments A-D - CQC

55. I note that s47B(2) ERA prevents employees from bringing overlapping complaints of detriment under s47B ERA and automatic unfair dismissal under s103A ERA against their employer.

56. Detriments A to D relate directly to the claimant's dismissal on 17 November 2021:

    56.1 Detriment A is a complaint about the process (or lack of process) followed by the CQC after the introduction of their policy on vaccination on 28 September 2021;

    56.2 Detriment B is a complaint that CQC did not accept the claimant's 25 October 2021 document as providing 'clinical reasons' for non-vaccination or a medical exemption from vaccination;

    56.3 Detriment C relates to the reasons for the claimant's dismissal with notice on 17 November 2021.

    56.4 Detriment D is a complaint that Ms Georgiou was involved both in handling the claimant's correspondence and the VCOD and dismissal processes.

57. In addition, the other detriments listed by the claimant at paragraph 4.5 of her ET1 attachment also relate to her dismissal:
    57.1 Paragraph 4.5.1 overlaps with Detriment A;
    57.2 Paragraph 4.5.2 overlaps with Detriment C;
    57.3 Paragraphs 4.5.3, 4.5.4 and 4.5.5 all relate to the claimant's dismissal and/or a denial of the claimant's right of appeal against such dismissal. (I note that the claimant stated that she informed the CQC that she had an appointment to discuss her Covid Pass on 22 December 2021 and that she subsequently obtained what she described as an 'official Covid Pass exemption letter' on 2 January 2022. Both of these events took place after the claimant's employment terminated).

58. The Tribunal does not have jurisdiction to consider the claimant's complaints of Detriments A to D or the detriments listed by the claimant at paragraph 4.5 of her ET1 attachment against the CQC. The claimant's application to amend her claim to include such complaints is therefore refused.

Detriments A-D – individual respondents

59. The Court of Appeal in *Timis* held that it is possible for workers to bring dismissal-related detriment complaints against their co-workers. However, the claimant has failed to explain why she states that each of the eleven individual respondents (i.e. all respondents except for the CQC) subjected her to detriments because she made protected disclosures.

60. For example, in relation to Detriments A and C, the claimant refers to her notice of dismissal dated 17 November 2021 at paragraphs 10 – 17 (pages 3-5) of her ET1 Attachment. She concludes at paragraph 14.5 that:

    "The reason for dismissal appears to be solely on the statutory interpretation of SI 891 2021 by my employer vs the statutory interpretation of SIU 891 2021 by me as an employee".

61. The claimant does not state in relation to Detriment A or C which of the individual respondents she says was responsible for her dismissal, although I note that the termination letter of 17 November 2022 was signed by Alison Chilton.

62. The Tribunal's previous case management orders asked the claimant to specify who said or did any actions or non-actions. The claimant stated in relation to Detriments A-D:

    Detriment A - *"This is yet to be identified (and could be any of R1 to R12)"*
    Detriment B – *"KB & potentially other R1-R12 respondents e.g. GG"*
    Detriment C – *"AC & potentially other R1-R12 respondents e.g. GG"*
    Detriment D – *"GG & potentially other R1-R12 respondents e.g. IT, KT"*

63. The claimant did not provide any specific explanation in the Claimant's Tables why she believes that any protected disclosures that she stated she made caused all or any of the twelve respondents to commit detriments A-D.

64. However, the claimant did provide some particulars of Detriment D in her ET1 attachment under the heading 'implied terms of the contract of employment – duties of the employer" (paragraph 9, pages 22-24). The claimant states that Detriment D took place in attempt to 'suppress' her protected disclosures at paragraph 9.1.10:

    > *"It is apparent from the timeline of the correspondence bullet points mentioned above, that Gina Georgiou has potentially been a gate keeper to suppress and bury my whistle blowing case."*

65. I have concluded that:

    65.1 The claimant has been given ample opportunity to name the individual respondents which she believes were responsible for these detriments and to explain why she believes they were responsible. It is not sufficient to name all twelve respondents without explanation as to why they were alleged to have committed detriments as a result of protected disclosures.

    65.2 **Detriment A is therefore struck out against all individual respondents** as having no reasonable prospects of success because the claimant has neither identified specifically which individuals she believes were responsible for Detriment A nor explained why they were responsible.

    65.3 Detriment B cannot proceed as a detriment complaint because it relates to the claimant's letter of 25 October 2021, which was sent before the first Existing Alleged Disclosure on 12 November 2021. I have already refused permission for the claimant to amend her claim to include protected disclosures that took place prior to 12 November 2021. **Detriment B is therefore struck out as having no reasonable prospects of success because it took place after before the first Existing Alleged Disclosure.** This of course does not prevent the claimant referring to Detriment B as background to her remaining complaints.

    65.4 **I have granted permission for the claimant's complaints in relation to Detriments C and D to continue against the individual respondents that the**

claimant states were responsible (rather than potentially responsible) for those detriments, i.e.:

65.4.1 **Detriment C – Alison Chilton only** (as noted above, Ms Chilton the claimant's dismissal with notice letter); and

65.4.2 **Detriment D – Gina Georgiou only** (as noted above, the claimant states that Ms Georgiou acted as a *"gate keeper to suppress and bury my whistle blowing case"*).

