EMPLOYMENT TRIBUNALS

Claimant: Miss J Francis

Respondent: Education Learning Trust

Heard at: Manchester (by CVP) **On:** 13 October 2023

Before: Employment Judge Cookson

REPRESENTATION:

Claimant: Mr Moment (Lay Representative)
Respondent: Mr Butler (counsel)

JUDGMENT

It is the decision of the Employment Tribunal that:

1. The application to strike out the claim under Employment Tribunal Rule 37(1)(a) is refused.

2. The application to make any specific allegation or argument in the claim subject to a deposit under rule 39(1) is refused.

REASONS

Introduction

1. This was a public preliminary hearing to determine the respondent's application for the claimant's claims under section 47B of the Employment Rights Act 1996 to be struck out.

2. The preliminary hearing was listed by Employment Judge Johnson at a private case management hearing on 26 July 2023. The hearing was listed with a time estimate of three hours to consider any application made by the respondent for strike out or deposit. Unfortunately, we had significant technical difficulties at the outset of the hearing and in consequence it was not possible for me to conclude my

deliberations and give judgment in the time allocated. For that reason, I had to reserve my decision.

3. In addition, some time was lost considering Mr Moment's objections to the hearing proceeding on the basis that the respondent had not complied with instructions given by the Employment Tribunal for bundles for today's hearing to be provided at least five days before today's hearing. That had not happened, and Mr Moment told me that as a result he had not had an opportunity to discuss the preliminary hearing bundle with the claimant. He had previously written to the Tribunal to object to today's hearing going ahead.

4. I acknowledged Mr Moment's concerns, but there were no documents in the preliminary hearing bundle which he and the claimant had not seen. The claimant did not attend today's hearing as it appears that Mr Moment had not considered that necessary. Nevertheless, I could see no reason why we could not have a fair hearing and I did not consider that the failure to provide the bundle was reason enough for this hearing not to proceed. Mr Moment told me that he had discussed the strike out and deposit application with the claimant, and after some discussions he accepted that the hearing should proceed. I offered him more time to read through the preliminary hearing bundle if required but he declined to do so.

Grounds for the application to strike out or make a deposit

5. The grounds on which the strike out and deposit were sought are set out in the respondent's application of 20 September 2023. The grounds of the application were developed by Mr Butler in the skeleton argument provided to the Employment Tribunal together with a supporting authority (**Bahad v HSBS Bank PLC [2022]** EAT 83. The grounds for the application can be briefly summarised as follows.

Reasonable belief that the disclosure was made in the public interest

6. First, it is argued that the claimant has failed to demonstrate in the claims or in any documents disclosed to the date of the application that she had made a qualifying disclosure within the scope of the Employment Rights Act 1996. In particular in relation to the alleged qualifying protected disclosure, which it is asserted was made by email on 15 March 2023, it is argued that it is clear from this correspondence that the claimant did not have a reasonable belief that the disclosure was made in the public interest. On that basis the respondent argued that the claimant has no reasonable prospects of establishing that her alleged disclosure is a qualifying disclosure. If the respondent is right about that, none of the claims of detriment under section 47B could succeed. Mr Butler emphasised in particular that there is nothing in the pleaded case which suggests that the claimant had a reasonable belief in public interest in the disclosure at the time it was made. My attention was drawn to *Bahad* (above) - As HHJ Tayler made clear in that judgment:

"35 When considering strike out, it is not necessary that the claimant has already reached the destination of establishing the "something more", but a claim can properly be struck out if there is no realistic prospect of the claimant getting there.

36. As Maurice Kay LJ put it in Ezsias [26] the employment tribunal has to consider whether an application has a realistic as opposed to a merely fanciful prospect of success."

7. Mr Butler acknowledged that the principle that tribunals should be slow to strike out public interest disclosure cases where there are factual disputes but argued that this case falls into that category of cases the claimant has no prospect of getting to the point where her case can succeed.

8. My attention was drawn to the requirements of section 43B – that in order to amount to a qualifying disclosure any disclosure of information must, in the reasonable belief of the worker making the disclosure, be made in the public interest as well as amounting to a disclosure of information which tends to show a breach of a relevant legal obligation.

9. Mr Butler drew my attention to the case of **Mr A Dobbie v Paula Felton t/a Feltons Solicitors** (UKEAT/0130/20/OO) which reviews the authorities on public interest and emphasises the approach in **Chesterton** which I have referred to further below.

