# EMPLOYMENT TRIBUNALS

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| **Claimant:** | Mrs S Cook |
| **Respondent:** | (1) Turning Point<br>(2) Ms K Eaton<br>(3) Mr L Nicholson |
| **Heard at:** | Bury St Edmunds (via CVP) |
| **On:** | 25 July 2023 |
| **Before:** | Employment Judge Graham |

**Representation**

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| Claimant: | Mr Frater, Consultant |
| Respondents 1 and 3: | Ms Themistocleous, solicitor |
| Respondent 2: | Mr Frame, solicitor |

# RESERVED JUDGMENT

1. The Claimant's application to strike out the Responses is refused.

2. The Respondents' applications to strike out the complaints of victimisation and detriment for having made a protected disclosure is refused.

3. The Respondents' applications for deposit orders with respect to the complaints of victimisation and detriment for having made a protected disclosure succeeds.

4. In order for the Claimant to continue to pursue her claims of victimisation she is required to pay a deposit of £150.

5. In order for the Claimant to continue to pursue her claims of detriment for having made a protected disclosure she is required to pay a deposit of £150.

6. The complaint of failure to implement reasonable adjustments is not affected by this judgment and will proceed.

# REASONS

**Introduction**

1. This matter has a short but already a complicated procedural history which will be summarised below.

2. I would add at the start of this judgment that my understanding of the claim and the legal issues has not been assisted by the number of bundles in existence. At the preliminary hearing I had before me three different hearing bundles of different lengths (of 186, 201 and 207 pages respectively), and the Claimant's exhibits bundle of 49 pages, and then various versions of the list of issues, some with track changes, some with text in red - some of which were within one hearing bundle and some were standalone versions.

3. I also had before me a skeleton argument on behalf of the Claimant (19 pages) and her witness statement (34 pages) as well as copies of two authorities relied upon by the Claimant.

4. The First Respondent ("R1") is a charity which supports individuals with complex needs including drug, alcohol, mental health, learning and employment related issues. The Second Respondent ("R2") was former colleague of the Claimant but no longer works for R1. The Third Respondent ("R3") remains employed by R1 and was responsible for conducting an investigation into a grievance raised against the Claimant by colleagues.

5. The Claimant was employed by R1 as a universal education facilitator. The Claimant's employment commenced 28 June 2021 and terminated on 22 June 2022 following her resignation. The Claimant says that she is disabled by way of depression and anxiety.

6. The Claimant presented an ET1 on 14 September 2022 alleging detriment for having made protected disclosures (also known as whistleblowing) and automatic unfair dismissal – s. 43B and s 103A Employment Rights Act 1996. The Claimant also complained of a failure to implement reasonable adjustments and victimisation – s. 20, s. 21 and s. 27 Equality Act 2010. ACAS early conciliation took place as follows:

| | **Date of EC notification** | **Date of ACAS Certificate** |
|---|---|---|
| R1 | 14 July 2022 | 24 August 2022 |
| R2 | 14 July 2022 | 24 August 2022 |
| R3 | 7 August 2022 | 6 September 2022 |

7. R2 filed an ET3 resisting the claim on 21 October 2022. R1 and R3 filed their ET3s denying the claim on 26 October 2022.

8. A private preliminary hearing for case management took place on 7 March 2023 which came before Employment Judge Aspinall. It was ordered that there would be a two day public preliminary to consider the Claimant's

application to amend her claim and the application of R1 and R3 for a strike out/deposit order. Directions were made for the Claimant to provide additional information concerning the protected disclosures relied upon, the victimisation complaints, and the alleged detriments. A public preliminary hearing took place on 6 June 2023 which came before Employment Judge Krepski which lasted only one day and dealt with the Claimant's amendment application. The following Orders were made:

8.1 Only the protected disclosures that were made on dates specified in the ET1 shall be allowed – any amendment which sought to include new dates is refused;

8.2 The amendments to the PCP as per page 119 of the bundle shall be allowed;

8.3 The addition of dismissal as a detriment as part of the victimisation claim is refused.

9. Today's hearing was intended to consider the application of R1 and R3 to strike out parts of the claim (save for the reasonable adjustments complaint) or to order a deposit in the alternative, and also to consider whether the claim (or parts of it) had been brought out of time, unless the Tribunal decides otherwise. It was explained to me by the solicitor for R1 ad R3 that there was no application to strike out the reasonable adjustments complaint as the PCPs had yet to be particularised by way of dates.

10. At the start of the hearing I was informed that on 11 July 2023 the Claimant had applied for a strike out of the Responses of R1, R2, and R3 on the basis of their conduct of proceedings, and R2 informed me that it also had applied for a strike out of the Claimant's claims or a deposit in the alternative (contained within the original ET3 Response).

11. Pragmatically the Respondents consented to the Claimant's application being heard today. I therefore decided that I would hear that application first at 12pm after sufficient reading in time given the volume of material I had been presented with today. I decided that I would then hear the applications from R1 and R3, which R2 could dovetail any additional comments on. This was agreed with the parties.

12. It is an established principle that an Employment Tribunal cannot strike out a claim until such time as it knows what it is – ***Cox v Adecco and others*** **EAT/0339/19** and accordingly the tribunal must take all reasonable steps to identify the claim and the issues. I was therefore concerned that part way through the hearing it appeared that the parties had different understandings as to the protected acts relied upon by the Claimant for her victimisation complaint. R1 and R3 had been under the impression that there was one alleged protected act whereas the Claiamnt suggested there were many more than that.

13. I was also of the view that a strike out should not be used as a substitute for proper case management, and I considered whether an adjournment of the hearing was appropriate solely in respect of the application regards the victimisation claim. However I was conscious that hiving that off to a fourth preliminary hearing would be unfair on all parties as it would involve

additional legal expenditure (all parties being legally represented). As the Claimant was professionally represented and was present herself, I decided not to adjourn that aspect and spent some time with the parties during the hearing going over previous versions of the list of issues which had been updated a number of times by different parties, to try and identify the alleged protected acts relied upon.

14. This was time usefully spent clarifying the issues and it was confirmed that the Claimant relied upon eight instances where she says that she made a protected act, and these were set out in the list of issues at 1.2, 1.5, 1.6, 1.7, 1.8, 1.9, 1.13 and 1.19 of the 186 page version of the hearing bundle (pages 135-158). These will be set out below in the main body of this judgment so that going forward all parties are clear on the alleged protected acts.

15. The hearing was conducted via CVP which worked well with no interruptions. The Claimant was in attendance but I understand that she left at one point by choice but she was able to return later.

**Background and the claim**

16. The Claimant was employed by R1 as a Universal Education Facilitator from 28 June 2021 until her resignation on 22 June 2022. The Claimant says that during her employment she made complaints about bullying, harassment and discrimination from other colleagues. Difficulties arose in the working relationship between the Claimant and her colleague, Beth Bradshaw, from around the end of September 2021. On 8 March 2022 a grievance was raised against the Claimant by R2 and Mrs Bradshaw even though she had already left R1's employment. It was alleged that the Claimant was bullying and harassing the First Respondent's Young People team members. The Claimant resigned on 22 June 2022 which was before the outcome of the grievance investigation was sent to her. The outcome of the grievance was inconclusive as regards the Claimant but criticisms were made of her conduct during her employment.

17. The Claimant says she made protected disclosures during her employment. There are various versions of the list of issues before me however not all of those alleged protected disclosures have been allowed as an amendment to the claim. As it stands only the alleged protected disclosures on 28 September and 5 and 6 October 2021 are being pursued. For absolute clarity I have pasted below the alleged protected disclosures relied upon:

<u>20.1 On 28 September the Claimant said the following to Ruth Croft orally during a single conversation:</u>

*"I am concerned about Beth's emails; they are upsetting me and I'm feeling anxious. Why has she escalated an informal meet up to a formal meeting asking that management be present? I feel incredibly intimidated."*

And

*"Beth has said that her and others will continue to work this way. I am worried about the impact that constant copying of management will have on others, both internal and external."*

And

*"If this continues it will create an atmosphere of pressure and mistrust and will impact negatively upon the service."*

And

*"I'm worried that this formal meeting will impact on my probation and that it will be gossiped about with others."*

The Claimant says that pursuant to s. 43B(1)(b) ERA 1996, she considers that this tended to show a breach of a legal obligation to ensure that resources are not wasted when this is a charity funded by donations from members of the public, and the particular part of the service was commissioned by Suffolk County Council thus also a waste of public money. The Claimant says that the trustees are under a legal obligation to ensure that money is appropriately spent and not wasted which the Claimant says she considered was being breached by duplications and Trustees being personally liable in the event of a breach of their fiduciary duty.

The Claimant also says that pursuant to s. 43B(1)(d) ERA 1996, she considers that this to tended to show that the health and safety of the Claimant and others would be put at risk, including external service users and staff, and relies on the Health and Safety at Work Act (including S(2)(1)) and the implied term of health and safety in her contract of employment.

