EMPLOYMENT TRIBUNALS

Claimant: Mr Irfan Hashmi

Respondent: HSBC Group Management Services Limited

RECONSIDERATION JUDGMENT

1. The judgment of the Tribunal that :

   The Respondent's applications to strike out the Claimant's claims for unfair dismissal (whether advanced under Section 103A, 105 or Section 98(4) of the Employment Rights Act 1996) and its applications to strike out the Claimant's claims of direct discrimination brought under the Equality Act 2010 are dismissed.

   is confirmed upon reconsideration.

REASONS

1. On 6 April 2023 I heard an application for orders striking out the Claimant's claims made by the Respondent. I refused those applications although I did make some deposit orders. I gave written reasons for my decisions. My decisions recording that I refused the Respondent's applications ought to have been included in a judgment rather than a case management order. I have dealt with that by reproducing the order I made above, and I have set out the reasons I gave for that conclusion as an annex to this judgment in order that both can be published as required.

2. By an e-mail sent at 11:23 on 10 October 2023 the Respondent sought a reconsideration of my judgment refusing the Respondent's application to strike out the Claimant's claims of unfair dismissal (brought pursuant to Sections 94 and 103A of the Employment Rights Act and his claims of direct discrimination relying on the protected characteristics race and age.

3. The basis of the Respondent's application was that in giving my reasons for my decisions I had referred exclusively to a skeleton argument prepared by Ms Diya Sen Gupta KC for an earlier hearing and had made no reference to the skeleton argument prepared by Mr Jammie Susskind who had appeared before me.

4. On 11 October 2023 I asked for a letter to be sent to the parties in which I indicated that the Respondents had correctly identified that I had not dealt with the skeleton

argument of Mr Susskind. I agreed that in the light of that I would need to reconsider my judgment in respect of my refusal to strike out the claims.

5. For the avoidance of any doubt my letter of 11 October 2023 was intended as notification to the parties that I considered that the Respondent's application should not be said to have no reasonable prospects of success for the purposes of rule 72(1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (hereafter references to rules are references to the rules set out in schedule 1 of the regulations).

6. In its application the Respondent asked for the matter to be dealt with without a hearing. I was unfortunately on leave when on 11 October 2023 the Claimant sent an e-mail asking for an indication of when he needed to make his written submissions. In the event the Claimant sent in written submissions by e-mail on 19 October 2023. Mr Hashmi opposed the Respondent's application but went on to ask that I set aside the deposit orders that I made. I shall not deal with the application to set aside the deposit orders I have made in this document as deposit orders are not a 'judgment' and a different process exists for revisiting such orders. I shall deal with that and the other matters Mr Hashmi raises in a separate case management order.

A hearing

7. The first matter I shall deal with is the question of whether I should list a hearing to deal with the Respondent's application. Rule 72(1) requires there to be a hearing unless I consider that a further hearing is unnecessary in the interests of justice. It follows that having a hearing is the default position. It is the Respondent that challenges my decision. The Respondent does not seek a hearing. I infer that the Respondent has nothing to add to its written application which in turn asks me to have proper regard to Mr Susskind's skeleton argument.

8. If I was not persuaded by the arguments made in writing in support of orders striking out the claims contained in Mr Susskind's skeleton argument then Mr Hashmi would not suffer any prejudice by there not being a further hearing. That would simply cause unnecessary work and costs. As my ultimate conclusion is that the Respondent's application falls to be refused there is no need for a hearing to deal with that application. It is not necessary in the interests of justice to have a hearing.

Reconsideration – the interests of justice test

9. Rule 70 provides that a tribunal may only reconsider a judgment when it is 'necessary in the interests of justice' to do so. The Respondent's application essentially says that in reaching a conclusion on its application I have overlooked a skeleton argument and that has caused me to assume that a concession was made in respect of whether the Claimant made protected disclosures where no such concession was made (and contrary arguments advanced).

10. The expression necessary in the interests of justice is plainly sufficiently wide to encompass procedural errors by a tribunal.

11. In my letter to the parties sent on 11 October 2023 I acknowledged that I failed to deal with arguments raised by Mr Susskind. I owe the parties both an apology and an explanation. As is my practice I made notes during the hearing of the main submissions made by both parties. If I recall the oral submissions made by Mr Susskind in respect of the protected disclosures he stated that the disclosures were in writing and that I was therefore in a good position to judge whether they amounted to qualifying disclosures for the purposes of Section 43B of the Employment Rights Act 1996. I made only a brief note of this (which I think reflected either a remark I made, or Mr Susskind made) recording that the Tribunal was in a position to decide for itself.

12. At the conclusion of the hearing I read through the pages of the bundle where it is said that the Claimant made protected disclosures. At that time I had the parties' submissions ringing in my ears. I made a decision but, at that point, simply recorded what I had intended to do without setting out any further reasons for myself.

13. As the parties know it took me some time to prepare my reasons. I had several lengthy judgments to complete and a great deal of other work. I wrote up the reasons over a number of evenings and weekends. I completed the final draft having forgotten that Mr Susskind had prepared two skeleton arguments. I did have both and had read both but simply forgot that I had done so. When I read my notes I took the lack of detailed oral submissions about protected disclosures as a tacit concession. In fact it was nothing of the sort.

14. I have no hesitation in accepting that the error I have made amounts to a serious procedural error and that it is in the interests of justice for me to revisit the reasons that I have given and to assess whether the points in the submissions that I overlooked in my reasons mean that I ought to have come to a different conclusion.

<u>My decision on reconsideration.</u>

15. I do not think that my self-direction on the law to be applied when considering the test that needs to be applied on an application to strike out claims overlooked anything said by Mr Susskind. Between paragraphs 52 and 59 of my reasons I set out the relevant test and in my view I do not suggest that there proper approach is any different than Mr Susskind does at paragraphs 22 to 25 of his skeleton argument. The issue is whether I have correctly applied those principles.

16. I shall deal firstly with the unfair dismissal claim. The Claimant brings a claim (in part) relying on the automatically unfair reason for dismissal set out in Section 103A of the Employment Rights Act 1996. It is therefore necessary for him to show that he has made protected disclosures.

17. The submissions that I overlooked when writing up my reasons are set out at paragraphs 28 through to 58 of Mr Susskind's skeleton argument. That is not of course to say that I failed to consider whether the Claimant could be said to have no reasonable prospects of showing that he made protected disclosures. I did that between paragraphs 70 and 78 of my reasons although by reference to the arguments made in writing by Diya Sen Gupta KC. I need to revisit that decision

having full regard to the manner in which Mr Susskind puts the Respondent's case.

18. Before turning to the Respondent's detailed points I step back and have regard to the oral submissions made by Mr Hashmi. He did not descend into the forensic detail that Mr Susskind does, but his broad points are worth repeating. The first point, which is accepted in Andrew Grisdale's witness statement, is that the Claimant was first engaged as Head of Financial Risk Management. His role is described at paragraph 4.2 of the ET3. The Claimant was made redundant from that role but continued to work within the same field of expertise. What is clear is that the Claimant was employed to manage 'risk'. The risk is primarily a risk to investments but as is clear both from the Claimant's submissions and from the witness statement of Andrew Grisdale the sector is highly regulated. In order to stay within regulatory requirements the Respondent needs to regulate risk.