10. Mr Butler argued that the terms of the protected disclosure made make clear that the claimant was raising a private contractual dispute with her employer and pointed to there being no suggestion of a public interest in that contractual dispute. He points to the absence of any pleading or allegation of such a belief in the claim form.

11. It is relevant to note at this stage that there is no express reference to a claim under sections 43A and 47B in the claim form (that is in relation to public interest disclosures and detriment). However, after discussions at the preliminary hearing before Employment Judge Johnson, he had accepted that a section 47B complaint can be fairly identified through the references in the claim form to the claimant notifying the respondent of her entitlement to full sick pay and the fact that she believed she suffered detriments as a consequence. The record of the preliminary hearing notes that Mr Moment had agreed that that was effectively the claim which was being brought, and that the respondent had argued that that claim had not been identified with any clarity. In relation to that latter point however, EJ Johnson identified that the s43A/s47B claims can be identified and there is no suggestion that this has been appealed or that he has been asked to reconsider that.

12. The List of Issues prepared by Employment Judge Johnson goes on to identify that the claimant is relying on a protected disclosure made on 15 March 2023 and that she says that she suffered two detriments in consequence – on 21 March 2023 at a stage one absence meeting, and on 30 March 2023 in relation to a payslip sent to the claimant which suggested that she was to receive half pay even though she had returned to work.

The alleged detriments

13. In relation to the allegations about the meeting, Mr Butler points to the fact that there is no mention of the meeting on 21 March at all in the ET1. He argued that the allegations (even as identified in the List of Issues) are very broad brush, and if there was a claim it could be expected that that would be set out in clear terms in the claim form but nothing about the meeting has been pleaded. Mr Butler argued that the claimant has no reasonable prospect of showing a link between the meeting and the alleged protected disclosure. He argued that at present there is no suggestion at all of how the claimant would prove her claim – that there is a connection between the meeting and the email of 15 March 2023.

14. In relation to the second detriment Mr Butler points to the fact that at best there appears to be a complaint about the delay of one day in receiving pay as a result of an oversight by the respondent. He argued that it was simply implausible that this claim could succeed and again pointed to the absence of any pleading. Mr Butler argues that I should take the pleaded case at its highest, but the case cannot go beyond the pleaded case. There is nothing explicit in the claim form about this being a detriment and no suggestion of who is said to be responsible and why it is said there is a connection with the alleged public interest disclosure.

15. I will add here that Mr Moment clarified that the second detriment complaint is about the stress the claimant experienced when she received the payslip suggesting she was only to be paid half pay (as if she was still off sick) which had caused her very significant distress, and that she had needed to take steps to ensure that she received payment. The detriment is not that she was in fact underpaid.

16. Mr Butler's main submission was the complaints have no reasonable prospect of success but in the alternative invited me to find they had little reasonable prospect of success and order the claimant to pay a deposit for each complaint.

Claimant's response to the application

17. Mr Moment objected to the applications for strike out or deposit. He argued that the application has been made before it is possible to say if it has any reasonable prospects of success because it has been made before the claimant has had the opportunity to disclose relevant documents or explain her case in her witness statement.

18. In relation to the question of public interest disclosure, Mr Moment accepted that the claimant had a personal interest in the issue set out in the email and that the email does not refer to the issue being raised in the public interest, but says that the claimant will be able to show that behind her email that was her belief that her complaint was about the Burgundy Book for Teachers is being applied by schools including at the respondent, where there are issues of stress and mental health. Mr Moment points out the there is nothing in the legislation requiring a disclosure of information to refer to public interest to amount to a qualifying disclosure. Mr Moment told me that the claimant will be able to demonstrate that she had a belief that she was raising an issue of public interest at the time through correspondence between her and trade union representative.

19. In relation the detriments, in relation to absence meeting Mr Moment said that the claimant will show the email of 15 March was a material influence on the headteacher through her evidence about how much the head's attitude towards her had changed in just a few days since the disclosure. He says that the claimant's evidence will be that the head and the claimant went from being on good terms to the head being becoming extremely hostile. Mr Moment suggests that the obvious explanation in terms of what had happened was that the claimant had sent the "whistleblowing" email. It is suggested that the trade union representative will support the claimant's evidence that the head's attitude and behaviour was extremely and unusually hostile.