20.2 On 5 October 2021 the Claimant wrote to Ms Ruth Croft in a single email:

"*Ruth, I'm sorry but I can't work like this – this is obvious that Beth has spoken to Kathy about the incident and now Kathy is also having her say which to be honest I'm feeling like my face doesn't fit (I'm concerned that my privacy has been breached)."*

And

*"I don't like how they are communicating to me - I'm finding it upsetting."*

20.3 On 5 October 2021 the Claimant wrote to Ms Kathy Eaton (R2) in a single email:

*"I have forwarded these emails to Ruth. I'm sorry Kathy but I disagree, you cc'd me into the email with the third party asking me to contact her to sort out what it is they are requesting- of which you had already sorted out."*

And

*"From your email I can only conclude that Beth has been discussing the incident that happened last week for which I was told it was confidential. This is a breach I take very seriously."*

The Claimant says she relies upon s. 43B(1)(b) ERA 1996 that the information tended to show a breach of a legal obligation, namely the GDPR

as R1 (vicariously) and R2 breached her confidentiality along with her contract of employment. The Claimant also says these are breaches of the confidentiality of other staff members. The Claimant again relies upon s. 43B(1)(d) ERA 1996, namely that the information tended to show that the health and safety of the Claimant and others would be put at risk, including external service users and staff, and she relies on the Health and Safety at Work Act (including S(2)(1)) and the implied term of health and safety in her contract of employment. The Claimant says she believed that the actions of R2 would continue in her interactions with those individuals.

20.4 On 5 October 2021 the Claimant wrote to Ruth Croft and Janet Holmes in a single email:

"*I'd like to resign from my position as Universal Education Facilitator. I'm being bullied and harassed and the impact this is having on my health is a concern*."

The Claimant again relies upon S43B(1)(d) ERA 1996, namely that the information tended to show that the health and safety of the Claimant and others would be put at risk, including external service users and staff, and she relies on the Health and Safety at Work Act (including S(2)(1)) and the implied term of health and safety in her contract of employment. The Claimant says she believed that the actions of R2 would continue in her interactions with those individuals.

20.5 On 6 October 2021 the Claimant wrote to Janet Holmes in a single email:

*"I don't really want to resign however this past week has had an impact on me."*

And

*"I don't think there is an easy way of me saying that both Beth's emails and then Kathy's yesterday have upset me. I think what has upset me more is that Beth has shared our confidential meeting last week with Kathy as it is evident in Kathy's response to me, it mirrored what Beth had said."*

And

*"On my first day and something I haven't spoken about is that I met with Beth and Kathy for lunch. During lunch it was clear that they were both talking about a member of staff negatively in terms of her work performance. I felt uncomfortable with this and decided to just let it go."*

And

*"However, with what has happened in our exchanges this last week I can only deduce that Beth spoke to Kathy about the cc-in incident, and I'm now being accused of being patronising and telling people what they should do."*

And

*"My past experiences if anything have led me to believe that I'm not hard skinned and any sign of difficult relations will only impact on my anxiety and mental health which then impacts on work."*

And

*"My emails where I have tried to communicate clearly with colleagues and challenge positively have caused offence and I've re-read them and I'm having difficulty in seeing how."*

The Claimant again relies upon s. 43B(1)(b) and s. 43B(1)(d) ERA 1996 for the same reasons as set out above.

<u>20.6 On 6 October 2021 the Claimant wrote to Ruth Croft in a single email:</u>

*"I emailed Janet today the below of which I know she will want to discuss with you."*

And

*"Although there have been some negative interactions – I wouldn't want Beth or Kathy brought into a meeting – this would only make it worse. That's why I handed my resignation in yesterday as making sense of these interactions as of lately is impacting on my health."*

And

*"I think its going to take time for me to trust working relationships again – all I can hope is the team do eventually accept me (anxieties and all)."*

The Claimant relies upon s. 43B(1)(d) ERA 1996 for the reasons as set out above.

18. The Claimant says that she suffered various detriments as a result of having made those disclosures. These alleged detriments include collusion in meetings, mishandling of the grievance process, breach of confidentiality, falsifying health information to mislead Occupational Health, the eventual outcome of the grievance including disparaging comments about her, and failing to stop alleged bullying and harassment of the Claimant.

19. As regards the Claimant's victimisation complaints, the Claimant says that the protected acts are as set out below. The numbering relates to the list of issues I was referred to by the Claimant and her representative in this hearing.

20. <u>1.2 On 28 September 2021 to Ruth Croft orally during a single conversation:</u>

*"I am concerned about Beth's emails; they are upsetting me and I'm feeling anxious. Why has she escalated an informal meet up to a formal meeting asking that management be present? I feel incredibly intimidated "*

And

*"Beth has said that her and others will continue to work this way. I am worried about the impact that constant copying of management will have on others, both internal and external."*

And

*"If this continues it will create an atmosphere of pressure and mistrust and will impact negatively upon the service."*

And

*"I'm worried that this formal meeting will impact on my probation and that it will be gossiped about with others."*

21. 1.5 On 5 October 2021 to Ms Ruth Croft in writing in a single email:

"*Ruth, I'm sorry but I can't work like this – this is obvious that Beth has spoken to Kathy about the incident and now Kathy is also having her say which to be honest I'm feeling like my face doesn't fit (I'm concerned that my privacy has been breached)."*

And

*"I don't like how they are communicating to me - I'm finding it upsetting."*

22. 1.6 On 5 October 2021 to Ms Kathy Eaton in writing in a single email:

*"I have forwarded these emails to Ruth. I'm sorry Kathy but I disagree, you cc'd me into the email with the third party asking me to contact her to sort out what it is they are requesting- of which you had already sorted out."*

And

*"From your email I can only conclude that Beth has been discussing the incident that happened last week for which I was told it was confidential. This is a breach I take very seriously."*

23. 1.7 On 5 October 2021 to Ruth Croft and Janet Holmes in writing in a single email:

"*I'd like to resign from my position as Universal Education Facilitator. I'm being bullied and harassed and the impact this is having on my health is a concern*."

24. 1.8 On 6 October 2021 to Janet Holmes in writing in a single email:

*"I don't really want to resign however this past week has had an impact on me."*

And

*"I don't think there is an easy way of me saying that both Beth's emails and then Kathy's yesterday have upset me. I think what has upset me more is that Beth has shared our confidential meeting last week with Kathy as it is evident in Kathy's response to me, it mirrored what Beth had said."*

And

*"On my first day and something I haven't spoken about is that I met with Beth and Kathy for lunch. During lunch it was clear that they were both talking about a member of staff negatively in terms of her work performance. I felt uncomfortable with this and decided to just let it go."*

And

*"However, with what has happened in our exchanges this last week I can only deduce that Beth spoke to Kathy about the cc-in incident, and I'm now being accused of being patronising and telling people what they should do."*

And

*"My past experiences if anything have led me to believe that I'm not hard skinned and any sign of difficult relations will only impact on my anxiety and mental health which then impacts on work."*

And

*"My emails where I have tried to communicate clearly with colleagues and challenge positively have caused offence and I've re-read them and I'm having difficulty in seeing how."*

25. <u>1.9 On 6 October 2021 to Ruth Croft in writing in a single email:</u>

    *"I emailed Janet today the below of which I know she will want to discuss with you."*

    And

    *"Although there have been some negative interactions – I wouldn't want Beth or Kathy brought into a meeting – this would only make it worse. That's why I handed my resignation in yesterday as making sense of these interactions as of lately is impacting on my health."*

    And

    *"I think its going to take time for me to trust working relationships again – all I can hope is the team do eventually accept me (anxieties and all)."*

26. <u>1.13 On 15 February 2022 to Ms Janet Holmes and Ms Ruth Croft in writing in a single email:</u>

    *"Could you please ask Kathy to stop emailing me with regards to the below. I would like these to stop please."*

27. <u>1.19 On 6 April 2022 to Ms Ruth Croft orally in a single call:</u>

    *"The things she has said about me in the grievance are just so hurtful Ruth and she has used the grievance policy to harass me even further. She is even undermining my performance"*

    And

    *"I don't understand what is happening, you were addressing it in February, and I haven't heard anything until this."*

    And

*"Did she carry out her reflective task that you asked her to do?"*

And

*"I don't understand you haven't done anything wrong, both you and Janet supported me; it's all logged."*

And

*"This is clearly victimisation, why is the Company proceeding with this?"*

And

"*I'm going to start preparing for a grievance, this isn't fair or right Ruth. Have you got representation? Something is not right."*

28. The alleged detriments for having made a protected disclosure are also relied upon as victimisation for having done a protected act. These are alleged to be:

28.1 Between 6 October 2021 and 2 August 2022, the First Respondent failed to take Mrs Cook's complaints seriously and/or undertook a flawed grievance process;

28.2 On 6 October 2021, 12 October 2021, 18 October 2021, 15 and 16 February 2022, 8 March 2022, 5 April 2022, 6 April 2022, 25 April 2022, 27 April 2022, 21 June 2022, 22 June 2022 and 2 August 2022, the First and Third Respondent failed to consider, either properly or at all, that Mrs Cook's complaints about the Second Respondent had been upheld by management;

28.3 On 6 October 2021, 12 October 2021, 18 October 2021, 15 February 2022, 16 February 2022, 8 March 2022, 5 April 2022, 6 April 2022, 25 April 2022, 27 April 2022, 21 June 2022, 22 June 2022, and 2 August 2022 the First and Third Respondent failed and/or refused to sanction the Second Respondent for a malicious grievance and/or her continued acts of bullying/harassment/discrimination against Mrs Cook;

