Case No: 1301557/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr D Masih

Respondent: Mitie Ltd

Heard at: Midlands West

On: 28 September and 2 November 2023

Before: Employment Judge Faulkner (sitting alone)

Representation: **Claimant** - in person
Respondent - Mr R O'Dair (Counsel)

PUBLIC PRELIMINARY HEARING - JUDGMENT

1. The Claimant's complaints of race discrimination are struck out on the basis that they have no reasonable prospect of success.

2. The Respondent's applications to strike out the Claimant's complaints of unfair dismissal and protected disclosure detriments are refused.

3. The Respondent's applications for deposit orders in relation to the Claimant's complaints of unfair dismissal and protected disclosure detriments are also refused.

4. There will be a Case Management Hearing to fix a Final Hearing of the complaints of unfair dismissal and protected disclosure detriments and to make Case Management Orders accordingly. Details of that Case Management Hearing have been provided to the parties separately.

REASONS

This Hearing

1. These Reasons are provided at the request of the Claimant, made immediately following oral judgment and reasons being given on 2 November 2023.

2. Following the Hearing on 28 September 2023, by a Judgment with Reasons dated 13 October 2023 I determined that the Claimant's Claim did not stand struck out for failure to comply with an unless order, and I refused the Respondent's application to strike out the Claim for non-compliance with Tribunal Orders.

3. On 27 September 2023, the Respondent's solicitors had submitted a further application, this one to strike out certain parts of the Claimant's complaints on the basis that they have no reasonable prospect of success, the effect of which the Respondent said would be to dispose of the whole Claim, alternatively for deposit orders on the basis that the same parts of the Claimant's complaints have little reasonable prospect of success.

4. There having been insufficient time to deal in full with this second application on 28 September 2023, I resumed hearing it on 2 November. I set out in the last Judgment and Reasons the reading I undertook on 28 September. Prior to resuming on 2 November, I read in addition the Claimant's chronology and his summary of the same, running to 26 pages, which it appears stands as his witness statement. I did not read the Respondent's witness statements, though the Claimant clearly had read them and made submissions about them accordingly. I made clear that it was for the parties to take me to any material additional to that which I told them I had read, if they wanted me to have regard to it in reaching my decisions.

5. As set out in my previous Judgment and Reasons, the Respondent's application identified eight separate grounds for striking out or deposit orders, which were set out in some detail in Mr O'Dair's skeleton argument. My approach was to take each in turn, first discussing it with Mr O'Dair to ensure I understood the Respondent's application, secondly explaining the grounds of the application to the Claimant, and thirdly eliciting his response.

6. The same bundle of documents was used on both days of this Hearing. Page references below relate to pages in that bundle. On 2 November I also heard evidence about the Claimant's financial means, but given that I decided not to make any deposit orders, I do not need to record that evidence here.

Complaints and issues

7. The Claimant's complaints, and the issues the Tribunal would have to decide in order to determine them, had been clearly identified by Employment Judges Webb and Maxwell at previous Case Management Hearings referred to in my earlier Judgment – pages 88 to 91 and page 121. Those complaints and issues, in relation to liability, are as follows.

Protected disclosures

8. The Claimant's case is that he made three protected disclosures. He relies on the following:

8.1. An email dated 30 November 2021 to EMR (the Respondent's client, at whose site he was working), copied to the Respondent.

8.2. An email dated 13 December 2021 to the Respondent's Chief Executive, Phil Bentley.

8.3. A video sent to Mr Bentley on 23 December 2021.

9. The Tribunal at the Final Hearing would be required to decide:

9.1. Did the Claimant disclose information?

9.2. If so, did he believe that the disclosure was made in the public interest and was that belief reasonable?

9.3. If so, did he believe that the information disclosed tended to show that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation, alternatively that an individual's health and safety had been, was being or was likely to be endangered? I note that the Case Management Summary of EJ Webb only refers to compliance with a legal obligation, but it is plain from discussing the matter with the Claimant that he also relied on the endangerment of health and safety, without in any sense changing the factual basis of the disclosures. Mr O'Dair sensibly did not raise any issue about this point.

10. If the Tribunal at the Final Hearing answered the above questions in the affirmative, the Claimant would have made a qualifying disclosure and the Tribunal would then have to decide whether it was protected. The last two alleged disclosures were made to the Respondent. The first was made to its client and to the Respondent. Again, that is not mentioned in EJ Webb's Case Management Summary, but both parties addressed the point in their submissions to me. I return to it in my conclusions below.

Detriment

11. If the Claimant made protected disclosures, the Tribunal would then consider his detriment complaints. Although for reasons which will become clear below, I did not need to address the alleged detriments at all, I record them and the issues the Tribunal would have to decide in relation to them, for completeness.

12. The Claimant relies on the Respondent having done the following things:

12.1. In December 2021, by the Claimant's line manager, Mr H Bajwa, suspending him and subjecting him to a disciplinary process.

12.2. The negative outcome of his appeal against dismissal, set out in a letter of 14 January 2022, in particular the alleged fact that there was no consideration of the grievance or questions he had submitted on, respectively, 13 and 18 December 2021.

13. The Tribunal would have to decide whether the Respondent thereby subjected the Claimant to a detriment.

14. If so, the next question would whether that was done on the ground that the Claimant made a protected disclosure.

Unfair dismissal

15. The Tribunal will first decide whether the reason or principal reason for the Claimant's dismissal was that he made a protected disclosure. If it was, he will be regarded as having been unfairly dismissed.

16. If that was not the reason or principal reason for dismissal, the Tribunal will decide what the reason or principal reason was. The Respondent says the reason was conduct.