20. In relation to the second detriment, Mr Moment says that the claimant will be able to show that the email of 15 March had a material influence on the issue of

underpayment. The detriment the claimant says she was subject to is in essence the stress she was caused by a perceived threat that she would not be paid on time and would default on her mortgage and other significant payments. Mr Butler had referred to two emails in the preliminary bundle as showing that the idea that the pay issue had been deliberate was inherently implausible because they suggest the claimant queried payment and it was quickly resolved. However, Mr Moment told me that in fact that on the claimant's behalf he had drafted a large number of emails and he estimated that it taken twelve emails from the claimant for the respondent to take steps to ensure she was paid correctly. He says this this shows it was not a simple mistake and suggests (in essence) that inference should be drawn from the fact that the claimant had a return on 30 March planned with the senior managers but by 19 April the school's senior management had not taken any steps to sort out her pay. In terms of the connection with the whistleblowing Mr Moment argued that it is inconceivable that this could simply be a mistake.

The law

Public interest disclosure

21. The term "qualifying disclosure" is defined by section 43B Employment Rights Act 1996 ("ERA 1996"), which provides, so far as is relevant:

    "43B.— Disclosures qualifying for protection.

    (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

    …

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

    …"

22. In the reasonable belief of the worker making the disclosure, the information must tend to show one of the matters set out at paras. 43B(1) (a) to (f) ERA 1996. What is meant by this was considered by LJ Underhill in *Chesterton Global v Nurmohamed* [2018] ICR 731. Paragraphs 29 and 30 are particularly relevant in light of the issues raised by the respondent:

    "29. Third, 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. 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.

30. Fourth, while the 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: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

23. As it is the public interest element of the definition which the respondent raises in support of its application, I have not referred to the law in relation to qualifying disclosures more widely.

Strike out

24. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

"Striking out

37.— (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..."

25. The then President of the EAT, Choudhury J, helpfully summarised the current, and well-settled, state of the law on strike out in **Malik v Birmingham City Council** UKEAT/0027/19 as follows:

*"30 It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of **Mechkarov v Citibank N.A** [2016] ICR 1121, which is referred to in one of the cases before me, **HMRC v Mabaso** UKEAT/0143/17. UKEAT/0339/19/AT .*

*31. In **Mechkarov**, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:*

(1) only in the clearest case should a discrimination claim be struck out;

(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;

(3) the Claimant's case must ordinarily be taken at its highest;

(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

(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. ***In Community Law Clinics Solicitors Ltd & Ors v Methuen*** *UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."*

33. A similar point was made in the case of ***ABN Amro Management Services Ltd & Anor v Hogben*** *UKEAT/0266/09, where it was stated that, "If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be complaint with the principles in* ***Meek v City of Birmingham District Council*** *[1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out."*

26. A similar approach to that taken to strike out in discrimination claims is taken in protected disclosure claims: ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126.***

27. It is relevant to bear in mind that this guidance was given in the context of a litigant in person. Although the claimant in this case is represented by Mr Moment, he has emphasised to me that he is not a professional representative.

28. The Equal Treatment Bench Book reminds me of the difficulties that may be faced by litigants in person when they present a claim.

"Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:

- *Failing to choose the best cause of action or defence.*
- *Failing to put the salient points into their statement of case.*
- *Describing their case clearly in non-legal terms but failing to apply the correct legal label or any legal label at all. Sometimes they gain more assistance and leeway from a court in identifying the correct legal label when they have not applied any legal label, than when they have made a wrong guess."*

29. In ***Mbuisa v Cygnet Healthcare Ltd*** UKEAT/0119/18, HHJ Eady QC said this at para. 21:

"Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly

pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where – as Langstaff J observed in Hassan – the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

30. Whilst the issue of language is not relevant here, I have taken into account this principle, given that the claimant is, in essence, a litigant in person.

31. In his helpful judgment in the case of **Cox v Adecco & Others**. (UKEAT/0339/19/AT) HHJ Tayler summarised the law on strike out and set out nine propositions which I should regard to

"28. From these cases a number of general propositions emerge, some generally well- understood, some not so much:

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

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

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

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

Deposit

If I decide not to strike out the complaints under s43B/s47B of the ERA I am invited to make a deposit order under Rule 39.

"39.— Deposit orders

(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."

32. In ***Hemdan v Ishmail and anor*** 2017 ICR 486, EAT, Mrs Justice Simler (when she was President of the EAT) made clear that the purpose of a deposit order was 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 to continue them and by creating a risk of costs if the claim failed. She explained that that was legitimate policy because claims or defences with little prospect caused unnecessary costs to be incurred and time to be spent by the opposing party. They also occupied the limited time and resources of tribunals that would otherwise be available to other litigants. However, their purpose was not to make it difficult to access justice or to effect a strike-out through the back door.