28.4 On 15 February 2022, 16 February 2022, 8 March 2022, 5 April 2022, 6 April 2022, 25 April 2022, 27 April 2022, 21 June 2022, 22 June 2022, and 2 August 2022 the First and Third Respondent allowed the Second Respondent to continue to bully and/or harass and/or discriminate against Mrs Cook;

28.5 On 15 and 16 February 2022 and 8 March 2022, the Second Respondent failed and/or refused to cease harassing and/or discriminating against the Claimant;

28.6 On 8 March 2022, the Second Respondent lodged a malicious grievance;

28.7 On 8 March 2022, the First and Third Respondent allowed three individuals to collude in a meeting which itself may be considered a de facto grievance investigation meeting;

28.8 On 8 March 2022, the First and Third Respondent allowed a former employee to collude in a meeting which itself may be considered a de facto grievance investigation meeting;

28.9 Between 8 March 2022 and 2 August 2022, the First and Third Respondent failed and/or refused to consider that the complaint raised by the Second Respondent was malicious;

28.10 On 6 April 2022, the First and Third Respondent provided the same confidential grievance documents to both Mrs Cook and Ms Ruth Croft. The documents set out various complaints about each of them in fundamental breach of their confidentiality and Data Protection Act;

28.11 Around 6 April 2022 and 25 April 2022, the First and Third Respondent failed and/or refused to provide details of the allegations against Mrs Cook before any investigation meeting;

28.12 On 6 April 2022, the Third Respondent stated that Mrs Cook's explanation that the grievance was brought maliciously required a separate grievance and would not be considered as part of his investigation;

28.13 From 6 April 2022, the Third Respondent delayed the grievance process unnecessarily;

28.14 On 25 April 2022, the Third Respondent refused to permit Mrs Cook to answer his questions in writing;

28.15 On 28 May 2022, the First Respondent allowed senior management to falsify health information misleading occupational health;

28.16 On 21 June 2022, the First Respondent provided an Outcome that did not reflect the facts and matters;

28.17 On 2 August 2022, the Third Respondent provided an outcome that was a whitewash;

28.18 On 2 August 2022, the Third Respondent made disparaging remarks about Mrs and/or determined that Mrs Cook would be subject to the disciplinary process; and

28.19 On 15 February 2022, 16 February 2022, 8 March 2022, 5 April 2022, 6 April 2022, 25 April 2022, 27 April 2022, 21 June 2022, 22 June 2022 and 2 August 2022 the First and Third Respondent refused and/or failed to suspend the Second Respondent.

**Applications**

29. I set out below the applications I have considered.

30. The Claimant's application dated 11 July 2023 to strike out the Responses of R1, R2 and R3 under Rule 37(1)(b) on the basis that the manner in which the proceedings have been conducted by or on behalf of the R1 and R3 has

been scandalous, unreasonable or vexatious and was supported by R2. Specifically it is alleged that the representatives for R1 and R3 have:

30.1 Misled or attempted to mislead the Tribunal.

30.2 Relied upon misleading facts and matters to seek applications including for costs and/or made inappropriate applications and/or threatened the same.

30.3 Engaged in an overly aggressive course of conduct designed to prevent the Claimant from having a fair hearing, as a result of her disability.

31. The application of R1 and R3 dated 11 April and repeated on 16 May 2023 to strike out the Claimant's complaints of detriment for making a protected disclosure (or disclosures) and the complaints of victimisation on the basis that they have no prospects of success. Specifically it is alleged:

31.1 The alleged protected disclosures are incapable of amounting to protected disclosures under s.43(B)(1) of the Employment Rights Act 1996.

31.2 The alleged protected acts are incapable of amounting to protected acts under s.27 of the Equality Act 2010.

32. R1 and R3 apply for a deposit order in the alternative on the basis that those complaints have little reasonable prospects of success.

33. The application of R2 dated 21 October 2022 to strike out the claim on a similar basis to the above.

34. R1 and R3 also apply for a strike out of the complaints on the basis that they have been brought out of time. Specifically:

34.1 In respect of R1, any alleged acts and/or omissions which pre-date 15 April 2022 are presented out of time.

34.2 In respect R3, any alleged acts and/or omissions which pre-date 8 May 2022 are presented out of time.

34.3 The subject matter of the complaints do not form part of a continuing act under section 123(3)(a) of the Equality Act 2010.

35. I did not consider any complaint to strike out the reasonable adjustments complaints for the reasons as set out above.

36. Due to the volume of material and the number of allegations and applications it was necessary to reserve my decision.

## The law

### Strike out

37. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides:

    *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

    *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

    *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

    *…*

    *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

38. A two stage test must be followed under Rule 37. A tribunal must consider whether any of the grounds under Rule 27 have been established before then deciding whether to exercise its discretion to strike out given the permissive nature of the rule – ***Hasan v Tesco Stores Ltd*** **UKEAT/0098/16**.

    **R37(1)(a) - scandalous or vexatious or has no reasonable prospect of success**

39. The meaning of scandalous in this context has been clarified to mean not the "colloquial one" but has two more narrow meanings – (i) the misuse of the privilege of legal process in order to vilify others; (ii) the other is giving gratuitous insult to the court in the course of such process – as per Sedley LJ in ***Bennett v London Borough of Southwark*** **[2002] IRLR 497**.

40. It is an established principle that the threshold for striking out a claim or a response for having no reasonable prospect of success is a high one – ***Ezsias v North Glamorgan NHS Trust*** **[2007] EWCA Civ 300**. Where facts are in dispute it would be very exceptional for a case to be struck out without the evidence first having been tested by the tribunal – the facts must disclose no arguable case in law. A strike out has been referred to as a draconian power which should not be used lightly – ***Blockbuster Entertainment Ltd v James*** **[2006] EWCA Civ 684**.

41. In ***Balls v Downham Market High School and College*** **UKEAT/0343/10** the EAT held that the power should only be exercised after careful consideration of all the available material, including the evidence put forward by the parties and the documentation on the tribunal file. No reasonable prospects of success does not mean likely to fail or a possibility that it may fail, and it is not a test which can be decided by considering whether the other party's version of events is more likely to be believed. The test is essentially as described in the Rule – that there is no reasonable prospect of success.

42. Although this was an unfair dismissal claim, the Court of Session in ***Tayside Public Transport Company Ltd (t/a Travel Dundee) v Reilly*** **[2012] IRLR 755** (CS) held that *"… where the central facts are in dispute, a claim should*

*be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts."* The Court noted the possibility that there may be cases where it can be instantly demonstrated that central facts are untrue, for example where the alleged facts are conclusively disproved by the productions (disclosure documents).

43. In ***Romanowska v Aspirations Care Ltd*** **UKEAT/0015/14** Langstaff P held:

    *"Sometimes it may be obvious that, taking the facts at their highest in favour of the claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward. Where, however, there is a dispute of fact, then unless there are good reasons, indeed powerful ones, for supposing that the claimant's view of the facts is simply unsustainable, it is difficult to see how justice can be done between the parties without hearing the evidence in order to resolve the conflict of fact which has arisen."* (paragraph 1)

44. It is therefore clear from the authorities that the claimant's claim must be taken at its highest and that the tribunal must not conduct a mini-trial - ***Niedzielska v Faccenda Foods Ltd*** **EA-2019-002204-VP**.

45. Particular concerns arise in discrimination and whistleblowing claims. In the well known case of ***Anyanwu and another v South Bank Students' Union and south Bank University*** **[2001] IRLR 305** the House of Lords held that discrimination claims should not be struck out as an abuse of process for having no reasonable prospects of success, except in the plainest and most obvious cases. It is a matter of public interest that tribunals should examine the merits and particular facts of discrimination claims. The same principles have been held to apply to whistleblowing claims – ***Pillay v INC Research UK Ltd*** **UKEAT/0182/11**.

46. The EAT has reminded tribunals that for a case to be struck out on the basis of no reasonable prospect of success it must be *"truly exceptional in the sense that the prospects of the Claimant in establishing a connection between her dismissal and earlier events is utterly fanciful; in other words, this is such an extreme case that it falls within the exception that it should be struck out as having no reasonable prospects of success"* – ***A v B and C*** **UKEAT/0450/08**. This was a claim for unfair dismissal and sex discrimination.

47. The judgment of the EAT in ***Mechkarov v Citibank NA*** **[2016] ICR 112**1 summarises the principles from the authorities in dealing with applications for strike out of discrimination claims:

    47.1 only in the clearest case should a discrimination claim be struck out;

    47.2 where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

    47.3 the Claimant's case must ordinarily be taken at its highest;

47.4 if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and

47.5 a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

48. In cases where a claimant has made a number of different discrimination allegations, the EAT has warned tribunals that they should not "cherry pick" allegations that are part of the core of disputed facts forming the basis of the case – ***Dossen v Headcount Resources Ltd and others*** **UKEAT/0483/12**.