17. If the Respondent shows that the reason was the Claimant's conduct, that would be a fair reason for dismissal. The Tribunal would then determine whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, including determining whether:

17.1. The Respondent genuinely believed the Claimant had committed misconduct.

17.2. There were reasonable grounds for that belief.

17.3. At the time the belief was formed the Respondent had carried out a reasonable investigation.

17.4. The Respondent otherwise acted in a procedurally fair manner.

17.5. Dismissal was within the range of reasonable responses.

Race discrimination

18. As set out by EJ Maxwell, the Tribunal would first be required to decide whether the Respondent did the following things:

18.1. In December 2021, by Mr Bajwa, suspend the Claimant and subject him to a disciplinary process.

18.2. By Hayley Kirkman of Human Resources, concoct (i.e., fabricate) evidence against the Claimant, namely an email from Mr Bajwa to a Ms Delaney of EMR dated 30 November 2021 and an email sent by Delroy Ifill (the Claimant's colleague) to Mr Bajwa on 11 December 2021.

18.3. By Sarah Saxelby also of Human Resources, on 22 December 2021, "call the shots" (i.e., tell the dismissing officer, Mr Shah what do) and withhold vital evidence from the minutes of the hearing by which the Claimant was dismissed.

18.4. By Mr Shah, dismiss the Claimant.

18.5. Provide a negative outcome to his appeal against dismissal, set out in a letter of 14 January 2022, in particular not considering the grievance or questions the Claimant had submitted on, respectively, 13 and 18 December 2021.

19. The Tribunal would then be required to decide whether that was less favourable treatment.

20. If it was, the final question would be whether that was because of race.

Hearing the Respondent's applications

21. During the Hearing on 28 September 2023 and by a subsequent Case Management Order, I raised with the Respondent whether I should hear its applications at all. This was on the basis that it had made an application for deposit orders on the ground that the complaints had little reasonable prospect of success previously and that application had been refused by EJ Webb on 21 December 2022.

22. If a judge decides that a complaint cannot be said to have little reasonable prospect of success, that necessarily entails that it cannot be said to have no reasonable prospect of success either. Accordingly, where an application for a deposit order has been refused, a party cannot apply to strike out a complaint on the same basis, because of issue estoppel, or because an Order has been made that cannot be revisited (given that there was no appeal against EJ Webb's decision) absent a material change of circumstances, or because it would be contrary to the overriding objective. See **Liverpool Heart and Chest Hospital NHS Foundation Trust v Poullis [2022] EAT 9** in relation to material changes of circumstances.

23. EJ Webb was not requested to provide written reasons for the decision rejecting the application. It was therefore crucial for me to know from the Respondent the basis on which EJ Webb's decisions were reached – in other words, on what grounds the Respondent made its application for deposit orders on that occasion and what materials were before EJ Webb when the application was rejected. In response to my Case Management Orders to that effect, the Respondent provided a further skeleton argument from Mr O'Dair, Instructions to Counsel (not Mr O'Dair) for the Hearing before EJ Webb in December 2022 and the bundle of documents submitted for that Hearing. It also purported to provide Counsel's attendance note from that Hearing but, as I indicated, I was unable to open it.

24. As I indicated at the outset of the resumption of this Hearing on 2 November, I was satisfied based on this new material that it was in order for me to hear the Respondent's applications, though I made clear that this was subject to anything the Claimant may wish to submit to the contrary. This was because:

24.1. Counsel attending on 21 December 2022 had confirmed that the basis of the Respondent's application on that occasion was jurisdictional, related to time limits, and the additional point that the complaints were vague and poorly particularised.

24.2. It seems clear that none of the contemporaneous documents on which the Respondent now relies were before EJ Webb – pages 240 to 329 of the bundle before me.

24.3. In relation to the race discrimination complaints, these were made subject to the requirement for further particulars, which were only finally clarified at the later hearing before EJ Maxwell, so that there can have been no application in relation to them.

24.4. I was satisfied in any event that the mutual disclosure of documents and exchange of witness statements since EJ Webb's decision was a material change of circumstances.

25. Whilst of course the Claimant opposed the Respondent's applications substantively, he did not offer any reason why I should not hear them. Specifically, he did not suggest that the Respondent's account of the Hearing before EJ Webb was in any way inaccurate. I thus proceeded to conclude my consideration of the Respondent's applications on 2 November, having begun that process on 28 September.

The law

Striking out

26. The possibility of striking out Tribunal complaints is provided for by rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). In **Eszias v North Glamorgan NHS Trust [2007] EWCA Civ. 330**, the Court of Appeal dealt with an appeal against the strike out of a claim that a dismissal was automatically unfair because the reason for it was that the employee had made protected disclosures. At paragraph 4, Maurice Kay LJ stated that a tribunal "should be alert to provide protection in the face of an application that has little or no reasonable prospect of success but it must also exercise appropriate caution before making an order that will prevent an employee from proceeding to trial in a case which on the face of the papers involves serious and sensitive issues". At paragraph 26 he reflected on what is meant by "reasonable prospect of success" and stated that it requires "a realistic as opposed to merely fanciful prospect of success". At paragraph 29 he went on to say, "It would only be in an exceptional case that an application ... will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts as sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation". He then referred to the decision in **Anyanwu** (see below) and advocated an approach which recognises the importance of hearing full evidence – which would include oral evidence – before making decisions as to merits.

27. In **Anyanwu v South Bank Student Union [2001] ICR 391** the House of Lords (Lord Steyn) underlined in relation to discrimination cases "the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases", going on to state that "discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest". Similar sentiments were expressed by Lord Hope of Craighead:

"discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence ... The risk of injustice is minimised if the answers to [questions of law] are deferred until all the facts are out".

28. This approach was reiterated by the Employment Appeal Tribunal ("EAT") in a discrimination case, **Zeb v Xerox (UK) Ltd and others [2016] UKEAT/0091/15,** in which Simler P said that the strike-out power "has rightly been described as a draconian one, and case law cautions Employment Tribunals against striking out a claim in all but the clearest cases, particularly where that claim involves or might involve allegations of discrimination". It has also been reiterated by the EAT in an automatically unfair dismissal case, **Morgan v Royal Mencap Society [2016] UKEAT/0272/15** – "where there is a dispute of fact, unless there are very strong reasons for concluding that the claimant's view of the facts is simply unsustainable, a resolution of that conflict of fact is likely to be required before the case can be dismissed without a hearing".