19. The Claimant explained that his concerns surrounded the management of data. He advocated for a system where the data across the business was visible on a single system. He says that without such visibility there can be no proper assessment of the level of exposure. He says that that leads to the possibility of the Respondent being undercapitalised. He referred to the Respondent as being a 'house of cards'.

20. The Respondent disagrees. It says that whilst a single data platform has been tried by other institutions it is not effective. The Respondent is confident in its systems.

21. As I will come to the question for the Tribunal is not going to be whether the Claimant is right in what he says. The statutory test focuses on whether he had a reasonable belief that what he told the Respondent tended to show that a breach of a legal obligation had, was or was likely to occur.

22. When I am assessing whether the Claimant had a reasonable belief I need to take into account all the surrounding circumstances. I consider that these include the fact that the Claimant's initial role, and even thereafter his principal interest (to the exclusion of the work he was ment to be doing) was in risk management.

23. I accept the point made by Mr Susskind relying on ***Carr v Bloomberg*** **[2022] UKEAT 49** that, in contract with the subjective elements of a qualifying disclosure or the subjective reasons for a decision at tribunal might be better placed to make a decision about the objective elements, the reasonableness of a belief, on an application to strike out. As Heather Williams J said whether that is the case will depend on the particular context.

24. Mr Susskind relies on ***Twist DX Ltd and ors v Armes and anor*** **EAT 0030/20** and rightly says that a failure to identify a particular type of wrongdoing within a protected disclosure might provide evidence of what was or was not in the worker's mind at the time of the disclosure.

25. At paragraph 36.1 Mr Susskind relies on ***Blackbay Ventures Ltd T/A Chemistree v Gahir*** **UKEAT/0449/12/JOJ** and says that any legal obligation should be identified and 'capable of verification'. I would not disagree that the worker must

be required to say what legal obligation they had in their mind. As such the obligation must be identified. However what is said in ***Blackbay*** needs to be seen in the light of ***Babula v Waltham Forest College*** **[2007] EWCA Civ 174**. There does not actually need to be any legal obligation. All that is necessary is that the belief that that obligation exists is reasonable. Mr Susskind implicitly recognises that at paragraph 36.2.

26. In ***Riley v Belmont Green Finance Ltd*** **UKEAT/0133/19** the EAT upheld the decision of the Tribunal that the Claimant had not made a protected disclosure when he referred to breached of FCA requirements. It is clear from ***Babula*** if the Claimant actually believed that the FCA requirements had the force of law the fact that he was wrong would not mean that he had not made a qualifying disclosure. The question would be whether his belief was reasonable. In my view much would turn on the nature of the regulatory requirement and the nature of the alleged breach. I do not think this case sets out any general rule that a belief that regulatory requirements never have the force of law, if wrong, can never be reasonable or satisfy all elements of the test in Section 43B.

27. I do not think I need comment upon Mr Susskind's commentary on the law insofar as it refers to the public interest. I had directed myself in accordance with ***Chesterton Global Ltd*** as Mr Susskind invites me to do in my skeleton.

28. I turn then to the individual protected disclosures. I have read all the documents that either contain or are said to summarise what the Claimant has said. The core of what the Claimant was saying remains constant and to a great extent the Claimant repeats what he has said time and again. My reasons for concluding that I am unable to say that the Claimant has no reasonable prospects of success in showing that he made protected disclosures are broadly the same for each of the disclosures. I shall set out the reasons for my conclusions in respect of PD1 in some detail. Thereafter I shall simply comment where there any additional points taken by Mr Susskind.

29. In respect of PD1 I am invited to have regard to what was said by my colleague EJ Gardiner on the application for interim relief. He was of course asking himself whether the Claimant had established that he was 'likely' to succeed. Something higher than probable. I am dealing with the issue of whether the Claimant has no reasonable prospects of success. A much lower test.

30. Mr Susskind refers to passages quoted by the Claimant in his further and better particulars. I think in fairness the Claimant does not say that he relies only on those selective quotes. I have had regard to all that the Claimant has written.

31. Mr Susskind says that no legal obligation is identified. That is a little unfair. The e-mail refers explicitly to the fiduciary duties owed to depositors. The Claimant has set out in his further information details of the regulatory regimes. In the e-mail of 14 July 2021 the Claimant makes reference to some of these standards. I bear in mind that the e-mail is sent to employees dealing with 'risk'. At the final hearing evidence might be led that compliance with the various standards identified by the Claimant was the bread and butter of these roles.

32. I do not accept that there is an absence of 'information' in the Claimant's e-mail meaning there is insufficient specificity to satisfy the test in ***Kilraine***. In particular, the Claimant sets out things he says are wrong with the existing data systems . He says that there is a patchwork of legacy processes that do not allow 'vertical' and 'horizontal' visibility of data.

33. The Claimant has said what he thinks was being done incorrectly. He has said at the outset that he believes that there is a risk to depositors. He has referred in terms to 'capital adequacy'.

34. The Claimant is speaking to an educated audience. His role is one of risk management. One risk that requires management is the risk to depositors if the bank makes poor investment choices and/or is undercapitalised. The Claimant's audience were familiar with the regulatory regime. Whether the Claimant did or did not spell out the possible consequences of a poor data management system his audience would have been aware of them.

35. Here, and elsewhere, Mr Susskind suggests that no legal obligation has been identified. The Claimant, in his further information, has mainly referred to the BCBS standards and guidelines. He describes these standards and guidelines as a 'fundamental regulatory obligation'. It is important to put these BCBS standards into context. They were a response to the financial crash of 2008 when a number of banks failed by reason of being undercapitalised. The guidelines were drawn up with the aim of preventing a repeat of this.

36. In the UK banks are regulated. Mr Grisdale sets out a summary in his witness statement. From my own knowledge gleaned from similar cases I am aware that the Prudential Regulation Authority has fundamental rules couched in very general terms. Acting in breach of established guidelines such as the BCBS standards potentially amounts to a breach of those fundamental rules. The PRA has the power to enforce those rules and to levy fines against institutions that breach them. The FCA operates in a similar way.

37. It may not be the case that any particular BCBS, BIS or US OCC guideline is directly enforceable. The issue is whether the Claimant could reasonably believe that a breach of such guidance would amount to a breach of a legal obligation.

38. I consider that ***Eiger Securities LLP v Korshunova*** **,** ***Riley v Belmont Green Finance Ltd*** and ***Carr v Bloomberg*** do not detract from the need to firstly identify what legal obligation the worker says that he had in mind at the time of the disclosures and then to ask whether he believed what he said tended to show a past, present or future breach of that obligation. It is not determinative that the worker was wrong about the existence of the legal obligation. I accept that if the Claimant knew that there was no legal obligation but simply a moral obligation that would mean that he failed the subjective element of the test – ***Korshunova***. The Claimant says that he believes that the Respondent was subject to legal and not moral obligations. I am of the view that that can only be tested by cross examination.