49. However in ***Chandok v Tirkey*** **[2015] ICR 527** the EAT has confirmed that there is not a blanket ban on the striking out of discrimination claims and that:

*"There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassay v Nomura."* (paragraph 20)

50. As regards the exceptional cases where a claim may be struck out as having no reasonable prospects of success, authority for doing so may be found in ***ABN Amro Management Services Ltd and another v Hogben*** **UKEAT/0266/09** where the EAT struck out a discrimination claim which was considered to be "prima facie implausible as to the point of absurdity." This was an age discrimination complaint arising out of a redundancy situation where the comparator was only nine months older than that claimant.

51. In ***Community law Clinic Solicitors Ltd and another v Methuen*** **UKEAT/0024/11** Bean LJ stated (when granting permission to appeal) that

*"It would be quite wrong as a matter of principle...that claimants should be allowed to pursue hopeless cases merely because there are many discrimination cases which are sensitive to the facts, and the whole area requires sensitivity, delicacy and therefore caution before access is deprived to the tribunals on an interlocutory basis."*

52. In ***Croke v Leeds City Council*** **UKEAT/0512/07** the EAT upheld the decision of a tribunal to strike out a discrimination claim as there was no material identified which demonstrated a causal link between the protected act and the alleged treatment by the employer. The EAT held that where, *"on the available material, the employment judge considered that a case was "not, in any ordinary sense of the term, fact- sensitive", it could be struck out without evidence being formally heard."*

53. The ability to strike out a discrimination complaint where it is fanciful and baseless was confirmed by the Court of Appeal in ***Ahir v British Airways plc*** **[2017] EWCA Civ 1392**.

54. Most recently in ***HHJ Kalyany Kaul KC v (1) Ministry of Justice; (2) The Lord Chancellor; and (3) the Lord Chief Justice* [2023] EAT 41** the EAT has confirmed that:

    *"The need for caution applies equally to questions of inference as questions of primary fact. In cases where the 'reason why' question is the premise for success (including various discrimination claims arising under the 2010 Act), a court needs to think carefully before curtailing its opportunity to discover, examine and evaluate the primary facts, since those are the processes that equip it to decide which inferences relevant to the reason why question can fairly be drawn. This supports the long-recognised strong public interest that discrimination claims are thoroughly considered..."* (paragraph 20)

55. Nevertheless the EAT went on to hold that *"that the need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit."*

**R27(1)(b) - the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious**

56. When considering a strike out of the claim on the basis of one party's conduct of proceedings it is still necessary to take account of whether a fair hearing is still possible – ***De Keyser Ltd v Wilson* UKEAT/1438/00**. Even if I find that there has been scandalous, unreasonable or vexatious conduct I must still go on to determine whether a fair trial is still possible.

57. In ***Bolch v Chipman* UKEAT/1149/02** it was held at a tribunal must be satisfied, not just that a party, or its representative had behaved in this way, but that they had conducted the proceedings themselves, scandalously, unreasonably or vexatiously. The tribunal will need to decide whether the conduct complained of amounts to conduct of the proceedings. In such a situation the question is whether a strike out would be an appropriate response to that conduct of proceedings.

58. In ***Bennett v London Borough of Southwark* [2002] IRLR 407** the Court of Appeal provided guidance on the approach to be taken when assessing a representative's conduct. It is not the representative's conduct alone that needs to be scandalous, vexatious or unreasonable, but the way they are conducting proceedings on their client's behalf. A tribunal must consider the way the proceedings have been conducted and how far that is attributable to the party the representative is acting for, and also the significance of the conduct. What is done in a party's name is presumably done on their behalf however this presumption is rebuttable. When considering a strike out (of either the claim or response) the party must be given room to disassociate themselves from what their representative has done. In the immediate context "scandalous" does not mean shocking, rather it refers to the misuse of legal process to vilify others, or gratuitously insult the tribunal in the course of proceedings. Where such conduct is proven the tribunal must then go on to consider whether striking out is a proportionate response.

59. In ***Sud v London Borough of Hounslow*** **UKEAT/0156/14** the EAT upheld the decision to strike out a claim on discovering that the claimant had tampered with medical evidence and tried to mislead the tribunal when applying for a postponement. As per Laing J:

    *“it is absolutely clear that the Claimant's conduct had been such that a fair trial was no longer possible. The EJ referred in terms to the fact that the Claimant's conduct had fatally undermined the trust that the Tribunal could have in her veracity…”* (paragraph 33)

60. In ***Force One Utilities Ltd v Hatfield*** **UKEAT/0048/08** the EAT confirmed that the tribunal had been correct to strike out a response due to the respondent’s intimidatory conduct. In that case the claimant was representing himself as a litigant in person and the threatening conduct included threats of violence. The EAT upheld the finding that the conduct sufficiently intimidated the employee so as to affect his ability to give evidence without fear of consequences, accordingly a fair trial was no longer possible and the only proportionate response was to bar the employer from participating in both the liability and remedies hearing. As per Elias P:

    *“Once intimidation of this kind is found to have occurred, it will be a very exceptional case indeed where it can be said that a finding that no fair trial is possible is perverse.”* (paragraph 28)

61. The dicta of Elias LJ in ***Abegaze v Shrewsbury College of Arts and Technology*** **[2009] EWCA Civ 96** reminds tribunals that the questions to be considered are:

    *“In the case of a strike out application brought under paragraph (c), it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed.”* (paragraph 15)

62. The reference to paragraph (c) in the above quotation relates to the previous version Employment Tribunal Rules of Procedure.

63. Finally the EAT in the recent case of ***Smith v Tesco Stores Ltd*** **[2023] EAT 11** upheld the tribunal decision to strike out the claim but urged caution and reminded tribunals that “Strike out is a last resort, not a short cut” and that this case had been exceptional because the claimant had demonstrated that he was not prepared to cooperate with the respondent and the employment tribunal to achieve a fair trial.

**Deposit Orders**

64. Rule 39 of the Employment Tribunals Rules of Procedure 2013 provides:

    *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little*

*reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

*(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

*(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*

*(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.*

*(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

*(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

*(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.*

*(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

65. In the case of ***Hemdam v Ishmail*** **[2017] IRLR 228** Simler P set out the dual consequences of a deposit order:

*"A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit."* (paragraph 10)

66. It was noted that the whilst the test for ordering a deposit is less rigorous to that for striking out under Rule 37(1)(a), there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. When determining whether to make a deposit order, a tribunal is not restricted to considering purely legal questions, and is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and reach a provisional view as to the credibility of the assertions being put forward. However the EAT noted that the purpose is not to make access to justice difficult nor to effect a strike out through the back door.

67. Any order to pay a deposit must be one that is capable of being complied with, and so the value of any order (not exceeding £1,000) must be such that the party that is the subject of the order is able to pay it, and therefore Rule 39(2) requires the Tribunal to make reasonable enquiries into the paying party's ability to pay the deposit and have regard to that information when deciding the amount of the deposit.

68. That does not necessarily mean any deposit order should be for a nominal amount - it should also be high enough "*to bring home... the limitations of the claim*" - ***O'Keefe v Cardiff and Vale University Local Health Board*** **ET Case No.1602248/2015**.

69. In addition to the "pause for thought before paying" effect of a deposit order, Simler P in ***Hemdam*** above alludes the consequences of proceeding with complaints subject to a deposit and losing for the same reasons as set out in that order. In addition to awarding the deposit to the other side, the effect of Rule 39(5) is that the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76. This creates a significant risk that an order of costs may be made against the party subject to the deposit order.

70. Where a tribunal is considering making more than one deposit order (for example in relation to individual allegations) it is appropriate for that tribunal to consider not only the propriety of each individual deposit order sought, but also whether the total sum awarded is proportionate - ***Wright v Nipponkoa Insurance (Europe) Ltd*** **EAT 0113/14**.

**Protected disclosures / whistleblowing**

71. The Employment Rights Act 1996 provides:

*43B(1) 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) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

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

*(e) that the environment has been, is being or is likely to be damaged, or*

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

*…*

*43C Disclosure to employer or other responsible person.*

*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —*

*(a) to his employer, …*

*47B Protected disclosures.*

*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

*(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*

*(a) by another worker of W's employer in the course of that other worker's employment, or*

*(b) by an agent of W's employer with the employer's authority,*

*on the ground that W has made a protected disclosure.*

*(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*

*(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.*

*(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—*

*(a) from doing that thing, or*

*(b) from doing anything of that description.*

*(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—*

*(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and*

*(b)it is reasonable for the worker or agent to rely on the statement.*

*But this does not prevent the employer from being liable by reason of subsection (1B).*

72. In ***Williams v Michelle Brown AM*** **UKEAT0044/19/00**, HHJ Auerbach set out the test for identifying whether a qualifying disclosure has been made:

    *"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*

    *Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute."* (paragraphs 9 and 10)

73. As per Linden J in ***Twist DX and others v Armes and others*** **UKEAT/0030/30/JOJ**:

    *"..the five requirements of section 43B(1) are evidentially exacting for the claimant, who has the burden of proof in relation to this issue. ETs, in my view, can be relied upon to use their common sense and awareness of the aims of the legislation to separate the genuine public interest disclosure cases from claims which are constructed. Moreover, even where the worker has made a qualifying disclosure which is protected, they will not succeed unless the ET concludes that the disclosure of the qualifying information was a, or the, reason for the treatment complained of…"* (paragraph 105).