29. In light of these authorities, the power to strike out discrimination complaints in particular should be exercised very carefully. Establishing "no reasonable prospect of success" is a high threshold for a respondent to get over. A preliminary hearing should not involve the conduct of a mini-trial, hearing evidence and resolving factual disputes. Rather, the approach to be taken is to assume that the Claimant's case is established at its highest, unless for example there are contemporaneous documents of the sort referred to in **Eszias** which the Claimant could not reasonably hope to contradict at a Final Hearing. As the EAT put it in **Bahad v HSBC Bank plc [2022] EAT 83**, to strike out a claim the employment judge must be confident that at trial, after all the evidence has come out, it is almost certain to fail, so it genuinely can be said to have no reasonable prospects of success at a preliminary stage, even though disclosure has not taken place and no witnesses have given evidence.

30. All of that said, the Court of Appeal said in **Ahir v British Airways plc [2017] EWCA Civ 1392** that 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. It 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".

31. Two further points should be noted. First, the EAT in **Malik v Birmingham City Council and another [2019] UKEAT/0027/19** cautioned tribunals about the potential dangers of expecting litigants in person to explain their case under the pressure of questioning at the preliminary stage. Secondly, it is important for a tribunal not to proceed straight from holding that a complaint has no reasonable prospect of success to striking it out. If the threshold is reached, it must consider whether to exercise its discretion to do so.

Deposit orders

32. Rule 39 of the Rules of Procedure provides an alternative to striking out complaints, and states "Where at a preliminary hearing ... 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 ... to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument". If the deposit is not paid by the required date, the complaint is struck out. If it is paid, and then the Tribunal – usually at the final hearing – finds against a claimant for substantially the reason given in the deposit order, the claimant is treated as having acted unreasonably in pursuing it, unless the contrary is shown, and the deposit is paid to the other party. Otherwise, it is refunded.

33. In deciding whether to make a deposit order, as well as considering legal difficulties with a claimant's case the Tribunal may consider the likelihood of a party being able to establish the essential facts on which they rely, thereby forming a provisional view of the strength of the case. **Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14** makes clear that separate deposit orders can be made in respect of various arguments or allegations in a particular case. This is subject to an overall assessment of the proportionality of the total sum, given the requirement in rule 39 to have regard to the financial means of the person paying the deposit(s) before such an order is made. In **Hemdan v Ishmail [2017] IRLR 228,** Simler P described the purpose of rule 39 as being to identify complaints with little reasonable prospect of success and discourage their pursuit by requiring a sum to be paid and creating a risk of costs if the complaint is nevertheless pursued but fails on the ground identified in the deposit order. The purpose is "emphatically not" however to "make it difficult to access justice or to effect a strike out through the back door". In other words, the deposit order must be one which the claimant can comply with.

34. I should say a little about the substantive law in relation to each part of the Claimant's case which was the subject of the Respondent's applications. I do not need to say anything about the law in relation to protected disclosure detriments as in respect of those complaints the Respondent's application was based on striking out or obtaining deposit orders in relation to the Claimant's case that he made protected disclosures.

Protected disclosures

35. Section 43A of the Employment Rights Act 1996 ("ERA") defines a "protected disclosure" as a qualifying disclosure made by a worker in accordance with one of sections 43C to 43H. Section 43B then defines what counts as a "qualifying disclosure". For the purposes of this case, this is 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; (d) that the health or safety of any individual has been, is being or is likely to be endangered.

36. A "qualifying disclosure" requires first of all a disclosure of information by the worker. Once a tribunal is satisfied that information has been disclosed, the next question is whether the two remaining requirements of section 43B set out above are satisfied. The first such requirement is whether the Claimant reasonably

believed that the disclosure of the information was in the public interest. The second requirement is whether the Claimant reasonably believed that the information he disclosed tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation, or reasonably believed that the information he disclosed tended to show that the health and safety of any individual had been, was being or was likely to be endangered.

37. On the first of these requirements, as made clear in **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837**, the test is whether the Claimant reasonably believed that his disclosure(s) were in the public interest, not whether they were in fact (in the Tribunal's view for example) in the public interest. The worker must actually believe that the disclosure is in the public interest and the worker's belief that the disclosure was made in the public interest must have been objectively reasonable. Why the worker makes the disclosure is not of the essence, and the public interest does not have to be the predominant motive in making it. Tribunals might consider the number of people whose interests a disclosure served, the nature of the interests affected, the extent to which they were affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

38. The second of these requirements is assessed very similarly. In order for the Claimant to demonstrate that he reasonably believed the information he disclosed tended to show (for example) that health and safety was endangered, it is not necessary that this actually be true, although of course the factual accuracy of what is disclosed may be relevant and useful in assessing whether he reasonably believed that what he said tended to show that health and safety was endangered. This is a question of fact for the Tribunal, looking at the Claimant's state of mind at the time he made the disclosures.

39. A "qualifying disclosure" is a protected disclosure if made in accordance with one of sections 43C to 43H of the ERA. Section 43C applies if a qualifying disclosure is made (a) to the worker's employer. Section 43C(2) provides that, "A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer".

40. Section 43G protects a qualifying disclosure if the worker reasonably believes the information disclosed, and any allegation contained in it, are substantially true; he does not make the disclosure for personal gain; one of the conditions in subsection (2) is met; and in all the circumstances of the case, it is reasonable for him to make the disclosure. As to subsection (2), for the first alleged disclosure, made to EMR as well as the Respondent, the Claimant relies on section 43G(2)(b), namely that he reasonably believed that it was likely evidence relating to the relevant failure would be concealed or destroyed if he made a disclosure to his employer.

Unfair dismissal

41. Under Section 98(1) ERA, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be

of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers.