39. The next issue is whether I can say that the Claimant has no reasonable prospect of establishing that his belief that the standards he says he had in his mind

amounted to legal obligations. I do not think I can. I suspect that in the wake of the financial crash many people would assume that the rules and guidance put in place to prevent a recurrence would have the force of law. It might be entirely reasonable to assume that the PRA and FCA would take steps to enforce those rules and guidance. They might be wrong, but it is possible that such a belief would be reasonable.

40. What is also required is that the Claimant needed to have a reasonable belief that the information he was disclosing tended to show a breach of the legal obligation he had in his mind. That is a separate question but bound up in the same test.

41. I accept Mr Susskind's point that in respect of a potential future breach the Claimant needs to reasonably believe that such a breach is 'likely' - ***Kraus v Penna plc*** **[2003] UKEAT 0360_03_2011.** That does not mean that the Claimant needs to show that a breach of a legal obligation in the future was probable but that he actually and reasonably believed that it was. There is the degree of latitude identified in ***Chesterton*** that the Claimant can pray in aid at the final hearing. A further difficulty in dealing with this issue on an application to strike out the claim is that there are assertions and counter assertions based on untested evidence. The Claimant says that the Respondent's data management processes have resulted in a 'house of cards'. The Respondent says that there is nothing wrong at all and that the systems have been approved by the regulator. There is a factual dispute that underlies the question of whether the Claimant could have reasonably believed that a future breach is likely.

42. It is not entirely clear that the Claimant is not saying that he believed that the failure (in his eyes) to improve the data management was not an existing breach of legal obligations. That is how I have understood his case following his oral submissions. That is consistent with the Claimant's further information where he sets out the legal obligations he says arise from BCBS *'Principles for Effective Risk Data Aggregation & Risk Reporting'*.

43. I am unable to say at this stage that the Claimant has no reasonable prospects of showing that he reasonably believed that saying that providing information that the data management system operated by the Respondent is inadequate tended to show a breach of the legal obligations that he believed the Respondent was subject to.

44. Mr Susskind says that as the concerns raised by the Claimant related to the Respondent's internal processes he has no reasonable prospect of showing that he reasonably believed that the disclosure was in the public interest. I cannot accept that submission. It is self-evident that it is in the public interest for large banks to properly manage risk. The collapse of a bank is not a matter of purely private concern. At the very least I would say that the Respondent has failed to show that the Claimant has no reasonable prospects of showing that any belief he held that a disclosure about risk management was in the public interest was unreasonable.

45. I consider that the same reasoning applies to the other protected disclosures which means that I can deal with them fairly briefly.

46. PD2 is said to be contained in a power point presentation. In these slides the Claimant repeats his contention that the Respondent lacks a 'Credit Data Backbone'. He says that there is a patchwork of legacy systems. He refers to a lack of subject matter expertise with external consultants. He refers in terms to the regulatory regime.

47. Again I am asked to have regard to comments made by EJ Gardiner. He did not think it likely that the Claimant would establish PD2 as a qualifying disclosure. EJ Gardiner says that these slides do not identify the factual basis for suggesting that there is a breach of any legal obligation. I do not agree. The Claimant says that the existing data management software is inadequate. That is a factual statement. I do not think a disclosure would fail to qualify as a protected disclosure just because the worker fails to spell out the consequences. Particularly here where he is speaking to an educated audience.

48. I turn to PD3. That concerns what the Claimant said at a meeting on 16 July 2021. There is a what is clearly a summary of the Claimant's position in 4 numbered paragraphs. Those paragraphs contain a critique of the Respondent's data management systems. He refers in terms to US OCC guidelines and to BIS principles. Mr Susskind says that the Claimant could not reasonably believe that these gave rise to legal obligations. I disagree that there is no reasonable prospect of the Claimant establishing that. I have come to the same conclusion in relation to striking out this allegation for the reasons I give above.

49. PD4 is said to be contained in an e-mail of 9 August 2021. Mr Susskind makes identical points in respect of this purported disclosure as he does to the disclosures above. In that e-mail the Claimant says that the Respondent's approach to data management is not in line with regulatory guidance and best practice. I did question whether that lacks specificity. I have concluded that it is sufficiently specific to potentially qualify as a qualifying disclosure or at least I have concluded that the allegation should not be struck out. What the Claimant says needs to be seen in context. He had identified specific issues in the previous disclosures (whether right or wrong) he criticised the existing system as fragmented and lacking visibility. He described it as being maintained by patchwork. I consider that in this context there is sufficient specific information included in the disclosure. I need not repeat my conclusions about the other elements. The points made are the same.

50. In respect of PD5 the same points are taken. I am also asked to have regard to the views of EJ Gardiner who considered that the power point slide deck did not identify specific breaches of a legal obligation. On one slide the Claimant quotes extensively from 'BIS Corporate Principles for Banks'. These include the point that data management systems should be accurate. It is clear that what the Claimant is saying in subsequent slides is that the current system falls short of those standards. He is maintaining his suggestion that only a 'Credit Data Backbone' will meet those requirements. I do not think that lacks specificity. The Claimant may very well be wrong, and the Respondent says he is, but it is clear what he was saying. In notes of meetings I have been provided with there is a strong suggestion that the Respondent's senior employees understood what the Claimant was saying it was more the case that they did not agree. I would not strike out this allegation on the basis that the Claimant has no reasonable prospect

of shoring that what he said met the test in ***Kilraine*** or, for the reasons I have given the other elements of the test set out in Section 43B.

51. PD 6 relates to a telephone call the Claimant had with Mr Tai said to be the Chairman of the Risk Committee HSBC. The Claimant's case is that he took Mr Tai through the slide packs he had presented on 7 and 20 September 2021. I have already found that I cannot accept that there is no reasonable prospect of success in showing that those slide packs did not amount to qualifying disclosures. It follows that if the Claimant repeated what he said to Mr Tai I must come to the same conclusion here.

52. Mr Susskind does not deal with whether disclosures 7 to 13 are qualifying disclosures. He has argued that it is unnecessary to do so because the disclosures post date the decision to dismiss the Claimant. I return to that point below.

53. PD7 concerns a disclosure to the PRA. Under Section 43F the Claimant will have an additional hurdle. He will have to show that he reasonably believed that what he said is 'substantially true'. In my view that is not something that can be resolved without hearing the Claimant give evidence and having that evidence tested in cross examination.

54. PD8 made to both the Respondent and the PRA includes an explanation of why the Claimant believes that the data management systems employed by the Respondent are inadequate. His complaint made again is about all parts of the business having visibility of risk in other parts of the business. It is properly arguable that that has sufficient factual specificity to satisfy the ***Kilraine*** test.