74. There must be a disclosure of information. In ***Cavendish Munro Professional Risks Management Ltd v Geduld*** **[2010] IRLR 38**, the EAT held that to be protected, a disclosure must involve giving information, and not simply voice a concern or raise an allegation:

*"The ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information."* (paragraph 24)

75. However in ***Kilraine v London Borough of Wandsworth* [2018] ICR 1850** the Court of Appeal held that:

*"…the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. …*

*On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1) , not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision."* (paragraphs 30 and 31).

*…*

*"The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). 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). The statements in the solicitors' letter in the Cavendish Munro case did not meet that standard.*

*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. As explained by Underhill LJ in Chesterton Global Ltd v Nurmohamed [2018] ICR 731 , para 8, this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such*

*that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."* (paragraphs 35 and 36).

*…*

*"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 the Cavendish Munro case [2010] ICR 325, para 24, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the 1996 Act, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner"* (paragraph 41).

76. It is possible for several communications together to cumulatively amount to a qualifying disclosure even where each communication is not a qualifying disclosure on its own - ***Simpson v Cantor Fitzgerald Europe*** **[2020] EWCA Civ 1601.** Here the Court of Appeal agreed with the approach of the EAT in ***Norbrook Laboratories (GB) Ltd v Shaw*** **UKEAT/0150/13** where it was held that three emails taken together amounted to a qualifying disclosure even where the last email did not have the same recipients as the first two, as the former emails had been embedded in the final email. It will be a question of fact for the tribunal to decide whether two or more communications read together may be aggregated to constitute a qualifying disclosure on a cumulative basis.

77. As regards the Claimant's belief about the information disclosed, the question is whether the Claimant believed at the time of the alleged disclosure that the disclosed information tended to show one or more of the matters specified in section 43B(1). Beliefs the Claimant may have come to hold after the alleged disclosure are irrelevant. Whether at the time of the alleged disclosure the Claimant held the belief that the information tended to show one or more of the matters specified in s.43B(1) and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs. It is important for a tribunal to identify which of the specified matters are relevant, as this will affect the reasonableness question.

78. The belief must be as to what the information tends to show, which is a lower hurdle than having to believe that it does show one or more of the specified matters. There is no rule that there must be a reference in the disclosure to a specific legal obligation or a statement of the relevant obligations nor is there a requirement that an implied reference to legal obligations must be obvious. However, the fact that the disclosure itself

does not need to contain an express or even an obvious implied reference to a legal obligation does not dilute the requirement that the Claimant must prove that he had in mind a legal obligation of sufficient specificity at the time he made the disclosure - ***Twist DX***.

79. In ***Eiger Securities LLP v Korshunova* [2017] ICR 561**, Slade J held:

*"In order to fall within ERA s.43B(1)(b)… the ET should have identified the source of the legal obligations to which the claimant believed Mr Ashton or the respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. …*

*The decision of the ET as to the nature of the legal obligation the claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the claimant's belief that a legal obligation has not been complied with"* (paragraphs 46 and 47).

80. The Court of Appeal considered the public interest part of the test in ***Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979**, from which the following principles can be identified:

80.1 There is a subjective element - the Tribunal must ask, did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest?

80.2 There is then an objective element - was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest.

80.3 The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. As per Underhill LJ:

*"That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable."* (paragraph 29)

80.4 While a worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.

80.5 The reference to public interest involves a distinction between disclosures which serve only the private or personal interest of the worker making the disclosure, and those that serve a wider interest.

80.6 It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest.

81. When considering the question of the Claimant's reasonable belief, it must be remembered that motive is not the same as belief - ***Ibrahim v HCA International Limited* [2020] IRLR 224**.

**Victimisation**

82. Section 27 Equality Act 2010 provides:

*Victimisation*

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*

*(a) bringing proceedings under this Act;*

*(b) giving evidence or information in connection with proceedings under this Act;*

*(c) doing any other thing for the purposes of or in connection with this Act;*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

*(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

*(4) This section applies only where the person subjected to a detriment is an individual.*

*(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

83. A three stage test for establishing victimisation under the legislation in force prior to the Equality Act 2010 was endorsed in ***Derbyshire and ors v St Helens Metropolitan Borough Council and ors* [2007] ICR 841, HL**, and ***Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, HL**. This three stage test involved asking the following:

    i. did the employer discriminate against the Claimant in any of the circumstances covered by discrimination legislation?

    ii. in doing so, did the employer treat the Claimant less favourably than others in those circumstances?

    iii. was the reason for the less favourable treatment the fact that the Claimant had done a protected act or that the employer knew that the Claimant intended to do a protected act, or suspected that the Claimant had done, or intended to do, a protected act?

84. Following the implementation of the Equality Act 2010 the definition of victimisation under s. 27 EQA 2010 differs slightly and it is now more appropriate to approach the test by asking the following questions

    i. did the alleged victimisation arise in any of the prohibited circumstances covered by the Equality Act 2010?

    ii. if so, did the employer subject the Claimant to a detriment? and

    iii. if so, was the Claimant subjected to that detriment because of having done a protected act, or because the employer believed that the Claimant had done, or might do, a protected act?

Protected act

85. There must be a clear allegation amounting to a protected act. Therefore an allegation that something might be discriminatory rather than is actually discriminatory, will not be sufficient - ***Chalmers v Airpoint Limited and Others* UKEAT/0031/19.** In addition, if what is alleged by Claimant as amounting to a breach of the Equality Act would not be unlawful under that Act then it cannot be a protected act - ***Waters v Metropolitan Police Commissioner* [1997] IRLR 589.**

86. In ***Beneviste v Kingston University*** **UKEAT/0393/05** the EAT held that merely making a criticism, grievance or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of discrimination legislation was not sufficient to amount to a protected act.

87. In ***Durrani v London Borough of Ealing*** **UKEAT/0454/12** the EAT upheld a tribunal's decision that the Claimant had not done a protected act. Whereas that claimant had referred to being "discriminated against" and suffering detriment during his employment, the tribunal found that he had not used the word "discriminated" in any sense other than that he had been unfairly treated generally, not specifically because of the protected characteristic (here race). Nevertheless the EAT made it clear that each case must be determined on its own particular circumstances and as per Langstaff P:

*“This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances…”*

88. In ***Fullah v Medical Research Council and another*** **UKEAT/0586/12** the EAT upheld a tribunal decision that the claimant had not carried out a protected act even where he had brought an internal complaint of harassment alleging that he had been "physically, verbally and psychologically bullied and harassed, discriminated and victimised both directly and indirectly." That claimant did not mention the protected characteristic (here race) and alleged that the manager had treated other employees badly as well. The EAT accepted that the word race did not have to appear, but the context had to indicate a relevant complaint which was lacking here. It was noted that the claimant was articulate and well-educated and clearly knew the language to use for such a claim as he had done so a year later.

Detriment

89. The employee must be subjected to a detriment, which has been decided to mean placed at a disadvantage – ***Williams***. above. In ***Ministry of Defence v Jeremiah*** **[1980] ICR 13, CA** it was held that detriment is established if the treatment complained of is of a kind that a reasonable worker would or might take the view that in all the circumstances it was to their detriment. This interpretation was upheld in ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337 HL** however the court noted that an unjustified sense of grievance cannot amount to a ‘detriment’.

90. The meaning of detriment was considered in ***Warburton v Chief Constable of Northamptonshire Police*** **[2022] ICR 925**. Whereas s. 27 makes reference to a “reasonable worker” it is not a wholly objective test, and it is enough that a worker might take that view. If a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied.

91. It is not necessary to try to demonstrate whether the Claimant is better off or no worse off, rather it is sufficient if the complainant can reasonably say that they would have preferred not to have been treated differently - ***Chief Constable of West Yorkshire Police v Khan*** **[2001] ICR 1065, HL.**

92. Therefore, for detriment to be proven, it is for the Claimant to show that they were or would have been, in their subjective view, placed at a disadvantage and that it was objectively reasonable for them to have held that view.

Causation

93. The detriment relied upon by a Claimant must be linked to the protected act. The same test for causation in direct discrimination, is therefore relevant to victimisation because the statutory wording is the same.

94. Whereas conscious motivation on the part of the discriminator is not a necessary ingredient of victimisation – ***Nagarajan v London Regional Transport*** **[1999] IRLR 572,** it is still necessary to determine the reason for the treatment complained of - ***Khan***.

95. The essential question at heart of a victimisation complaint is to identify the reason for the treatment. A detrimental act in response to a complaint of discrimination will not constitute victimisation if the reason for it is not the complaint as such, but rather some feature of it which can properly be treated as separable - ***Martin v Devonshires Solicitors*** **EAT/0086/10**.

