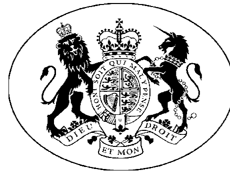

EMPLOYMENT TRIBUNALS

Claimant: Miss S Messi

Respondent: Coremont Partnership Services Limited

Heard at: London South ET (Croydon) (in public, via CVP)

On: 18th October 2023

Before: Employment Judge McCann

Representation
Claimant: In person
Respondent: Mr Mark Greaves (Counsel)

RESERVED JUDGMENT

AMENDMENT APPLICATION
Employment Tribunals Rules of Procedure 2013

The claimant is refused permission to amend her ET1/Claim Form in order to assert the new complaints which were not originally pleaded – namely, the complaints of direct race discrimination, race-related harassment, victimisation, public interest disclosure detriment, direct disability discrimination and discrimination by way of failure to make reasonable adjustments, breach of contract and unauthorised deduction from wages.

STRIKE OUT OF CLAIM
Employment Tribunals Rules of Procedure 2013

The claims for automatic unfair dismissal (contrary to s103A of the Employment Rights Act 1996), victimisation (contrary to ss27 and 39(2)(c) of the Equality Act 2010), equal pay (contrary to s66 of the Equality Act 2020) and wrongful dismissal (notice pay) are struck out and dismissed under Rule 37(1)(a) because they have no reasonable prospects of success.

REASONS

Background

1. The claimant presented her ET1 claim form on 12th January 2023, with an Acas early conciliation (EC) certificate having been issued on 9th January 2023 showing the receipt of the EC notification on 6th January 2023.

2. The parties agree that the claimant was employed as a purchase ledger accountant from 4th November 2022 until she was dismissed in a telephone call at 4:30pm on 6th January 2023.

3. There is a dispute about whether the claimant was given notice and or paid for her notice period and/or paid in lieu of notice.

4. At the Preliminary Hearing, the claimant said that her employment came to an end on 21st January 2023 but that she had not been paid during her notice period. On behalf of the respondent, it was asserted that the effective date of termination was 20th January 2023 and that she was paid during her notice period.

5. I note that if two weeks' notice was given and received on 6th January 2023 (as would be the case where notice of dismissal is conveyed verbally, as was the situation here), then a two-week notice period would have ended on 20th not 21st January 2023.

6. The respondent duly filed an ET3 form and Grounds of Resistance in which they referred to making an application to strike out the claimant's claims on the basis that the claims had no reasonable prospects of success.

7. On 24th February 2023, that application was made in writing on behalf of the respondent, as well as an application for (in the alternative to strike out) deposit orders as a condition of the claimant being able to pursue her claims. A 58-page bundle of documents was provided on behalf of the respondent alongside the application letter.

8. The claimant responded to that application by email the same day, stating that "*the respondent discriminated against me after I made protected disclosure to the ICO of their legal obligations on GDPR, and of equal pay in the workplace amongst other concerns raised before I was unfairly dismissed with no notice pay.*" She took issue with the respondent's references (in its application) to unconnected tribunal proceedings which had been previously issued by the claimant against various other respondents and stated about the strike out application, "*Everyone is entitled to give oral evidence and to have a claim heard and not to do so will be a miscarriage of justice*".

9. There was then some delay in the tribunal dealing with the proceedings but, on 4th August 2023, a Notice of Hearing was sent to the parties for a 3-hour preliminary hearing by video hearing on 18th October 2023 to consider the

respondent's strike out and/or deposit order application and for any case management.

10. In the Notice of Hearing, the parties were directed to useful sources of information about employment tribunal procedures, including case management and preparation, the tribunal procedure rules, practice directions and other resources. The parties were also directed to have all relevant documents with them when they took part in the hearing.

Documents

11. On 17th October 2023, at 21:02 (by email and copied to the respondent and its legal representative), the claimant submitted what she described as her List of Issues.

12. At 21:31 (by email and copied to the claimant), the respondent submitted a Skeleton Argument dated 16th October 2023 and an associated bundle of documents running to 142 pages. A few minutes later, copies of the case law referred to in the Skeleton Argument were emailed to the claimant and tribunal. The Skeleton Argument was evidently prepared before the claimant had sent her list of issues (as is made clear in paragraph 32 of the Skeleton Argument).

13. The respondent also relied on its written application for strike out and/or deposit orders dated 24th February 2023, which was accompanied by a 58-page bundle.

14. At the outset of the hearing, the parties confirmed that they both had copies of all the documents referred to above.

15. During the course of the hearing, given the discussion with the claimant about the complaints/issues she was seeking to advance and her application to amend, the respondent's representative emailed copies of:

(1) The claimant's payslip for November 2022
(2) The respondent's compassionate leave policy
(3) A PDF clip of documents consisting of (i) the claimant's data subject access request (**DSAR**) made on 8th January 2023; (ii) the respondent's Employee Privacy Notice; and (iii) the respondent's response to the claimant's DSAR, with a covering letter to her dated 9th February 2023.