55. I shall not deal further with the remaining alleged qualifying disclosures. The Claimant continues to give the same information on every occasion. I consider that it is impossible to say that the Claimant has no reasonable prospect of establishing that on each occasion he made a qualifying disclosure. My reasons are the same as I have set out above.

Protected disclosures – Conclusions.

56. For the reasons I set out above, having had regard to all the points raised by Mr Susskind I do not accept that the Claimant has no reasonable prospects of success in shoring that he made protected disclosures. Nothing I set out above should be taken as an indication that I consider the Claimant's claim strong. I accept that there are some cases where an accurate assessment can be made of the prospects of success simply by looking at what was written or said. In other cases the context and any contested factual background becomes important. I find that this is not a case where a paper determination allows me to say that these allegations should be struck out.

Causation

57. There are two arguments raised by the Respondent. The first is that no protected disclosure that post dated the Respondent's decision that the Claimant's temporary assignment would not be renewed could have caused his dismissal. The second relates to the issue of causation generally. It is said that the ostensible

reasons for the dismissal relied upon by the Respondent are so strong that the Claimant has no reasonable prospects of displacing them.

58. Mr Susskind makes written submissions in support of those submissions at paragraphs 58 to 66 of his skeleton argument. I had a good note of Mr Susskind's submissions made orally and took those submissions fully into account not only when reaching my decision but also when giving my reasons.

59. I do not consider that there is anything in Mr Susskind's skeleton argument which I have not expressly or implicitly dealt with when giving my reasons.

60. I do not consider that there is any basis for me to vary or revoke my decision.

Discrimination

61. Mr Susskind set out brief written reasons why he said that the discrimination claims should be struck out. These are between paragraphs 67 and 73 of his skeleton argument. His arguments overlap considerably if not completely with those of Diya Sen Gupta. I had a note of his oral submissions before me when I gave my reasons.

62. Perhaps more by luck than judgment I consider that I have dealt with all the matters raised by Mr Susskind in my original reasons. It follows that I do not find that there is any basis for me to vary or revoke those decisions.

63. I end by apologising for the error on my part. I was busy and conscious of the delay. That is a poor excuse for overlooking the arguments identified above and discourteous to the parties. As conscientiously as I could I have revisited my decisions where I failed to deal with any points made by Mr Susskind. Ultimately I have concluded that my original decision would have been no different.

64. I will deal with other outstanding matters in a further case management order.

Employment Judge Crosfill
Dated: 14 November 2023

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Annex 1

This annex includes the decision and the reasons for not striking out the Claimant's claims originally sent to the parties in a case management order dated 3 October 2023

The paragraph numbers below have been preserved from the original reasons sent to the parties.

Decision

The Respondent's applications to strike out the Claimant's claims for unfair dismissal (whether advanced under Section 103A, 105 or Section 98(4) of the Employment Rights Act 1996) and its applications to strike out the Claimant's claims of direct discrimination brought under the Equality Act 2010 are dismissed.

Reasons

The applications made by the Respondent

65. In advance of the Preliminary Hearing of 20 June 2022 both parties had prepared skeleton arguments. On behalf of the Claimant Lesley Millin of Counsel had prepared a skeleton that dealt with the application strikeout the claim. On behalf of the Respondent Diya Sen Gupta KC had produced a scope running to some 32 pages. As the Claimant was representing himself before me I had regard to the skeleton argument that had been submitted on his behalf. The Respondent had provided a bundle of authorities which ran to 459 pages. Most if not all of those authorities were familiar to the Employment Tribunal.

66. Mr Susskind adopted the skeleton argument that had been prepared for the previous hearing for the purposes of the Respondent's applications but set out submissions orally to explain the basis of the applications. The applications were broad ranging and suggested that none of the claims brought by the Claimant had any reasonable prospects of success.

67. In respect of certain of the protected disclosures the Respondent argued that the allegation that the Claimant was dismissed for the reason or principal reason of disclosures made after 30 September 2021 had no reasonable prospect because it was said that the decision to dismiss the Claimant had already been taken at that stage. In respect of the earlier disclosures the argument put forward was that, when viewed against the contemporaneous documents there was no reasonable prospect of success in showing that was the reason or principal reason for the dismissal.

68. The arguments in support of that latter contention included reliance upon documents which were said to show that the Respondent afforded the Claimant a

number of opportunities to meet with senior managers to discuss his concerns. It was said that contemporaneous documents made it clear that the Claimant was spending an excessive amount of time raising issues about data controls that he was not spending any or any sufficient time on the job he was employed to do. In the light of that it was said that it was inherently unlikely that the Claimant was dismissed for making protected disclosures. The Respondent had provided a statement from Mr Andy Grisdale in opposition to the Claimant's application for interim relief. The Respondent relied upon that statement in support of its present applications.

69. In relation to the claims for discrimination the argument that was made was that the allegations had no reasonable prospect success because they were based on a bare assertion. There was nothing more than an assertion that there was a dismissal and the existence of a protected characteristic. That it was said would never be enough to shift the burden of proof to the Respondent.

70. Finally it was argued that in respect of the unfair dismissal claim the Claimant had no reasonable prospect of success because he had failed to identify any credible basis for suggesting that the non-renewal of his temporary contract was unfair. It was said that it was improper to allow the claim to proceed on the basis that something might turn up.

71. The paragraphs above are brief summary of the manner in which the Respondent put its case. I mean no discourtesy by not referring to the arguments in full, but I took them into account in reaching the conclusions below.

72. The Claimant made oral submissions to me. His early submissions were focused on the history and reasons behind his protected disclosures. He suggested that he had gradually had to escalate his disclosures when nothing was done in respect of the issues that he was raising. He drew attention to the fact that a decision was taken to dismiss him place him on garden leave in November 2021. He suggested that the people who took the 1st decision to select for redundancy and the 2nd decision to dismiss him were not the same people but asked me to infer that it was inconceivable that they would not have spoken to each other.

73. The Claimant argued that it was too early to reach any view as the merits of his claim in circumstances where he had not been given disclosure.

74. When dealing with the age discrimination complaint the Claimant's submission was that he believed that because of his age and experience it was thought that he was difficult to manage. He expanded upon that and suggested that the older person was, the more difficult it would be to manage them.

Contemporaneous documents

75. I was provided with contemporaneous documents. I have had regard to them all but considered the following documents to be most significant to the decisions that I had to make.

76. The first document that I consider significant is a letter to the Claimant dated 1 October 2020 given him notice of termination of his employment from his original role. The correspondence continues and on 10 December 2020 the Claimant was

given temporary redeployment commencing on 14 December 2020 which was *'expected to end on 31 December 2021'.* The letter set out that the balance of the Claimants notice period would be deferred.

77. I note that the first protected disclosure relied upon by the Claimant was made on 14 July 2021. It follows that the decision to terminate the Claimant's original contract of employment could have had nothing whatsoever to do with any protected disclosures.