42. The Court of Appeal in **Kuzel v Roche Products** [**2008] ICR 799** (approving in this respect the earlier decision of the EAT) said that the questions tribunals must answer in relation to a dismissal said to be automatically unfair because the reason or principal reason for it was a protected disclosure are:

42.1. Whether the Claimant has shown a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal.

42.2. If so, whether the Respondent has proven the reason for dismissal.

42.3. If not, whether it has disproved that the Claimant having made a protected disclosure was the reason or principal reason for dismissal.

43. If the Respondent shows the reason (or disproves that the protected disclosure was the reason) and establishes that the reason was one falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. In assessing these requirements in connection with a purported conduct dismissal, the Tribunal will of course have regard to the guidelines in **British Home Stores v Burchell [1980] ICR 303** as to whether the Respondent believed the Claimant to be guilty of misconduct (on the basis of a reasonable suspicion), had reasonable grounds to sustain that belief, and when forming that belief had carried out a reasonable investigation in the circumstances.

Race discrimination

44. Section 136 of the Equality Act 2010 ("the Act") sets out the burden of proof provisions for discrimination complaints. That section and related case law makes clear that it is for the Claimant to prove a prima facie case at a final hearing. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them.

45. Direct discrimination is defined by section 13 of the Act. In short, there must be a detriment (or dismissal), amounting to less favourable treatment than was or would be afforded to others in not materially different circumstances (section 23 of the Act), because of race. A difference in race and in treatment is not sufficient – **Madarassy v Nomura International plc [2007] IRLR 246**; there must be something more, though this "need not be a great deal" – **Deman v The Commission for Equality and Human Rights and others [2010] EWCA Civ. 1279**.

46. The crucial question in a discrimination case is the reason why the alleged discriminator acted as they did. As Mr O'Dair pointed out, the EAT in **Alcedo Orange Ltd v Ferridge-Gunn [2023] EAT 78**, relying on the Court of Appeal's decision in **Reynolds v CLFIS (UK) Ltd [2015] ICR 1010**, made clear that the

individual who did the act complained of must themselves have been motivated by the protected characteristic (here, race).

47. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (**Nagarajan v London Regional Transport [1999] IRLR 572**). Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

Submissions and conclusions

48. This was an unusual case in that all the documents had been disclosed and witness statements had been exchanged prior to this Hearing. This was because the Final Hearing had been postponed by the Tribunal, apparently due to the unavailability of a judge, after the parties had completed all of the preparations for it. Whilst as indicated in the summary of the law, it is important not to conduct a mini-trial at the preliminary hearing stage, the particular situation in this case meant that each party had the other's evidence available to them in full, except of course for any oral evidence.

49. I deal now in turn with each of the Respondent's applications, summarising the parties' submissions in relation to each and setting out my conclusions. I list each issue using the wording adopted in Mr O'Dair's skeleton argument and also using the order he adopted.

Issue 1: Was the email sent by the Claimant to EMR, copied to the Respondent, on 30 November 2021 a protected disclosure?

50. The email in question is at pages 245 to 248. Its focus was very much the alleged aggressive behaviour and incompetence of one of the Claimant's colleagues who was working as a security guard, but it also raised in detail, as context to those complaints, that the colleague had improperly obtained a master key to several of the client's sites. It is the disclosure of that matter which is the heart of the alleged protected disclosure. The email also referred to the Claimant's colleague leaving his post early.

51. The Claimant clearly has reasonable prospects of showing that he disclosed information in this email, even if the Tribunal confines its consideration to the point about the master key. What the Respondent says is that he will not be able to show that he had either of the required reasonable beliefs referred to in my summary of the law, including because he did not allege in the email itself that what he said involved matters of public interest.

52. Of course, employment tribunals will always have regard to what was written in any alleged protected disclosure at the time, but it is not necessary to qualify for protection under the ERA that a worker say it is a disclosure in the public interest or even to refer to that interest. The Claimant says he reasonably believed the information about his colleague having the master key tended to show a danger to health and safety and that disclosing this was in the public interest because the colleague was under investigation in relation to fires, was

unstable (the Claimant alluded to that in the email) and could have caused a major incident at any of the sites in question.

53. As already noted, raising those issues does not have to have been the main focus of the email, or even the main intention in sending it, in order for it to be a qualifying disclosure. At this preliminary stage, I must also take into account that a full analysis of the Claimant's beliefs, what they were based on and whether they were reasonable would require oral evidence to be elicited, so that the Tribunal could make relevant findings of fact. What can be said at this point is that the Claimant expressed concern in the email about the security implications of his colleague having a master key and leaving his post early, in relation to the latter referring to who would be blamed in the event of a fire breaking out. Taking those details into account and putting his case at its highest, I cannot say he has little or no reasonable prospect of persuading the Tribunal at the Final Hearing that he reasonably believed there was a risk to health and safety and that disclosing the colleague's conduct was in the public interest, given the potential impact on doubtless multiple individual occupants of the client's sites and other sites nearby them. As I have indicated, it will be for the Tribunal at the Final Hearing to decide (based on more detailed evidence, including oral evidence) whether the Claimant had these things, or other things unrelated to the public interest and health and safety in mind at the time, and the effects on the status of the alleged disclosure if he did not. I do not say therefore that he will establish that this email was a qualifying disclosure, but the burden is on the Respondent to show that he has no or little reasonable prospect of doing so, and I am not satisfied that it has, when the Claimant's case is understood at its best.

54. As to whether he has little or no reasonable prospect of showing that this disclosure was protected if it was qualifying, as the Respondent says, it was sent to the Respondent's client and not only to the Respondent. Mr O'Dair submitted that the Claimant has advanced no case for why it was appropriate to inform EMR of the matters referred to in the email. Having heard the Claimant's reply to that however, I cannot say there is little or no reasonable prospect of him showing that his sending the email to the client meant that any qualifying disclosure within it was not protected, particularly where the Claimant says (putting his case at its best) that he was instructed to report matters of concern to the client first – see section 43C(2) ERA.