96. If protected acts have a 'significant influence' on the employer's decision-making, discrimination will be made out - ***Nagarajan****.* The word "significant" was considered by the Court of Appeal in ***Igen***, where it was clarified that for an influence to be 'significant' it does not have to be of great importance – is "an influence which is more than trivial." The words "significant" and "trivial" were considered by the EAT in ***Villalba v Merrill Lynch and Co Inc and ors*** **[2006] IRLR 437, EAT** where it was held at first instance that the protected act complaint was 'only a very small factor, not a significant influence' in the decision to that Claimant remove her from her role therefore it did not amount to an act of victimisation under the then Sex Discrimination Act 1975. This was upheld on appeal to the EAT which confirmed that:

*"We recognise that the concept of "significant" can have different shades of meaning, but we do not think that it could be said here that the tribunal thought that any relevant influence had to be important; as Mr Linden pointed out, the juxtaposition of "a very small factor" with "not a significant influence" strongly supports the view that they did not think that such victimisation as there was amounted to anything more than trivial in relation to the decision taken by Mr Yu. It was not material to the decision to remove Ms Villalba from office, or the subsequent decision to dismiss. If in relation to any particular decision a discriminatory influence is not a material influence or factor, then in our view it is trivial."* (paragraph 79)

97. It is not necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor - ***Pathan v South London Islamic Centre*** **EAT 0312/13***.*

**Time**

98. Section 48 Employment Rights Act 1996 provides:

***Complaints to employment tribunals.***

***…***

*(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.*

*…*

*(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 failures, 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.*

*(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;*

*and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.*

99. Section 123 Equality Act 2010 provides:

***Time limits***

*(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
*(b) such other period as the employment tribunal thinks just and equitable.*

*(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*

*(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section—*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

100. In the case of ***E v X and others*** **UKEAT/0079/20** HHJ Ellenbogden reviewed previous authorities and identified a number of key principles to be applied when time points are being considered at a preliminary hearing:

*1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form:* ***Sougrin****;*

*2) It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial:* ***Robinson****;*

*3) Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant:* ***Sridhar****;*

*4) It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue:* ***Caterham****;*

*5) When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case:* ***Lyfar****;*

*6) An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs:* ***Aziz; Sridhar****;*

*7) The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor:* ***Aziz****;*

*8) In an appropriate case, a strike-out application in respect of some part of a claim can been approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading:* ***Caterham*** *(as qualified at paragraph 47 above);*

*9) A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect*

*of that case is innately implausible for any reason:* ***Robinson*** *and paragraph 47 above;*

*10) If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing:* ***Caterham****;*

*11) Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out:* ***Caterham****;*

*12) Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing:* ***Caterham****;*

*13) If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively,, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue:* ***Caterham****.*

101. In ***Hale v Brighton and Sussex University Hospitals NHS Trust*** **UKEAT/0342/17** the EAT considered the issue of a "state of affairs" when deciding whether separate acts relied upon formed part of a continuing act. As per Choudhury J:

*"By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "a succession of unconnected or isolated specific acts" as per the decision in Hendricks, paragraph 52.* (paragraph 42)

…

*That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete.*

*In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision. It seems to me that that provision can encompass situations such as the one in question."* (paragraphs 43 and 44)

102. As regards the tribunal's discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable, a tribunal is entitled to take into account anything that it deems to be relevant - ***Hutchinson v Westward Television Ltd*** **[1977] IRLR 69.** The discretion of the tribunal is a wide one **- *Bexley Community Centre (t/a Leisure Link) v Robertson*** **[2003] EWCA Civ 576.** Time limits are intended to applied strictly and there is no presumption in favour of extending time, and it is intended to be the exception and not the rule.

103. However, there is no requirement that a claimant must always put forward a good reason for the delay or that time cannot be extended without an explanation by the claimant for that delay **- *Abertawe Bro Morgannwg University Local Health Board v Morgan*** **[2018] IRLR 1050**. This was followed in ***Concentrix GVC Intelligent Contact Ltd v Obi*** **[2022] EAT 149** where there had been no reason for the delay and the claimant was aware of the time limit, however the tribunal found that the delay did not cause any genuine prejudice to the respondent, whereas if the extension had not been granted, the claimant would not have been able to receive any remedy. However the EAT held that it would be an error for a tribunal to fail to consider the potential "forensic prejudice" arising from historical allegations that would be brought in if an extension of time were allowed.

104. The tribunal's discretion when extending time is as wide as that of the civil courts under *section 33* of the Limitation Act 1980 - ***British Coal Corporation v Keeble*** **[1997] IRLR**. This requires courts to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

1. The length of and reasons for the delay.
2. The extent to which the cogency of the evidence is likely to be affected by the delay.
3. The extent to which the party sued had co-operated with any requests for information.
4. The promptness with which the claimant acted once they knew of the possibility of taking action.

5. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

105. Similarly in ***Abertawe*** it was observed by Leggatt LJ that:

*"…factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."* (paragraph 19)

106. The Court of Appeal in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23** has cautioned tribunals against rigidly adhering to the checklist of potentially relevant factors and advised against the adoption of a mechanistic approach. When exercising the s. 123(1)(b) discretion, tribunals should assess all relevant factors in a case, including "the length of, and the reasons for, the delay". although some factors may be customarily relevant (such as the length of the delay and the reason for it), the factors that are actually relevant in a given case will be case-sensitive and must be determined by the tribunal on the basis of the given facts - ***Miller v Ministry of Justice*** **UKEAT/0003/15/LA**.

107. It is not wrong in principle to take into account the merits of a proposed claim and to weigh this in the balance of the overall factors - ***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** **[2022] EAT 132**. However when considering an extension of time on a just and equitable basis a tribunal should not conduct a mini-trial.

**Decision**

**(i) Claimant's application for strike out**

108. I will first deal with the Claimant's application to strike out the Responses of R1, R2, and R3. I should first point out that within her application of 11 July 2023 the Claimant has not made a specific allegation regarding R2's conduct of proceedings save to suggest in oral submissions that R2 some how supports the conduct of R1 and R3. In the absence of any specific allegation against R2 I consider that the application against R2 was entirely misconceived. I decline to strike out her Response and that part of the application is **refused**.

109. As regards the conduct of R1 and R3, it is alleged that their representative, Ms Hardy, sent an email to the Tribunal on 31 May 2023 which was misleading. This email concerned the contents of the hearing bundle for the preliminary hearing of 6 June 2023 before Employment Judge Krepski. I noted it was the Claimant who had been given the responsibility for preparing that bundle and I was advised that this was because R1 and R3 had been put to expense preparing the bundle for a previous hearing.

110. In her email to the tribunal on 31 May 2023, Ms Hardy (for R1 and R3) suggested that their additional documents had not been included in the bundle as the Claimant's representative had said that this was because the there was no requirement for the parties to agree the bundle. Having seen

the email from the Claimant's representative this is not the entirety of what was said – in his email of 30 May 2023 Mr Frater had actually said that there was no requirement to agree the bundle however he went on to add that if the documents were provided in a suitable format that day and an explanation of relevance, he would take instructions on their inclusion etc.

111. The reply from Ms Hardy rightly makes reference to the Overriding Objective to ensure the parties are on an equal footing, to deal with the case proportionately, to avoid unnecessary formality and delays, and to save expense. Ms Hardy suggested that she had to chase Mr Frater for the hearing bundle, she had had to review and make comments on the format, and that he already had copies of the documents she wanted to be included. I note that there was also a disagreement about Mr Frater having only included a redacted version of a medical document. Ms Hardy asked to be provided with an updated hearing bundle that day, failing which she would produce one and make an application for costs for doing so. No reply was sent. Mr Frater sent the bundle to the Tribunal the following day on 31 May and noted that a supplemental bundle may be required. The email from Ms Hardy to the Tribunal of 31 May sets out a number of concerns about the Claimant's bundle including the formatting, the contents, the numbering, and she attached a bundle she had produced including a statement of costs for having produced the bundle.

112. I do not agree that Ms Hardy misled or attempted to mislead the Tribunal. The issue of the preliminary hearing bundle should not have taken up at the amount of time that it did to agree what should have been a relatively straight forward matter. I find that Ms Hardy's email was an attempt to explain why the Tribunal was now presented with a second hearing bundle for the same hearing. I agree that Mr Frater's comment about not having to agree a bundle could have been considered either out of context or incomplete, but the fact remained that the bundle was not agreed by R1 and R3 and they sought to explain why they had produced their own. I do not find that there was any intention to deliberately mislead the Tribunal.

113. By the same token Mr Frater told me in oral submissions that the Claimant had complained to the Regional Employment Judge on 31 May 2023 about the behaviour of the Respondents, however on closer examination I noted that her email was addressed to the Watford Employment Tribunal and not as suggested by Mr Frater. I do not for one moment take that to be an intention to mislead either, occasionally in complex matters, comments may be made which turn out to be wrong or incomplete, but it does not automatically follow that there is an intention to mislead.

114. The Claimant has also referred to R1 and R3's alleged contentions that that the bundle she had produced was unsuitable. I should point out that until this hearing the Respondents were under the impression that it had been produced by Mr Frater an experienced legal representative. However it transpired that the bundle had been prepared by the Claimant. I have reviewed that bundle (of 186 pages) and it appears as though the documents have been pasted into MS Word with track changes applied, it has produced a large margin on the right side. Nevertheless I would agree with Mr Frater that the format of the bundle is usable, however this misses the point of R1 and R3 that they say that they had to produce their own as

it was incomplete. It would have been open to the Respondents to produce a supplementary bundle with the missing documents included (or better copies of those already included) rather than to produce a new bundle and I would point out to the parties that it is not a good use of judicial time and resources for bundle preparation to have escalated in the way in which it has today.