78. I've seen an email chain which started with an email from the Claimant to Barry Bagirathan who was his line manager. The Claimant states that he is cancelling all future one-to-one meetings. Later in the email chain he explains this by suggesting that he needed to *'figure out with Simon and HRD where I could be reassigned and my wholesale credit risk expertise can be gainfully employed in the risk transformation process……!'*. By many standards the Claimant emails could be regarded as being rude.

79. On 24 June 2021 a colleague Michael Soppitt raised a complaint with the Claimant's managers about an email sent by the Claimant in which he said that Michael Soppitt had *'tried to sell consultant hogwash with no substance'*. This was plainly inappropriate language to use in a professional environment. These issues were raised with the Claimant by his managers the emails contained within the bundle would suggest the Claimant was unrepentant.

80. On 16 July 2021 the Claimant attended a meeting with a number of senior managers. He had prepared a series of PowerPoint slides. The opening slide is robustly critical and includes a cartoon suggesting that the Respondent discouraged initiative. The notes of the meeting suggest that there was a broad ranging discussion about the ideas that both the Claimant had and those of the other participants in the meeting. The minutes the meeting would not suggest that the attendees resisted the Claimant's input.

81. A further meeting took place on 22 September 2021 to discuss work done by the Claimant in respect of the issues that he had raised. Once again the Claimant had prepared and presented a PowerPoint presentation in which he advocated for a wholesale reform of the way in which data was collected and used. He is recorded in the minutes as saying, '*that the only correct approach was to implement one system and to put all data in one place'*.

82. I have had regard to correspondence that followed this meeting. That records that the Claimant's managers did not agree with the Claimant's proposals and that they believed that there were sufficient systems in place that it was not necessary to make the changes that the Claimant suggested.

83. On 30 September 2021 in response to a question about whether the Claimant and the two other members of his team were to have their contracts extended Simon Penny responded by e-mail stating *'To confirm, Irfan Hashmi is NOT to be extended'*.

84. On 8 October 2021 the Claimant was told that his temporary role would not be extended. An e-mail sent on 14 August 2021 from Charlotte Tauszky to Andy

Grisdale shows Ms Tauszky apparently setting out the rational for the decision. The suggestion in that e-mail is that whilst two of the Claimant's colleagues who had also been in similar temporary roles were to be retained the Claimant was not. Part of the explanation is 'relative performance'. 8 matters are set out in the e-mail. A most of these could broadly be categorised as the Claimant not having satisfactorily completed the work that he was actually employed to do. The 6th performance issue refers to the title of the Claimant's PowerPoint slides prepared for the meeting of 16 July 2021.

85. The correspondence that follows showed that the Claimant immediately asserted that the reason for the termination of his temporary role was that he had raised concerns about data handling.

86. On 1 November 2021 Andy Grisdale sent the Claimant an e-mail. He included minutes of two meetings that he had attended with the Claimant. He is responding to an e-mail from the Claimant in which the Claimant described the risk 2025 transformation plans as 'hogwash'. The Claimant suggested that he was being dismissed for raising these concerns. Andy Grisdale suggests that the tone of the Claimant's e-mail is unprofessional. He went on to set out his view that the changes proposed by the Claimant were not appropriate. He went on to say, *'it is very evident that you have no belief in any component of our program of works, or the management running the same'*. He went on to inform the Claimant that his Temporary role would be terminated on 30 November 2021 and that he would immediately be placed on garden leave.

87. On 1 November 2021 James Yates wrote to the Claimant and told him that his deferred notice from his previous contract would be reinstated and that his employment would end on 30 November 2021. The Claimant was later told that his contract would be extended to 31 December 2021 to allow him to look for alternative roles.

The law to be applied

Striking out claims

88. The power to strike out a claim under Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances ***Tayside Public* Transport *Co Ltd (t/a Travel Dundee) v Reilly*** **[2012] IRLR 755**, at para 30. In discrimination claims where findings of fact can depend upon whether or not it is appropriate to draw inferences of discrimination from primary facts particular care needs to be taken before striking out a claim ***Anyanwu v South Bank Students' Union*** **[2001] IRLR 305, HL.** The same cautious approach should be applied in a claim brought under S47B ERA 1996 ***North Glamorgan NHS Trust v Ezsias*** **[2007] IRLR 603**.

89. It will generally not be appropriate to strike out a claim where the central facts necessary to prove the case are in dispute. It is not the function of a tribunal such an application to conduct a mini trial. The proper approach is to take the Claimant's case at its highest as it appears from their ET1 unless there are exceptional circumstances ***North Glamorgan NHS Trust v Ezsias***. Such exceptional circumstances could include the fact that the Claimant's case is contradicted by

undisputed contemporaneous documents or some other means of demonstrating that *'it is instantly demonstrable that the central facts in the claim are untrue'* ***Tayside***.

90. In ***Balls v Downham Market High School*** **[2011] IRLR 217** Lady Smith reminded tribunals that the test is not whether the claim is likely to fail but whether there are no reasonable prospects of success. That however is not the same thing as there being no prospects of success at all - see ***North Glamorgan NHS Trust v Ezsias*** at para 25 citing ***Ballamoody v Central Nursing Council*** **[2002] IRLR 288**. Another way of putting the test is that the prospects are real as opposed to fanciful see ***North Glamorgan NHS Trust v Ezsias*** para 26.

91. ***QDOS*** **Consulting** ***Ltd and others v Swanson*** **UKEAT/0495/11/RN** provides authority the proposition that orders under rule 37 should be made only in the most obvious and plain cases and not in cases where there is a need for prolonged and extensive study of documents and witness statements. Those propositions may also be found in the authorities above. HHJ Serota QC prior to stating those propositions drew attention to the similar position under the Civil Procedure Rules. He said (at para 45):

> *[45] It may be instructive to compare the position of striking out under the Employment Tribunal Rules with striking out as provided for in the Civil Procedure Rules. I note that there is a close affinity between striking out under CPR 34.2(a) [sic –there is a typo in the report], which enables the court to strike out the whole or part of a statement of case that discloses no reasonable grounds for bringing or defending a claim overlaps with Pt 24, on summary Judgment. Rule 24(2) entitles a court to give summary Judgment against a Claimant or Defendant on a claim or issue where there is no real prospect of succeeding on the claim or issue, or successfully defending the issue. The notes to CPR 24 in the White Book make this clear:*
>
> > *"In order to defeat the application for summary Judgment, it is sufficient for the Respondent to show some prospect; i.e. some chance of success. That prospect must be real; i.e. the court will disregard prospects that are false, fanciful or imaginary. The inclusion of the word 'real' means the Respondent has to have a case which is better than merely arguable. The Respondent is not required to show their case will probably succeed at trial; a case may be held to have a real prospect of success even if it is improbable. However, in such a case the court is likely to make a conditional order."*

92. Care needs to be taken when assessing whether a case has no reasonable prospects of success to avoid focussing only on individual factual disputes. A case may have some reasonable prospects when regard is had to the overall picture and all allegations taken together see ***Qureshi v Victoria University of Manchester*** **[2001] ICR 863**

93. The statements of principle derived from the cases referred to above do not in any way fetter the discretion of a tribunal to strike out a case where it is appropriate to do so ***Jaffrey v Department of the Environment, Transport and the Regions*** **[2002] IRLR 688 at para 41**.