33. Deposit orders are not a substitute for more appropriate case management orders aimed at clarifying the facts and issues or for ensuring compliance with case management directions (such as ordering further particulars, requiring amendments, or using unless orders) (***Tree v South East Coastal Ambulance NHS Foundation Trust*** EAT 0043/17).

34. The threshold for making a deposit order is that there is 'little reasonable prospect' of the particular allegation or argument succeeding. The test of 'little prospect of success' is plainly not as rigorous as the test of 'no reasonable prospect' for strike out and it follows that a tribunal has a greater leeway when considering whether to order a deposit. However, if a deposit order is to be made there must still be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response — ***Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors*** EAT 0096/07.

Discussion and conclusions

35. Mr Butler emphasised to me that I must take the pleaded case at its highest. I have been mindful however that the complaints which can be identified from the claim form has already been considered by EJ Johnson. He had identified that the claim form contains complaints about a single protected disclosure in sections 8.2 and 9.2 of the claim form and he records that he has identified that

two detriments have allegedly occurred following the disclosure – those are further identified in the annex setting out the issues and complaints.

36. I have taken into account the guidance referred to in the section on the law about the use of strike out and deposit and case management. If the respondent considers that further information is required to clarify the claimant's whistleblowing complaints, that can be dealt with by the clarification of the claims, although it seems to me that has been done by EJ Johnson in the annex in any event. If there are amendment issues which are said to arise those can be dealt with although that was not the purpose of this hearing. However, I do not consider that it is in accordance with the overriding objective for me to strike out a claim, or indeed order a deposit, because the claims have been imperfectly pleaded in the claim form.

37. Mr Butler has submitted that it is not at all clear from the claim form how the claimant will prove her case, but we do not expect to claimants to plead of all of the evidence that they intend to rely upon, indeed claims forms which refer in detail to evidence are often unhelpful to we seek to discourage

38. I cannot accept that because the claim form des not refer to public interest that means the claimant's claim is doomed to fail. The protected disclosure the claimant says she made has been identified. Whether the claimant can show that the email of 15 March was a qualifying protected disclosure will be determined by the tribunal which has the benefit of all of the evidence. One of the key issues may well be whether the claimant can persuade the tribunal that at the time she sent her email she had a reasonable belief that it was in the public interest, but the claimant is not prevented from presenting evidence about that because she it has not been pleaded in a technical sense.

39. I have taken into account what Mr Moment has told about the evidence which the claimant will present about this. Based on what he tells me about the evidence which can be presented about discussions between the claimant and her trade union, I cannot say that she has only a fanciful prospect of establishing that she had a reasonable belief about her disclosure being in the public interest at the time. I have taken into account the guidance in Chesterton. The claimant does not have to show that she had no personal interest in the information disclosed and it seems to me that it is clearly arguable that a disclosure relating to how a school or schools is applying the Burgundy Book to teachers suffering from stress is capable of being in the public interest. I cannot say that the claimant has no, or even little, prosect of establishing that she had a reasonable belief in public interest in the information disclosed when the email was sent. This seems to me to be a factual dispute which will need to be determined by consideration of the evidence.

40. Likewise, I am not persuaded that I can find that the identified detriments have no or little prospect of success. Mr Buter suggests that the claimant will not be able to how that the alleged protected disclosure had a material influence on what happened and the reasons for it, but I do not accept that. I certainly cannot find that the case is inconsistent with the contemporaneous documents produced to me when I am told that the respondent has not included all of the relevant contemporaneous correspondence. Mr Moment has also suggested that the evidence about the change in the relationship between the claimant

and the head teacher is evidence that the reason for the head's conduct at the meeting was the disclosure email.

41. Public interest disclosures cases are like discrimination cases because it is very unlikely that there will be explicit evidence that a protected disclosure was the reason, or part of the reason, for something happening. Whilst it is sometimes clear that the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documents, that is not the case here. I cannot say that there is little or no reasonable prosect of success if the claimant is able to show the facts are as Mr Moment asserts and I do not accept that the evidence which he says he will present means the complaints brought by the claimant go further than the claims identified by EJ Johnson for the claim form as set out in the case management summary.

42. It is important that I make clear to the claimant that I am not saying that I consider that her complaints will succeed. She still bears the burden of proof to show she made a protected disclosure and bears an initial burden of proof to show that this was the reason for the detriments. I have concluded only that she is arguable case if she is able to evidence the case described to me by Mr Moment.

Employment Judge Cookson

Date: 20 October 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
Date: 30 October 2023

FOR THE TRIBUNAL OFFICE