65.5 **to the extent that complaints regarding Detriments A to D have already been brought against any other individual respondents, these are struck out as having no reasonable prospects of success**. It would be highly prejudicial to the individual respondents to be required to answer complaints without any knowledge of why the claimant states that they

Detriments C and D – respondents' applications to strike out or make a deposit order

66. I considered the respondent's application to strike out or make a deposit in relation to Detriments C and D on the basis that they have no reasonable prospects of success or little reasonable prospects of success. I have concluded that it would not be appropriate to grant either application for the following key reasons:

66.1 **Detriment C** – there is a dispute between the parties as to the reason for the claimant's dismissal, of which Ms Chilton's letter terminating the claimant's employment on notice dated 17 November 2021 forms part; and

66.2 **Detriment D** – there is a dispute between the parties as to the reason for Ms Georgiou's involvement in the dismissal process and correspondence with the claimant.

The Tribunal at the final hearing would have to determine whether these matters occurred in the manner in which the claimant has alleged and (if so) why they occurred, having considered the evidence from both parties.

Detriments E and F (30 December 2021 and 10 February 2022) – application to amend

67. The claimant's application to amend her claim to include Detriments E and F was made outside of the time limits for bringing such complaints. The claimant first referred to Detriments E and F in her original table of particulars, provided to the Tribunal in October 2022. The primary time limits for bringing detriment complaints is within three months of the matters that are the subject of the complaint.

68. I have rejected the claimant's application to amend her claim to include the letter dated 30 December 2021 and the email dated 10 February 2022 as additional Detriments E and F because:

68.1 the claimant accepted that these matters were not referred to in her claim form, although she was obviously aware of their existence at the time because they were correspondence that she had produced. She was unable to provide a satisfactory explanation as to why she did not raise any complaints regarding

these matters within the primary time limit or at any earlier stage in these proceedings;

68.2 the claimant was unable to explain why she stated that the correspondence that she herself had produced would amount to a detriment because of any protected disclosure that she had made – I explained that a detriment normally consisted of an action or omission of the respondent, not something that the claimant herself had chosen to do. On that basis, these complaints appear to have no reasonable prospects of success even if I were minded to extend the time limits;

68.3 the respondent would be prejudiced in facing additional complaints, which would be likely to require additional documentary and witness evidence thus extending the time for the final hearing.

Respondents' applications re automatic unfair dismissal complaint (strike out and/or deposit order applications)

69. The respondents also applied to the Tribunal to either:
    69.1 strike out the claimant's complaint of automatically unfair dismissal (under Rule 37 of the Employment Tribunal Rules of Procedure); and/or
    69.2 make a deposit order in relation to the claimant's complaint of automatically unfair dismissal (under Rule 39 of the same rules).

70. Mr Brown stated that:

    70.1.1 the CQC had a policy of dismissing any individual who declined to be vaccinated and either:
        c) did not have a clinical exemption; or
        d) declined to participate in the medical exemption process.

    70.1.2 the claimant was aware of at least one other person who was dismissed in circumstances where they had not made a protected disclosure (Miss Gray). This was because Miss Gray's Employment Tribunal claim (case reference 1801109/22) was originally joined with the claimant's claim.

71. The claimant originally stated that she was not aware of any other individuals who had been dismissed in line with the policy set out at paragraph 70.1.1 above. However, the claimant later accepted that Miss Gray was dismissed in circumstances which Miss Gray claimed to amount to unfair dismissal (amongst other things), but which were unrelated to whistleblowing. After this hearing, I read the case management orders in which it was recorded that Miss Gray confirmed expressly in her case management agenda that she had not made a protected disclosure to the CQC. Miss Gray therefore withdrew her whistleblowing complaints and they were dismissed in a judgment dated 25 April 2022 by Employment Judge Knowles.

72. The claimant and Ms Ward submitted that another anonymous CQC inspector had provided the Workers of England Union as evidence of an exemption from vaccination and that this had been accepted by the CQC. However, they were unable to confirm the identity of that individual. They also reiterated the points made in the claimant's ET1

and the Claimant's Tables regarding the timeline of events leading up to the claimant's dismissal.

Conclusion on respondents' applications for strike out or a deposit order re the claimant's automatic unfair dismissal complaint

73. I have concluded that it would not be appropriate to strike out or make a deposit order in relation to the claimant's complaint for automatic unfair dismissal on the grounds that it has no reasonable prospects or little reasonable prospects of success for the following key reasons:

    73.1 the process by which the claimant was dismissed was not straight forwards – she was initially dismissed with notice on 17 November 2022. Her employment was later terminated with immediate effect (and pay in lieu of the remainder of her notice period) on 21 December 2022;

    73.2 there is a dispute between the parties in relation to the events leading up to both termination letters and a dispute between them as to the reason for dismissal. These matters would have to be determined by a Tribunal, once it has considered the relevant evidence;

    73.3 Mr Brown referred to Ms Gray as an example of another individual whose employment was terminated in similar circumstances, but who had not made a protected disclosure. However, I have not heard any evidence from either party as to whether Ms Gray's employment was terminated summarily with pay in lieu of the remainder of her notice period.