55. As set out above, the Claimant relies alternatively on section 43G(2)(b) because he says two serious misconduct issues related to other security guards had been disclosed before and the Respondent had not acted upon them. In other words, he says he reasonably believed that evidence relating to what he disclosed on 30 November would be concealed by the Respondent if it was the only recipient of the email. Putting his case at its highest as I must, and without any documentation flatly contradicting his contentions in either respect, I cannot say he has little or no reasonable prospect of showing that any qualifying disclosure was also a protected disclosure. Taking what he says at face value, he has more than little reasonable prospect of showing that section 43C(2) or section 43G applied.

Issue 2 Was the email sent to the Respondent's CEO on 13 December 2021 a protected disclosure?

56. This email is at pages 282 to 285. There is of course no issue in terms of who it was sent to. What the Respondent says is that it was just a recitation of

the Claimant's personal grievances, so that again he has no or little reasonable prospect of establishing the required reasonable beliefs.

57. The Respondent is correct in saying that the email included the Claimant's assertion of racism and set out a grievance against two colleagues, including his manager, Mr H Bajwa, asserting the latter's incompetence. He again referred to the client site being put at risk as a result, detailed his own qualifications and expertise. He then referenced what he had reported on 30 November. The rest of the email was the Claimant's attempt to say why disciplinary allegations which had been brought against him by this point were unfounded, before he then referred to what seem to me to have been historic issues.

58. My discussion with the Claimant elicited that it is the alleged risks to the client's site (or sites) on which he relies for these purposes. Essentially, the reference to and repetition of what he said in the 30 November email leads me to the same conclusion as I have reached in relation to Issue 1. As with the first alleged protected disclosure, it seems to me that the Claimant has a sensible basis for arguing that he disclosed information related to the colleague with the master key. As to whether he believed and reasonably believed that this tended to show a danger to health and safety and that disclosing it was in the public interest, again this does not have to have been the Claimant's main motivation in sending the email. For the reasons given above in relation to Issue 1, putting the Claimant's case at its best, I cannot say he has no or little reasonable prospect of persuading the Tribunal at the Final Hearing that this second email was also protected. I do not say he will establish that, but at the preliminary stage I do not see sufficient grounds for striking out his case in this regard or making it the subject of a deposit order.

Issue 3: Was the video sent to the Respondent's CEO on 23 December 2021 a protected disclosure?

59. The video is said to show one of the Claimant's security guard colleagues asleep on duty. The Respondent has not asked me to consider the Claimant's prospects of showing that this was a disclosure of information and so I say no more about that. The focus of the Respondent's applications is the Claimant's prospects of showing that he reasonably believed the disclosure of the video to be in the public interest.

60. What the Claimant said to me is that the video showed people being deployed on dangerous sites inappropriately. I cannot say that this was in the Claimant's mind without his giving oral evidence and without other contextual evidence being considered to which I was not referred. Taking what the Claimant says on face value however, it is plain that he has better than little or no reasonable prospect of showing that he reasonably believed the information in the video tended to show a risk to health and safety – it can be sensibly argued that part of a security guard's job is to protect the health and safety of individuals on the site in question.

61. As to the Claimant's belief that disclosing this was in the public interest, and the reasonableness of any such belief, he said to me that the Respondent has major contracts at many sites nationwide. Again, it will be for the Tribunal at the Final Hearing to decide (based on more detailed evidence, including oral evidence) whether the Claimant had these things (or other things unrelated to the public interest) in mind at the time, whether he had a reasonable basis for the

same, and the effects on the status of the alleged disclosure if he did not. Taking what he says at its highest however, at this preliminary stage the Respondent has not satisfied me that the threshold test for striking out this part of the case or subjecting it to a deposit order is made out.

62. As I have indicated a couple of times, I need say nothing further about the complaints of protected disclosure detriment. Mr O'Dair submitted that the Respondent's application to strike out or for deposit orders in relation to these complaints was based on the Claimant having little or no reasonable prospect of showing that he made protected disclosures. Having refused the Respondent's applications in those respects, the complaints of protected disclosure detriment will be considered in full at a Final Hearing.

Issue 4: Was [the Claimant's suspension and] the instigation of the disciplinary investigation by Harvey Bajwa materially influenced by the Claimant's race?

63. It is clear that in relation to this allegation it is Mr Bajwa who is the alleged discriminator. The Respondent submitted that part of the reason this complaint has little or no reasonable prospect of success is that Mr Bajwa and the Claimant are of the same race. That is a factor in the overall assessment of the complaint's prospects, not least because the Claimant's response to this submission was to say that he and Mr Bajwa have different religions – there has never been any complaint by the Claimant in this case of religion or belief discrimination. That said, it is well-known that a person can be discriminated against, because of race, by someone of the same race as them and there are all sorts of reasons why that might happen. Accordingly, whilst I accept that it is much rarer than discrimination between people of different races, I would be unwilling to strike out the complaint or make a deposit order on that basis alone.

64. The same is true of the Respondent's submission that it has (and had at the relevant time) a multi-racial workforce and that no evidence has emerged in disclosure or witness statements of discrimination against others of the same race as the Claimant. Those are things that it is right for me to take into account, but again are not of themselves an indication that there is little or no reasonable prospect of the Claimant showing discrimination in his individual case.

65. When combined however with the Claimant's explanation of his case as to why he says the suspension and disciplinary investigation were acts of race discrimination, the difficulties with this complaint are substantial. The Claimant explained his case to be that Mr Bajwa was used as a pawn by more senior employees of the Respondent, specifically certain individuals in its HR department, to get rid of him, as shown by the fact that Mr Bajwa himself was removed from the Respondent's employment after the Claimant's dismissal. In other words, his case is that Mr Bajwa was employed, as someone "with the same skin colour" as him, to get rid of him and be a "smokescreen" to help the Respondent avoid allegations of race discrimination.