94. In ***Chandhok & Anor v Tirkey*** **UKEAT/0190/14/KN** Mr Justice Langstaff made the following comments (with emphasis added):

"20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. 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 Madarassy v Nomura [2007] ICR 867):

"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."

95. In ***Ahir v British Airways Plc*** **[2017] EWCA Civ 1392** Underhill LJ said:

[at paragraph 16] Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'….

[and at paragraph 24] As I already said, in a case of this kind, where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced.'

Discussion and Conclusions

96. I shall deal with the argument that protected disclosures that post-dated the decision that the Claimant's contract would not be extended could not be the cause of the dismissal. I take account of the following matters. It is unclear exactly what was communicated to the Claimant on 8 October 2021 about the date upon which his temporary role would come to an end. According to the terms of the appointment letter his role was expected to end on 31 December 2021. It therefore appears that the decision communicated in writing on 1 November 2021 that the Claimant's contract would terminate on 30 November 2021 was a fresh decision. There was then a further decision to extend the notice period until 31 December 2021.

97. Ordinarily the reason for a dismissal will be the reason for giving notice. That proposition is not beyond argument see ***Parkinson v March Consulting Ltd*** **[1997] IRLR 308** but I shall assume it is correct for the purpose of the decisions below.

98. It is clear that events that postdate the giving of notice might make a dismissal which was otherwise fair unfair. In those circumstances events between giving notice and dismissal may be relevant to the question posed by section 98(4) of the Employment Rights Act 1996. The list of issues proposed by the Claimant in the 'ordinary' unfair dismissal claim, which I have ruled above forms part of the claim, includes a question of whether sufficient efforts were made to obtain suitable alternative employment. Amongst the correspondence I have seen are assertions by the Claimant that there was suitable employment available.

99. Whilst the Claimant was notified that his contract would not be extended as early as 8 October 2021(and it appears that that decision was taken as early as 30 September 2021) I consider that it is properly arguable that the decision as to how exactly that would be implemented was not taken until 1 November 2021. On the evidence the previously notified date of 31 December 2021 had been brought forward. It is properly arguable that that amounted to a fresh decision to dismiss the Claimant.

100. The only disclosure that postdates the Claimant being told that his contract would end on 30 November 2021 is the disclosure at paragraph 1.6(l) of the marked-up list of issues commencing at page 24 of my bundle. That is an email sent by the Claimant to the Bank of England on 13 December 2021. I would accept that logically that cannot have had any influence on the decision taken on 1 November 2021. It follows that insofar as the Claimant relies upon that email being the reason or principal reason for his dismissal that allegation has no reasonable prospect of success. However, the Claimant was during December given additional time to seek an alternative role. Had he done so his dismissal might have been averted. The Claimant says that there were opportunities but that they were denied to him. He does not identify any specific opportunity/denial after his final protected disclosure but there is not sufficient clarity for me to be able to say that this final disclosure could have had no causative effect on the failure to offer the Claimant an alternative role.

101. I have used the expression above 'properly arguable' to describe the argument that the Claimant might be able to rely upon of the reasons for the decision taken on the 1 November 2021 rather than the earlier reasons for the decision that his contract would not be extended. I should make it clear that what I am saying is that I do not accept that the Claimant has no or little reasonable prospect of success of showing that alleged protected disclosures made between 8 October 2021 and 1 November 2021 were the principal reason for his dismissal on the basis of the chronological point attractively taken by Mr Susskind. Whilst the point has far more force in relation to the final disclosure the picture was not sufficiently clear that I could say that there are little reasonable prospects of the Claimant showing that the principle reason that no redeployment possibilities were identified or offered was on the ground of this final disclosure.

102. Before I deal with the second way in which it was said that the claim for automatic unfair dismissal has no reasonable prospect success I need to deal briefly with points raised in the skeleton argument of Diya Sen Gupta KC where she suggests that the Claimant has no reasonable prospect of establishing that he made protected disclosures. Neither in that skeleton argument nor before me was there a detailed analysis of each alleged protected disclosure.

103. A great deal of Diya Sen Gupta KC's skeleton argument is a critique of the quality of the Claimant's pleaded case. Certainly the case that his ET1 required further particulars. It is also a fair point that in setting out the nature of the wrongdoing the Claimant has referred to Section 43B(1)(a) a suggestion that a criminal offence had been committed is being committed or is likely to be committed without identifying what criminal offences he says he believed at the time. The same criticism can be made of the Claimant's references to Section 43B(1)(f) where he suggests that the information he disclosed tended to show that information of other wrongdoing has been, is being, or is likely to be deliberately concealed. I do not however think that the criticism is as well made where the Claimant relies upon section 43B(1)(b). The Claimant's further particulars need to be read as a whole and they start with reference to the regulatory regime imposed on banks. It is at least tolerably clear that the legal obligations that the Claimant says he believed had been, were being or was likely to be breached arose from that regulatory regime.

104. I shall try and resist setting out an extensive self-direction in respect of the requirements of a qualifying disclosure. The proper approach to assessing whether there is a qualifying disclosure for the purposes of Section 43B is that summarised by HHJ Aurbach in ***Williams v Michelle Brown AM*** **UKEAT/0044/19/OO**. He said:

> *"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."*

105. In ***Kilraine v London Borough of Wandsworth*** **2018 ICR 1850, CA** Sales LJ said (with emphasis added):

> *"35. 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 sub-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)……..*

106. Where a worker says that the information they conveyed tended to show the commission of a criminal offence or a breach or likely breach of a legal obligation they do not have to be right either about the facts relayed or the existence or otherwise of the criminal offence or legal obligation. It is sufficient that the worker actually holds the belief and that objectively that belief is reasonable - see ***Babula v Waltham Forest College*** **[2007] EWCA Civ 174**. However, it is necessary that the belief is actually held. In ***Eiger Securities LLP v Korshunova*** **[2017] IRLR 115**

107. I commented in the course of the hearing that the Claimant was probably wrong to believe that the requirements of the BCBS are directly enforceable legal obligations but that doesn't matter. What matters is that the Claimant might have reasonably believed that they were and that the information he disclosed tended to show they were being breached.

108. The question of what is required to satisfy the public interest element of any disclosure was considered in ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)*** **2018 ICR 731**. In that case it was emphasised that the might be a range of reasonable opinion about whether something was or was not in the public interest.

109. Ms Sen Gupta KC suggests that if the Claimant was motivated by his own desire to generate work devising a new system that might exclude a belief that disclosures were in the public interest. Motivation is not the issue - ***Dobbie v Felton*** **UKEAT/0130/20/OO** - a disclosure might qualify even if the motivation was a personal one provided always that the worker had given some thought to the public interest and that was reasonable.