115. The Claimant also complains about Ms Hardy's email to the Tribunal of 27 June concerning the list of issues. Ms Hardy had said that the Claimant had omitted dates from her list of issues, thus disadvantaging the Respondents and she then applied for an unless order. It transpired that the Claimant had in fact produced a list of issues on 20 April 2023 with dates and that this appeared in the preliminary hearing bundle prepared by the Claimant. The Claimant also complains that Ms Hardy sent the wrong version of the list of issues to the Tribunal for today's hearing. The Claimant says that this can only be considered to be a deliberate act to mislead the Tribunal into believing that the Claimant has failed and/or refused to provide the relevant dates of events in the List of Issues. At this hearing today Ms Themistocleous has apologised and said that this was an error due to having different versions of the documents. I agree that is the most likely explanation for this as well. The fact that the list of issues appeared in the Claimant's own bundle would suggest to me that there was no intention to mislead the Tribunal given that the dates were clearly in the document before me, although I would add that the dates of the PCPs with regards to the reasonable adjustments claim are absent. I would again draw the Claimant's attention to my earlier finding that both representatives have accidentally made inaccurate comments in this case. Mistakes do happen and not every mistake belies an intention to mislead.

116. I also understand that the Claimant says that Ms Hardy wrongly removed her claim for aggravated damages from the list of issues on the basis that she was not entitled to claim them as they had not been pleaded. Here I agree with Mr Frater that aggravated damages can be claimed in a number of situations, including the conduct of proceedings. It would not have been possible to have included this in the ET1 before the conduct allegedly giving rise to the claim for aggravated damages had yet to arise. Aggravated damages is a remedy and not a cause of action in its own right, and accordingly it was incorrect to have removed the reference to that from the list of issues. I should make it clear that I am not suggesting that the Claimant is entitled to aggravated damages in this matter as that is not my function today, but rather I agree with Mr Frater that they do not have to be referred to in the ET1. I have seen nothing to suggest that this was done with any bad motive – the Claimant has instructed an experienced representative who has been able to challenge the removal of that issue so I see no prejudice to her. I find that it was no more than a disagreement between the parties.

117. I shall now turn to what the Claimant has described as aggressive conduct from the Respondents. This I understand is based upon the correspondence about the bundle and the list of issues including the application for an unless order which turned out to be unnecessary, as well as references to threats of applications for costs etc. The Claimant refers to suffering from anxiety and says that the conduct of the Respondents prevented her from attending the last preliminary hearing which she had

been asked to attend, and that if this conduct continues then she may not be able to take part in these proceedings. The Claimant also suggests that given the work of R1 it should be judged to a higher standard of conduct.

118. The Respondents have argued that litigation by its nature can be uncomfortable and that it will often involve hearing uncomfortable things said about a party which they would prefer not to hear. The Respondents deny aggressive conduct.

119. I have taken into account the reference to the Equal Treatment Bench book (pages 434-435) relied upon by the Claimant which states that many people with mental health problems are highly sensitive and need special care and protection to feel safe. I have also considered the Claimant's email to the Tribunal on 31 May 2022 where she complained of the Respondents' conduct. This email was sent by the Claimant herself rather than from Mr Frater. I have also considered the entirety of the Claimant's witness statement as well as the skeleton argument produced by Mr Frater. I have paid close attention to the correspondence from the Respondents, in particular the emails to the Tribunal which refer to the hearing bundle and the list of issues, and which make reference to seeking costs in the future.

120. Litigation by its very nature is adversarial and that for many people it can be distressing as they enter an arena which is foreign to them. That said litigation should not be conducted as it is warfare either, and there are standards of behaviour expected from all those who take part in tribunal proceedings. The Overriding Objective is a very good starting point for setting the standards which the parties are expected to meet. I do not agree that R1 should be subject to a higher standard than other employers in the conduct of litigation by virtue of the nature of its work. I do however find that a respondent's conduct of litigation should be measured and where a claimant is disabled by virtue of anxiety, I would expect a respondent to take care when sending correspondence. This can be ameliorated to a certain degree where that claimant is legally represented as it can be expected that their advisor will properly advise them, for example on the cost regime in the Tribunal and that costs are the exception and not the rule. The fact that a party threatens costs does not mean that they will obtain them – the discretion to award costs lies with the Tribunal not the parties.

121. Mr Frater tells me that the Respondents' threat of costs is endemic throughout the bundle, whereas as Ms Themistocleous refers me to two instances. I note that there are two occasions where Ms Hardy has provided a costs schedule, the first is 31 May 2023 regarding the preliminary hearing bundle and it was suggested that a costs application would be made at the preliminary hearing of 6 June 2023. There is a reference in an email of 27 June 2023 to another potential application for wasted costs regarding the list of issues. A further costs schedule is dated 6 June 2023 which must be an error as the work carried out is 3 July 2023 and the bundle index lists the date as 7 July 2023.

122. In any event, the Claimant will have the opportunity to oppose the applications for costs if those applications are pursued. I do not intend to deal with the merits of those applications today, however it is sufficient for the purposes of today's application for a strike out to note that I do not consider the references to costs from Ms Hardy to have been out of the

norm when disputes have arisen over the preparation of a bundle or a list of issues. Parties are entitled to indicate that they may apply for costs where the circumstances warrant it. The fact that the Respondents have indicated that they will apply for costs does not mean they will be successful either in full or in part.

123. Having reviewed all of the correspondence and conduct I have been referred to, I must, applying the guidance in ***Bolch***, consider whether the conduct relied upon has been scandalous, unreasonable or vexatious conduct, and if so I must then consider whether a fair trial is still possible, before then considering the appropriate remedy, bearing in mind that a costs order may be a more appropriate remedy than a strike out.

124. I do not find that the conduct of R1 and R3 has gone anywhere near meeting the threshold of being scandalous, unreasonable or vexatious. I find that it falls far short of that for reasons I have already explained. I note that the Claimant says that she has missed attending a preliminary hearing due to her reaction from the Respondents' conduct and that she fears she may not be able to attend in future if it continues. I do not doubt that this is how the Claimant genuinely perceives the situation to be, however I find that the reality is quite different. The nature of litigation involves seeking to resolve disputes and this in turn involves an element of conflict, and in this case I find that the conduct of Ms Hardy has been measured as she has attempted to clarify the list of issues and to prepare the matter for a preliminary hearing. Some of the correspondence contained errors, and some of it contained references to costs, however I do not find that it was done in an aggressive or a deliberately misleading way. I am sure that more care will be taken in the future when writing to the Tribunal.

125. Even if I am wrong on that, then I would have found that a fair trial was still possible. Accordingly the Claimant's application to strike out the Response of R1 and R3 is also **refused.**

**(ii) Respondents' application for strike out / deposit**

**Protected disclosure**

126. I will first address the complaint of detriment for having made a protected disclosure. I remind myself that I am to take the Claimant's case at its highest and that I am not to conduct a mini trial. In considering the prospects of success of this complaint I have applied the five stage test in ***Williams*** for identifying whether a qualifying disclosure has been made.

127. Having read the alleged disclosures relied upon it appears to me that at its very highest on 28 September 2021 the Claimant has done no more than to say that she was worried about the consequences on others (internal and external) if the staff continue to copy in management on emails and that if it continued it would create an atmosphere of pressure and mistrust which would negatively impact upon the service. The Claimant has also made reference to her own employment situation, specifically alleged breached of her privacy or confidentiality (and potentially that of one other colleague) and she has also made reference to an impact upon her health.

128. I consider that the Claimant has little reasonable prosects of demonstrating even the first limb in ***Williams*** that this was a disclosure of information. It appears to me that at their highest these are no more than general allegations on the part of the Claimant. I note that in ***Kilraine*** the Court of Appeal said that an artificial dichotomy should not be created between the passing of information and making an allegation, however the information provided by the Claimant is of a very general nature, lacking in specificity.

129. Even if the Claimant is able to demonstrate that some or all of this was a disclosure of information, I do not consider that she will be able to demonstrate that she reasonably believed that the communications about her privacy/confidentiality and her health were in the public interest. That said given her reference to those external to the business whom I understand are vulnerable adults and children, it is arguable that the Claimant may be able to demonstrate a potential public interest with respect to her comment about the negative impact upon the service to them of colleagues copying in managers into correspondence. However I consider that it will be difficult for the Claimant to demonstrate to the Tribunal the reasonableness of this belief. The witness testimony in this case may elaborate on why the Claimant feels that her belief was reasonable so that her communication was in the public interest. It not inconceivable that it could have been in the public interest, but it will depend upon the witness testimony.

130. As regards what this information tended to show, the Claimant relies upon a breach of a legal obligation under s. 43B(1)(b), which I understand is simply is a duty to spend public or charitable funds appropriately and to avoid wastage. A specific legal provision is not relied upon. The Claimant also relies upon s.43B(1)(d) which is that the health and safety of any individual has been, is being or is likely to be endangered. In this case the Claimant relies upon her own health, that of other colleagues and external people whom we know are vulnerable service users. Based upon the information before me I am not satisfied that the Claimant will be able to show either of these things, however again it is not inconceivable that the Claimant may be able to demonstrate that the information tended to show some risk to the health and safety of the service users. I am not satisfied that the Claimant will be able to show that the general information she says she communicated tended to show a breach of a legal obligation, however in both cases this may come down to witness testimony and it is not appropriate for me to conduct a mini-trial during a preliminary hearing. Similarly the reasonableness of the Claimant's belief that the information tended to show those things is again something which will need to be tested at a hearing as I do not have sufficient information before me to lead me to a particular conclusion.