66. There are to my mind a number of substantial difficulties with that case:

66.1. First, it is inherently improbable that the Respondent would employ a manager simply – or even principally – for the purpose of removing the Claimant, dispensing with the manager's services once that was done. I do not say that could not happen, but it is highly improbable to say the least.

66.2. Secondly, the Claimant's case that Mr Bajwa acted as the pawn of others was no more than assertion on his part. He knows his case very well indeed, has seen the Respondent's disclosure of relevant contemporaneous documents (which in essence amounts to no more than 80 pages – see paragraph 24.2 above), and yet did not point to any evidence providing any indication of support for his position in this respect.

66.3. Fourthly, as set out in my summary of the law it is clear that the individual who did the act complained of must themselves have been motivated by the protected characteristic, here race. The Claimant's case, carefully case-managed, is that it was Mr Bajwa who discriminated against him by suspending him and embarking on an investigation, but what the Claimant wishes to argue does not in fact impute a discriminatory mindset to Mr Bajwa at all: rather what is said to have been in Mr Bajwa's mind was to do what his "paymasters" (as the Claimant put it) told him.

67. I am very conscious of the caution urged on tribunals in respect of applications to strike out allegations of discrimination. In relation to this complaint however, where:

67.1. disclosure and exchange of statements – albeit not the giving of oral evidence – has taken place, and

67.2. the Respondent's case as to why Mr Bajwa took these decisions is entirely ignored, so as to put the Claimant's case at its highest and not seek to resolve factual disputes,

what the Claimant seeks to advance, and thus the complaint set out at paragraph 18.1 above, has no reasonable prospect of success. I also record that the Claimant had no difficulty telling me the basis for this complaint and that what he told me was consistent with what is set out in his chronology, so that I do not consider that even as a litigant in person he was put at any disadvantage in being asked to do so. Having found that a basis for striking out the complaint exists, I will return below to the separate question of the exercise of my discretion,

Issue 5A: Who took the decision to dismiss? Was the Claimant's dismissal formally taken by Mr Shah but in practice by a group of managers using him as a puppet in particular in relation to race?

68. As set out at paragraph 55 of Employment Judge Camp's Case Management Summary from a Hearing on 29 September 2022 (see page 55):

"The people who the Claimant alleges together decided to dismiss him are: the Respondent's CEO, Phil Bentley; the Claimant's line manager's line manager Alison Raybould; another manager called Amanda Petch; Julie Mason, Head of HR; Jasmine Hudson, HR Director; Jennifer Duvalier, Head of Employee Concerns; Mark Hopkins, a line manager … The Claimant cannot say how any of those people influenced Mr Shah to make the decision to dismiss, nor does he have any evidence that they did so. He relies on evidence that he thinks shows that they, or some of them at least, had previously treated him badly".

69. Mr O'Dair submitted that this aspect of the Claimant's case had no reasonable prospect of success for three reasons:

69.1. It is inherently fanciful to argue that all of the people named above – all or many of whom are/were employed in senior positions with the Respondent – together decided that the Claimant should be dismissed.

69.2. The Claimant's case again falls foul of the case law which says that the actual decision-maker must have been influenced by considerations of race, which the Claimant appears not to allege.

69.3. Mr Shah also shares the Claimant's race.

70. The Claimant's response to these submissions was as follows:

70.1. In relation to the last of the Respondent's points, he and Mr Shah have different religions. I repeat what I said in relation to Mr Bajwa. There has never been before the Tribunal any complaint of religion or belief discrimination.

70.2. He firmly asserted that the basis for his case that he was discriminated against was that Mr Shah was a puppet. As stated above, and as identified by EJ Camp, this was no more than assertion on his part and he was unable to point to any supporting evidence of any description – all of the evidence, apart from oral testimony, being out – other than to say that Mr Shah did not address the fact that he was prevented from carrying out training at various EMR sites. That seems to me an incoherent basis for seeking to establish race discrimination in relation to the dismissal decision. Yet again therefore, whilst the formal complaint is that Mr Shah discriminated against the Claimant, the substance behind it is not to that effect. In other words, what the Claimant wishes to argue does not in fact impute a discriminatory mindset to the alleged discriminator. Rather, what is said to have been in Mr Shah's mind was to do what his paymasters told him.

71. What the Respondent has identified, and the Claimant's firmly asserted replies to it, represent to my mind formidable difficulties for him in pursuing the complaint identified at paragraph 18.4 above, particularly in a case where disclosure and exchange of witness evidence has taken place. Taking into account again what is said in paragraph 67 above, I find that it has no reasonable prospect of success for the reasons I have set out. I will return to the exercise of my discretion below.

Issue 5B: Did the following acts of manipulation occur:

i. **Hayley Kirkman concocting an email on 30 November 2021, purportedly written by Mr Bajwa?**
ii. **Hayley Kirkman concocting an email from Delroy Ifill to Mr Bajwa on 11 December 2021?**
iii. **Sarah Saxelby telling Mr Shah what to do and withholding vital evidence from the minutes on 22 December 2021?**

72. The Respondent's application in these respects clearly relates to the allegations in the list of issues at paragraphs 18.2 and 18.3 above.

73. In relation to the first matter, the email is at page 242 and was sent by Mr Bajwa to Lisa Delaney at EMR. It appears to be a response to the Claimant's first alleged protected disclosure, and raises a number of questions about the Claimant's conduct. The Respondent's argument is that at its highest, the email includes text which had been provided for Mr Bajwa by Ms Kirkman, that it is

commonplace for HR staff to draft emails for managers, if that is what happened, and that the Claimant has identified no evidence to support his allegation that Ms Kirkman "manipulated" Mr Bajwa into sending the email. It also says Ms Kirkman was a junior member of the Respondent's HR team who evidently would not have "concocted" an email and sent it on Mr Bajwa's behalf, if that is what is alleged.