110. Applying those principles to the disclosure is set out more fully in the Claimant's further and better particulars I remind myself that at this stage I am only asking whether the Claimant has no reasonable prospect or little reasonable prospect of establishing that he has made qualifying and protected disclosures. I consider that Mr Susskind's decision not to focus on these points was a decision well made. It would be highly ambitious to argue that the Claimant has little reasonable prospect of establishing that he made protected disclosures in circumstances where there

has been no disclosure and no cross examination. The question of whether somebody held a particular belief or set of beliefs is highly fact sensitive.

111. It follows from what I said above that I would not make a deposit order or strike out any aspect of the claim on the basis that the Claimant has no or little reasonable prospect of establishing that he made protected disclosures as set out in his further information.

112. I then turned to the question of whether the Claimant has no reasonable prospect of success or little reasonable prospect success in showing that the reason or if more than one the principal reason for his dismissal was his protected disclosures.

113. The threshold that in a claim relying on Section 103A is relatively high. The claim will not succeed unless the Tribunal concludes that at least the principle reason for the dismissal was that the Claimant had made protected disclosures. It will be for the Claimant to raise at least an evidential case before the burden passes to the Respondent to disprove that reason – see ***Kuzel v Roche Products Ltd*** **[2008] EWCA Civ 380**.

114. Whilst the case is at an early stage I find that the contemporaneous documents provide the support for the following propositions relied upon by the Respondent:

114.1 That the Claimant was displaced from his original role for reasons totally unconnected with his alleged protected disclosures and that, subject to any extension, his role would end on 31 December 2021; and

114.2 That the Claimant was singularly reluctant to undertake many of the tasks that he had been assigned; and

114.3 That his language towards his colleagues and managers was unprofessional and merited the intervention of his managers; and

114.4 When the Claimant raised his issues with the collection and management of data the Respondent arranged a succession of meetings where the Claimant was invited to present his ideas and at which they were discussed; and

114.5 That the Claimant was reminded that he needed to attend to his core duties as well as contributing any ideas; and

114.6 That a number of duties that the Claimant was asked to perform were diverted to others when they were not completed; and

114.7 That the Claimant's salary had not been reduced to that appropriate for the grade of work he was allocated and was more than the two colleagues that were retained making his employment more expensive; and

114.8 That an initial decision that the Claimant's contract would not be extended was taken as early as 30 September 2021 prior to many of his disclosures.

115. I am of the view that it is highly unlikely that a Tribunal at a final hearing would not accept that those contemporaneous documents support the findings I have recorded above.

116. The Claimant says that the Respondent's managers did nothing in response to him raising his concerns. That does not appear to be disputed. The contemporaneous documents and in particular the documents summarising the meetings that took place to discuss the Claimant's ideas show that the Claimant's managers appeared to disagree with the Claimant about the benefits of the changes that he proposed. That does not strike me as a strong factor in the Claimant's favour. It is not at all obvious to me that the Claimant was right when he says that his suggestions were the only means of achieving compliance with regulatory standards. I note that in meetings a significant number of people disagreed and made records of their disagreement.

117. I have had regard to the correspondence which recorded the performance concerns that, on the Respondent's case, contributed to the decision that the Claimant's contract would not be extended when his colleagues' contracts were extended [Bundle 294 and elsewhere]. The reasons set out in that document set out concerns about the manner in which the Claimant interacted with colleagues and that he had not completed a number of tasks he had been asked to do. At paragraph 6 there is reference to the fact that the Claimant had engaged with Senior Executives sharing his ideas on *'WCR systems and architecture'*. This can be read as a reference to what the Claimant relies upon as protected disclosures.

118. I did not understand the Respondent to deny that they had taken into account the fact that the Claimant had raised these matters as part of the performance concerns. Had they done so this e-mail would seriously undermine any such suggestion. It appears to be the Respondent's case that dismissing the Claimant because he had effectively abandoned his existing role in favour of raising his views on how the Respondent should manage data was properly distinct from dismissing the Claimant for making protected disclosures. It is certainly properly arguable that such a distinction could be drawn see ***Kong v Gulf International Bank(UK) Limited*** **[2022] ICR 1513** and the numerous other decisions to the same effect discussed therein.

119. Up to this point in my analysis I see little that supports the Claimant's case. However, I do consider that there is one matter that may call out for an explanation. That is the e-mail from Andy Grisdale of 1 November 2021 in which he communicated to the Claimant a date for his dismissal and the fact that the Claimant would be placed on garden leave. The first matter which lends some support to the Claimant's case is the chronology. That decision is communicated very shortly after a series of e-mails where the Claimant says he made (and I find it arguable that he did) make a number of protected disclosures. The second point is the express reference in that e-mail which I have quoted above where an opinion is expressed that *'it is very evident that you have no belief in any component of our programme of works, or the management running the same'*.

120. I consider it highly likely that the Tribunal will conclude that the Claimant had no confidence in the Respondent's systems and management relating to risk and data. Indeed that appears to be the foundation of what he says are his protected

disclosures. It will be open to the Respondent to seek to persuade the Tribunal that there is a proper distinction between being dismissed for making protected disclosures and a dismissal for refusing to listen and work with contrary views. However, I cannot say with any sufficient degree of confidence that there is no real prospect that the Claimant will rebut that argument.

121. Whilst I consider many of the Respondent's arguments on the reason for the dismissal to be well made I have regard to the fact that the contemporaneous documents which I have discussed above will not be the only source of evidence at any final hearing. I have identified at least some evidence that might support the Claimant's case. That may be sufficient to require the Respondent to prove that the reason for the dismissal was not the alleged disclosures. In those circumstances I cannot say that the Claimant has no reasonable prospects of success.

122. It follows that I shall not strike out the claim for reliant on Section 103A of the Employment Rights Act 1996. It follows from that that I should not strike out the unfair dismissal claim at all.

The Discrimination Claims

123. When he commenced his claims the Claimant indicated at section 8 of his ET1 that he was bringing claims of discrimination relying on the protected characteristics of age, race, and disability. Within the attachment to his ET1 the Claimant does not explain his claims of discrimination at all. Having heard the Claimant's application for interim relief Employment Judge Gardiner made an order that the Claimant gave further information about each act of discrimination.

124. In his further information provided in response to that order the Claimant gives some particulars at section Q of that document. The Claimant identified the disability he relied upon as being the fact that he was an oesophageal cancer survivor. He went on to say that he was *'exactly the wrong ethnicity and vintage to have survived at HSBC - I do not belong to any of the entrenched power lobby groups and therefore was put on a sham redundancy list twice in 3 years'*. At paragraph 6 he goes on to say *'There are 3 distinct groups that hold power and influence and protect their own kind and on a reciprocal basis help protect individuals from other similarly powerful and influential groups within HSBC. These 3 distinct power lobbying groups are White English Males, Brown Indian Origin Males and Women (global level)*'. In section R he suggests that the principal decision-makers were white and English.