131. I have also considered the Claimant's reliance upon the principle in ***Norbrook*** that It is possible for several communications together to cumulatively amount to a qualifying disclosure even where each communication is not a qualifying disclosure on its own. I do not agree that anything is likely to be gained in this case by joining these communications together. Much of what the Claimant communicated is vague and relates to her own situation thus making it difficult to demonstrate that it was either a disclosure of information or that the Claimant reasonably believed that it

was in the public interest. Looking at the allegations cumulatively does not remedy what is lacking in them.

132. Taking all of these factors into account, I am not persuaded that the complaint has no reasonable prospects of success however I am satisfied for the reasons given above that the claim has little reasonable prospects of success. I do not propose to go on to consider the detriments or causation given my findings in respect of the alleged protected disclosures themselves. The application for a strike out therefore **fails** and the application for a deposit order **succeeds**.

**Victimisation**

133. I will now turn to the Claimant's complaints of victimisation. I have reviewed the eight instances where the Claimant says that she carried out a protected act. Taken at their highest I can see that the Claimant says she told Ruth Croft on 28 September 2021 that she felt intimidated. On 5 October 2021 the Claimant says that she wrote in an email to Ruth Croft and Janet Holmes that she was being bullied and harassed. On 15 February 2022 the Claimant says that she wrote to Janet Holmes and Ruth Croft to ask them to ask R2 to stop emailing her and she would like this to stop. On 6 April 2022 the Claimant says that she told Ruth Croft orally that R2 was using the grievance policy to harass her even further, that this was clearly victimisation and that she was "going to start preparing for a grievance."

134. In none of these instances has the Claimant used the word discrimination, nor has she gone further and connected the use of the words intimidation, bullying, harassment to her protected characteristic of disability. These comments would seem at a first glance to fall within the ***Durrani*** and ***Fullah*** examples of where the use of similar words were deemed not to have amounted to protected acts. In those cases the claimants had used the word discrimination but had still failed to show that they had done a protected act due to the lack of a connection with a protected characteristic.

135. The Claimant's alleged oral comment on 6 April 2022 to Ruth Croft that "*I'm going to start preparing for a grievance"* is a good indication that even at the material time the Claimant may not have considered herself to have carried out a protected act up to that date. However, the wording of s. 27(1)(b) makes it clear that victimisation can occur when person A believes that person B has done or "may do" a protected act. In the Claimant's case her comments could be interpreted as setting out her intention to do a protected act, either on their own or together with her previous comments about intimidation, bullying and harassment. It is for that reason I do not find that the victimisation complaint has no prospects of success.

136. Much will depend upon the witness evidence of what the Respondent interpreted that comment to mean. I note that the word discrimination is not used, nor is there any reference to a protected characteristic. I also note that the date of the alleged comment is 6 April 2022. Most of the alleged detriments had already occurred before that time and the comment on that date appeared to relate matters occurring on that date and beforehand. There are only two alleged detriments which post date the comment which

are that on 25 April 2022 R2 refused to allow the Claimant to answer his grievance questions in writing, and that on 28 May 2022 R1 allowed senior management to falsify or send misleading information to Occupational Health. A third alleged detriment of not taking the Claimant's comments seriously is alleged to have started on 6 October 2021 (some six months earlier) and endured until August 2022. As such I consider that there will be significant causation problems with the latter allegation if the Claimant intends to rely upon her alleged comment of April 2022.

137. Looking at all of the alleged protected acts together with the alleged detriments, I cannot find that the complaint has no reasonable prospects of success however I find for the reasons I have given above that it has little reasonable prospects of success. The application for a strike out therefore **fails** and the application for a deposit order **succeeds**.

**Deposit Order Amount**

138. I am required to take into consideration the Claimant's means when making a deposit order. The Claimant has not provided copies of her bank statements or pay slips however I do not criticise her for that as the Tribunal had not required her to do so. The limited information available to me about the Claimant's means is that set out in her witness statement which indicates that she has an income of £1058 per month, she has no housing costs (which she tells me are covered by her husband but are rising) and she is paying approximately £600 per month in legal fees, and its currently running a deficit of £317 per month when her other expenditure is taken into account – these include food, fuel, insurance and childcare costs.

139. The Respondent has asked for a deposit of £1,000 per head of claim which I consider to be wholly unrealistic and excessive. That would represent two months' take home pay which would leave her with almost nothing. The Claimant has suggested a nominal amount of £1 which I also consider to be unrealistic and inadequate.

140. In the circumstances, and given the Claimant's limited means I consider that a deposit order of **£150** per head of claim is appropriate, thus a total of **£300** if she wishes to proceed with both her detriments complaint and her victimisation complaint. This figure represents half of what the Claimant says she is paying in legal fees on average per month. This figure is high enough "*to bring home... the limitations of the claim"* but it is not so high that it would achieve a strike out by the back door. Nevertheless the Claimant will be on notice of the potential cost consequences should she proceed with those complaints and they are ultimately unsuccessful on the grounds which I have identified today.

**Time**

141. I am also asked to strike out the complaints on the basis that they have been brought out of time for the purposes of s. 123 Equality Act 2010 and also s.48 Employment Rights Act 1996. This was the last of the matters which Employment Judge Krepski had said would be considered today unless the Tribunal decides otherwise. In considering the issue of time I must apply the guidance in ***E v X and others***.

142. I have read the pleadings, the documents in the bundles to which I was referred and listened to the submissions of the parties (as well as reading the Claimant's written submissions), together with her witness statement. I find that the Claimant's witness statement was of limited assistance as it did not address the issue of time in great detail. The most that I can usefully extract from the Claimant's witness statement is that she says she did not feel the need to bring a claim earlier as she felt in safe hands with Ms Croft and Ms Holmes who she said had put in place protective measures for her. The Claimant then goes on to provide a chronology of what she says happened. The Claimant's skeleton argument goes some way further and relies upon "a continuing state of affairs" following the decision to instigate a disciplinary process against the Claimant.

143. I must view the claimant's case at its highest, assuming facts as pleaded by her. I must consider whether the claimant has established a reasonably arguable basis for her argument that the acts are so linked as to be a continuing act (for the victimisation complaint) or a series of acts or failures (for the detriment complaint). In doing so I need to stand back and look at the acts or omissions complained of, the alleged dates, and the wider context.

144. It is clear that anything allegedly occurring before 15 April 2022 with respect to R1 and R2 is *prima facie* out of time, and with respect to R3 that date is 8 May 2022. The majority of the alleged detriments occurred before those dates, however as I have noted, many of these are alleged to be part of a continuing state of affairs. There is a possibility that the alleged continuing state of affairs commenced on 8 March 2022 which is the date that R2 and Ms Bradshaw brought a grievance against the Claimant. I note that the Claimant says that she repeatedly asserted until she resigned that the Respondent ought to have treated it as a malicious grievance.

145. The bringing of that grievance and the manner in which it was investigated, may amount to a continuing state of affairs, however that is something which will require witness evidence to be heard and then tested at a final hearing. This is a case where there may be no appreciable saving of preparation or hearing time if issues that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints which are clearly in time. Victimisation and detriment claims are acutely fact sensitive and should only be definitively determined in light of all the evidence. I have therefore concluded that determination of whether the complaints of detriment and of victimisation are out of time is a matter that should be left to determined by the full tribunal at the final hearing.

146. Even if I am wrong on my observations in respect to a continuing state of affairs, there is also the question of the just and equitable extension. The claimant correctly asserts that the tribunal should consider the length and reasons for the delay, and whether there has been any prejudice to the Respondent. I have noted the Claimant's argument that she did not bring a claim earlier as she says that she had been assured by management that she would be protected and that she expected the grievance against her to be dismissed. I also note there are allegations which appear to be within time which may necessitate consideration of matters which are *prima facie* out of time. On that basis I was not satisfied that the Respondent's argument that it would suffer prejudice was particularly persuasive.

Accordingly, I do not consider that the Claimant's contention that it would be just and equitable to extend the time stands no or little reasonable prospects of success.

147. The application to strike out the detriment and victimisation complaints in respect of the time point (or for a deposit order in the alternative) is **refused**. The issue of time will be considered at the final hearing, subject to the payment of the deposit orders set out above.

**Costs**

148. The Claimant makes an application for wasted costs in connection with the applications today. I am not minded to consider an application for costs at this stage. Applications for costs from all the parties can be considered at the end the claim if they wish to pursue them then. I do not intend to confuse or to delay matters even more at the preliminary stage by engaging in costs applications which are premature.

**Further preliminary hearing**

149. It is clear that this case requires urgent case management before it can proceed to a final hearing so that the issues can be finalised, particularly with respect to the reasonable adjustments claim, and for directions to be made for the final hearing including consideration of any adjustments the Claimant may require to enable her to give evidence.

150. I will list this matter for a further private preliminary hearing via CVP to take place the first open date after the deadline for payment of the deposits has elapsed.

________________________________________

Employment Judge Graham
10 August 2023

________________________________________

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
15 August 2023

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FOR EMPLOYMENT TRIBUNALS