74. Reading the email on its own terms and without knowledge of the context in which it was sent, it does look like it was prepared for Mr Bajwa by someone else. Although that could only be confirmed by oral evidence, I can agree with the Claimant, for example, that saying in an email to EMR, "Why has Dev [the Claimant] gone to the customer and not Mitie as this is for us to deal with not EMR?" and referencing "potential gross misconduct" by the Claimant writing to the customer, does support that view. That said, when I asked the Claimant why he says Ms Kirkman did what was alleged because of race, he said that she was being "orchestrated" by senior people in HR and that she too was dismissed shortly after him.

75. In relation to the second matter, the email is at page 277 and was sent by Mr Ifill to Mr Bajwa, complaining about the Claimant. The Respondent says the Claimant's allegation is fanciful, because he bases it entirely on the fact that Ms Kirkman's name is at the top of the printed copy of the email, which shows no more than that she printed it or forwarded it at some point. The Claimant confirmed to me that this is indeed the factual basis of his complaint. He said again that Ms Kirkman was "being orchestrated by HR" and that she had to do what her paymaster said.

76. The Claimant faces serious difficulties in establishing the alleged facts on which his complaints against Ms Kirkman are based. He asserts without evidence that she drafted the emails – in fact, his case goes further than that, so that he alleges that she "concocted" them, which can only mean that she put the words of the emails into the mouths of Messrs Bajwa and Ifill to make it look as though this is what they were saying. That is an inherently improbable case, not least given Mr Bajwa's alleged antipathy towards the Claimant reflected in the allegation against him. As to the second email, there is the further point that although the question of who wrote (as opposed to who sent) the email could only be established with any confidence by oral evidence, the Respondent is clearly correct that Ms Kirkman's name being on the top of the email within the bundle shows no more than that she received it in her account at some point and probably printed it off. There is also the further highly improbable feature of these allegations in that what the Claimant is saying is that senior HR staff manipulated Ms Kirkman who in turn manipulated Messrs Bajwa and Ifill.

77. Further, in respect of both matters involving Ms Kirkman, the same problems arise as I have highlighted in relation to the alleged discrimination by Mr Bajwa and Mr Shah. First, the Claimant merely asserts, without any indication from the evidence, that she was a puppet for more senior HR officers. Secondly, the allegation is that Ms Kirkman herself discriminated against the Claimant in these respects and yet he does not impute to her any racial element in her conduct or thinking. Indeed, the Claimant told me that he had never met her, which raises a serious question about whether Ms Kirkman would even know the Claimant's race. In short, the Claimant's formal allegations are that Ms Kirkman discriminated against him but when asked to explain his case, he does not say that she did.

78. Again taking into account the matters rehearsed at paragraph 67 above, the threshold test for striking out the complaints identified at paragraphs 18.2 and 18.3 above is met. I will return to the exercise of my discretion below.

79. In relation to the third matter, concerning Ms Saxelby, I agree with the Respondent that the Claimant's case contradicts the burden of his contemporaneous email (dated 22 December 2021) at page 309 in which he described Mr Shah as a "*man on a mission*" (that is to dismiss him) and as a "*terminator*" who knew exactly what he was doing, referring to Mr Shah achieving his "*goal of complete termination*". I pause to note that, of course, this email further undermines the Claimant's case represented by issue 5A, in that it is a strong assertion that Mr Shah made his own decision. The email does also say that Mr Shah was "*sent in*" to achieve this goal, but as noted above, that is something the Claimant asserted without directing me to any supporting evidence.

80. As to the minutes, I agree with the Claimant that the fact Mr Shah sent them to him (page 304) does not indicate who prepared them. I also take as read for these purposes the Claimant's case that the comments of someone from EMR, Johnny Khan, who accompanied him at the hearing are not included. That said, the Respondent is plainly right that the email at page 309 firmly indicates the Claimant's belief at the time that it was Mr Shah who determined what went into the minutes, the Claimant saying, "*You even kept a watchful glance over to the minute writer correcting her several times [so] as to get the minutes to read how you wanted*". The Claimant's own statement/chronology at page 22 also indicates that he believes Mr Shah prepared them, describing them as "*his minutes*" and saying he must have "*bust a gut to get it all typed out on [the] same day*". The email and statement are completely at odds with his explanation to me that Ms Saxelby was pointing Mr Shah in the right direction.

81. Further, when asked why he says Ms Saxelby did what was alleged because of race, the Claimant said that she was "driven by the core agenda" of senior people in HR. I repeat what I have said above about the difficulties this presents for the Claimant's case. Given that, and given that the Claimant's case contradicts his own contemporaneous email, particularly in relation to the minutes, again I cannot see how his complaint has any reasonable prospect of success. I will come to the exercise of my discretion below.

Issue 6: Was the dismissal of the Claimant's appeal materially influenced by the Claimant's race … in particular the Claimant relies on the failure to consider his grievance [and] the failure to consider the questions submitted on 13 and 18 December.

82. The Respondent submitted that the disciplinary process which led to the Claimant's dismissal, and the appeal process which followed it, were reasonable and that the Claimant has pointed to nothing more than an outcome which he regarded as adverse – decided by Paul Wiggins – and his race in support of the first part of the complaint identified at paragraph 18.5 above. This, it says, is an insufficient basis for a complaint of race discrimination in relation to the appeal decision. As for the balance of the complaint, it seems to be agreed that the Claimant was informed by Mr Bentley that his grievance should be considered as part of the disciplinary process. The Respondent says that the grievance was indiscriminate in nature and that the Claimant has not said what the Respondent failed to investigate.

83. The Claimant told me that he never met Mr Wiggins, and again, referred to everything being orchestrated by HR. I repeat what I have said above about the difficulties this creates for him, namely that it is assertion without any indication of support from the evidence that is now substantially out in the open, and it also means that the Claimant does not in fact impute any consideration of race to Mr Wiggins himself. When asked why the appeal outcome was tainted by race discrimination, the Claimant referred again to the Respondent – this time Mr Wiggins – failing to address the fact that EMR wanted him to do training at other sites because of EMR's concerns about rogue guards. I repeat that this seems to me to be an incoherent basis on which to base a complaint of race discrimination about the decision to dismiss his appeal.