125. In her skeleton argument Diya Sen Gupta KC deals with the discrimination claims very briefly. She says:

'The claimants discrimination claims are hopeless. They appear to be nothing more than the Claimant seeking to rely on every protected characteristic he has. He has failed to provide any adequate explanation as to how he has been allegedly discriminated against because of his age, disability, race or religion'.

126. The reference to religion reflected the fact that the Claimant had sought to introduce a claim of religious discrimination when the parties were preparing a list of issues in advance of the hearing before EJ Russell. At the hearing before Employment Judge Russell the Claimant withdrew his claim for discrimination based on the protected characteristic of disability. Furthermore he did not make an application to amend his claim to rely on the protected characteristic of religion or belief. However the Claimant did indicate that he wished to advance a claim of sex discrimination. Employment Judge Russell made directions for the Claimant to reduce any application into writing. In her case management order produced sometime later she dismissed that application.

127. The suggestion made by Ms Sen Gupta KC and adopted by Mr Susskind is that the Claimant appears to be seizing upon every available protected characteristic in order to frame claims against the Respondent has some force. However, a claim of discrimination does not turn upon the beliefs of the employee but upon the state of mind of those acting on behalf of the employer.

128. As the authorities I have cited above make clear a large degree of caution is required in concluding that a claim of discrimination has no reasonable prospect of success and should be struck out. The difficulty of showing that a person was influenced by protected characteristics has been recognised both in statute and in the case law.

129. The burden of proof in respect of all claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

> *136 Burden of proof*
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

130. It follows in my view that a claim for discrimination should not be struck out unless it is possible to say that either that the Claimant has no reasonable prospects of shifting the burden of proof to the Respondent by establishing facts from which the court could decide, in the absence of any other explanation, that there had been discrimination, or that the evidence supporting the Respondent's explanation for any treatment is so overwhelming that there is no reasonable prospect of the Respondent failing to discharge the burden of proof on the assumption that it has shifted.

131. Findings of discrimination are commonly supported only by inferences. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or *'mere intuitive hunch'* see ***Chapman v Simon***

[1994] IRLR 124 see per Balcombe LJ at para. 33 or from *'thin air'* see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

132. Discrimination cannot be inferred only from unfair or unreasonable conduct ***Glasgow City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA**. Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** *'without more'*, the something more *'need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred'* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279** per Sedley LJ at para 19.

133. It is not disputed that the Claimant was told that his role was redundant in 2020 and that he would be dismissed unless he found redeployment. It is not disputed that after a period of temporary redeployment his contract was terminated. The fact that the Claimant has the protected characteristics that he relies upon is not a matter of dispute.

134. These facts are not enough that an employment tribunal could infer that the reasons for the treatment were discriminatory. The initial focus is therefore on whether at this stage in the proceedings I can say with confidence that the Claimant has no reasonable prospect of successfully establishing that there is the 'something more' that might shift the burden to the Respondent.

135. I accept that the 'something more' could include the fact that a decision to displace the Claimant from his original role or not extend his temporary role was surprising and therefore called out for an explanation. There is absolutely no evidence before me that would suggest that the decision to terminate the Claimant's original role was unusual or called out for an explanation. In respect of the later decision to terminate the Claimants temporary redeployment the Claimant was the only person not retained. That would not be enough by itself to draw an inference of discrimination. The only matter which in my view calls for an explanation is the initial acceleration of the Claimant's dismissal from the anticipated date of 31 December 2021 to 30 November 2021. A decision which was later reversed. If I ignore the explanation of the Respondent, which I must do the first stage, the decision to dismiss swiftly might call for an explanation.

136. The only other matter that the Claimant has identified in his further information is a suggestion that there are powerful groups of white people and people of Indian origin who are favoured within HSBC. I would accept that evidence of a disproportionate distribution of protected groups within an organisation might support an inference of discrimination. However, unless the statistical picture showed disparities at the level at which the Claimant worked the evidential value of such information would be greatly reduced. In my view it would be an incredibly thin basis to advance a claim merely to establish that the upper management of a company doing business in the United Kingdom were predominantly white.

137. When I sought to explore with the Claimant how he put his age discrimination complaint he suggested that the older and more experienced a person was the more difficult they would be to manage because their experience might lead them to question any instructions. When I listen to the Claimant I was under the strong impression that it was the Claimant who was applying a stereotype. He did not provide any direct evidence that that stereotype was held by anybody else. I would accept that there are some stereotypes of the behaviours of older people. One of which might be that they are set in their ways. The Respondent's case in relation to the Claimant does include the suggestion that the Claimant was unwilling to listen to other voices. If that was unjustified it might support an inference that the stereotype referred to by the Claimant was held by those criticising him. The difficulty for the Claimant is that he says that he is right in his proposals for data management and his managers are wrong. I believe that the stereotype referred to by the Claimant provides only the thinnest support for his contention that his age had anything to do with his treatment.

138. I turn to the question of whether there is no reasonable prospect of the Tribunal accepting the Respondent's explanation for the treatment. In respect of the initial displacement of the Claimant from his role that appears to have been part of a significant reorganisation. Whilst it is inherently implausible that that reorganisation took place for the purposes of removing the Claimant from the organisation because of race or age that does not mean that race or age had no part in the decision that it was the Claimant who was displaced. There is a distinction between the existence of an ostensible reason for the treatment and the actual reason for the treatment. That said, I consider the Claimant's case to be incredibly weak. It is clear from contemporaneous correspondence that the fact that the Claimant secured alternative role was welcomed. The Claimant was treated favourably in that his pay was not reduced.

139. The Respondent's explanation for why the Claimant's temporary role was not extended when others were is also compelling. There is contemporaneous documentary evidence which I have discussed above that provides considerable support for the suggestion that the Claimant was reluctant to engage with the tasks that were central to his role but instead pursued his critique of the Respondent's data management systems. Somewhat ironically, the stronger the Claimant's suggestion that he was dismissed because of raising his concerns the weaker his discrimination claims become.

140. The Claimant's suggestion that he was displaced from his earlier role in 2020 because of protected characteristics has an additional jurisdictional hurdle. Unless the Claimant can show that this earlier act forms part of conduct extending over a period with the later dismissal or that it is just and equitable to extend time the Tribunal will not be able to entertain these earlier claims.

141. An additional difficulty for the earlier claims is that the Claimant was able to secure an alternative role. He appears to have been treated well in that his salary was preserved. Contemporaneous documents suggest that this was welcomed.

142. I have had regard to all of the matters set out above. By the narrowest of margins I do not find myself able to say that the Claimant's discrimination claims have no reasonable prospect of success. I have identified matters which might possibly

provide the ‘something more’ required to shift the burden to the Respondent. Whilst the Respondent’s explanations for their treatment of the Claimant appear to be very strong indeed I cannot say that they are bound to be accepted as the only reasons for the treatment. The threshold for striking out claims is high and I must take into account the fact that there has not yet been any disclosure or exchange of witness statements. It follows that I must dismiss the applications made by the Respondent for orders striking out those claims.