84. I am satisfied again therefore, taking into account the matters rehearsed at paragraph 67 above and taking the Claimant's case at its best, that the first part of the complaint identified at paragraph 18.5 above has no reasonable prospect of success.

85. As to Mr Wiggins not considering the Claimant's grievance and the questions which he submitted on 13 and 18 December 2021, the Claimant's case as to why that was because of his race is that there is an inconsistency between the statements prepared by the Respondent's two witnesses, Mr Wiggins and Mr Shah. I repeat that I have not read those statements, but what the Claimant was keen to emphasise from them was that Mr Shah says he received an investigation report from Mr Wiggins, when the latter only got involved at the later, appeal stage. I do not see how the Claimant can hope to persuade the Tribunal at a final hearing that this is a basis for drawing an inference of discrimination by Mr Wiggins in not taking into account the Claimant's grievance and questions. It is another incoherent argument.

86. Again, therefore the threshold test is met and for the reasons set out above I have found that to be the case in respect of all of the Claimant's complaints of race discrimination. I must next determine whether they should be struck out accordingly, and conclude that it is right to exercise my discretion to do so. I have remained conscious of the caution enjoined by the case law, but having reached the conclusions set out above, I can see no benefit in allowing such fundamentally flawed allegations to proceed to a final hearing, taking up valuable judicial time and adding to the cost of the case for the Respondent.

87. I acknowledge that two of the allegations of race discrimination are repeated as protected disclosure detriment complaints which will proceed for the reasons I have given. The Claimant's challenge to his dismissal – as will appear below – will also proceed as a complaint of automatically, alternatively ordinary, unfair dismissal. That is not a sufficient basis however for allowing the complaints of race discrimination related to the same matters to proceed, whether with or without the imposition of a deposit order, when in my judgment they are fundamentally flawed. Allegations of race discrimination are serious, and the concomitant of the cautious approach to be taken at the preliminary stage is that where they have no reasonable prospect of success it is not appropriate to leave them as something which the Respondent is required to contest. Of course, the balance of the race discrimination complaints – reflected in the matters discussed under Issue 5B – are in reality factually separate complaints and there is no basis for allowing them to proceed at all. Deposit orders do not seem to me to be a suitable alternative in respect of any of the complaints in the circumstances.

88. For the reasons set out above, the Claimant's complaints of race discrimination are struck out.

Issue 7: What was the reason for the dismissal for the purposes of the law of unfair dismissal? If the principal reason for the dismissal was conduct, was the dismissal reasonable within section 98(4) ERA?

89. Mr O'Dair's submissions in respect of the reason for dismissal, rested on the assumption that the dismissal was not because of race or protected disclosure. As to the latter, he said that the application to strike out or to make a deposit order in respect of the complaint of automatically unfair dismissal was based on there being no or little reasonable prospect of the Claimant establishing that he made a protected disclosure. Given that I have found against the Respondent in that respect, the complaint of automatically unfair dismissal will proceed to be considered at a final hearing. I am not prepared therefore to say that there is no or little reasonable prospect of the Tribunal finding anything other than that the reason for dismissal was the Claimant's conduct.

90. Similarly, even if there was no reasonable prospect of the Tribunal finding the reason to be other than as the Respondent asserts, I would not be prepared to strike out this complaint. The Respondent says that the evidence for some of the allegations was not disputed and that the misconduct was serious. Those are matters that have to be tested by oral evidence, or at the very least by consideration of documents other than those to which I was taken in this Hearing, and in full submissions once all of that evidence is considered.

91. I do not say that the Claimant will establish what he said to me, but putting his case at its best, he has a number of coherent things to say in relation to all of the main allegations against him that led to his dismissal. In short:

91.1. In relation to his communicating concerns about a colleague to EMR, he says that it was not sensitive information and was simply a repeat or continuation of regular authorised practice.

91.2. Whilst the Respondent says otherwise, he says he was monitoring CCTV when on his laptop as he accessed the control centre by that means.

91.3. Whilst again the Respondent says otherwise, he says that he completed the incidents book (referred to as the "DOB") online and that is why the hard copy was not completed.

91.4. Yet again contrary to the Respondent, he also says he strongly disputed the disciplinary allegations.

92. To repeat, given the substantial conflict of evidence between the parties, these are all matters that should be fully considered with all the evidence before the Tribunal panel and fully analysed. I accept of course that when determining whether a dismissal was unfair a Tribunal does not have to find that a claimant actually misconducted himself, but the contested matters summarised above plainly go to the **Burchell** questions, including whether the Respondent reached reasonable conclusions after a reasonable investigation. I accept too Mr O'Dair's submission to the effect that the range of reasonable responses test to be applied to all such matters inherently provides a margin of appreciation to

employers in deciding whether to dismiss. That too however requires all the relevant facts and arguments to be before the Tribunal which, in contrast to the complaints of race discrimination, was not the case at this preliminary stage.

Summary

93. In conclusion, the complaints that will be considered at a final hearing are those of protected disclosure detriment and unfair dismissal. This will include the question of whether the Claimant made one or more protected disclosures. The issues to be determined are as set out above.

94. There was insufficient time at the conclusion of this Hearing to discuss arrangements for a final hearing, and to make case management orders. A short telephone case management hearing has been arranged for this purpose.

Note: This was in part a remote hearing. The Claimant attended at the Tribunal Hearing Centre and the Respondent remotely. The parties did not object to the case being heard in part remotely. The form of remote hearing was video.

Employment Judge Faulkner
Date: 17 November 2023

Note

All judgments and written reasons for the judgments (if provided), apart from those under rule 52, are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.