16. The claimant was given the opportunity (during a mid-morning break) to identify the date she wished to rely on for asserting a complaint of unlawful deduction from wages in respect of a day's leave which she says she took in November 2022 when there was a train strike but which she asserted was unpaid. She indicated there was an email which she had sent to the respondent at the time about wishing to take a day's holiday; and I gave her the opportunity to find that email and send it to the tribunal if she wished. Likewise, she had the opportunity to provide copies of any emails by which she allegedly made or did protected disclosures/acts in or around December 2022 (rather than 6th January 2023, which emails (to the ICO and the EHRC) were in the 58-page bundle). The claimant did not provide any

email(s) and, after the break, indicated that she could not find and/or did not have the relevant email(s).

17. I considered all the documents to which I was referred by the parties, either orally during the hearing or via the respondent's Skeleton Argument. I also reviewed the six authorities provided on behalf of the respondent:

    17.1. On the issue of strike out and when it may be an appropriate exercise of a tribunal's discretion in respect of fact-sensitive claims, such as claims under the Equality Act 2010 and/or whistleblowing detriment/dismissal claims, the respondent referred to:

    - ***Anyanwu v South Bank Student Union*** [2001] ICR 1126
    - ***Ukegheson v London Borough of Haringey*** [2015] ICR 1285
    - ***Chandhok v Tirkey*** [2015] ICR 527
    - ***Ahir v British Airways plc*** [2017] EWCA Civ 1392

    17.2. On the approach to be adopted by a tribunal when considering an application to strike out as well as an application to amend, the respondent referred to:

    - ***Cox v Adecco Group UK & Ireland and ors*** [2021] ICR 1307

    17.3. On the meaning of "vexatious" in the context of rule 37(1) of the Employment Tribunals Rules of Procedure 2013, the respondent relied on:

    - ***E.T. Marler Ltd v Robertson*** [1997] ICR 72

The hearing

18. Although this hearing was listed to determine the respondent's application for strike out and/or deposit orders, having reviewed the claimant's claim form and her proposed list of issues, it was apparent that the claimant was seeking to advance complaints which were not asserted in her ET1 claim form. On raising this with the claimant, she agreed but said that she wished to amend her claim form to advance these complaints.

19. I, therefore, decided – with the agreement of the parties – that I should, firstly, consider the application to amend in order to decide which issues the claimant was able to pursue. I would then be in a position to consider the respondent's application for strike out and/or for deposit orders. This approach was in line with the EAT's guidance in ***Cox v Adecco*** (referred to above); and, in particular, the EAT's guidance to tribunals when considering an application for strike-out/deposit orders against a litigant in person where the claims are not clear. HHJ James Tayler noted that a tribunal must make "*a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order*" (at paragraph 30).

THE LAW

Amendment

20. The importance of setting out the entirety of a party's case in the formal pleading (that is, the ET1 or ET3 as the case may be) was emphasised in ***Chandok v Tirkey*** [2015] ICR 527, in which Langstaff P observed that the ET1 is far more than a document "*to set the ball rolling*"; and that the parties' formal pleadings must set out the '*essence of their respective cases*" and that this prevents the case being on "*shifting sands*".

21. The respondent drew my attention to the case of ***Adebowale*** (especially at paragraph 16) for the proposition that the claim form must be readily comprehensible on its face, even where drafted by a litigant in person. Per Laing J (as she then was): "*The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented), and by the EJ*".

22. In ***Cox***, the ET concluded that, in identifying the claims asserted in the ET1, the tribunal could consider not merely the ET1 but other "*core documents*" to establish the case which the claimant litigant in person wished to advance, even if that meant the ET1 required amendment. However, in its Skeleton Argument, the respondent referred to a later judgment of the EAT in ***Khakimov v Nikko Asset Management Europe Ltd*** [2023] EAT 38 (at paragraph 82) which noted that ***Cox*** "*should not be read as general licence to include in a list of issues matters which have not been pleaded but which have been referred to in other documents*".

23. In ***Ali v Office for National Statistics*** [2004] EWCA Civ 1363, it was noted by the Court of Appeal that a mere reference to 'discrimination' in the claim form cannot be taken to cover all forms of discrimination, regardless of the facts pleaded in the ET1 (see paragraph 39). The language of the claim form needs to provide sufficient particulars from which a legal complaint could be discerned. Similarly, in ***Baker v Commissioner of Police of the Metropolis*** UKEAT/0201/09, the EAT upheld a tribunal's decision that a claim form did not include a complaint of disability discrimination, despite the fact that the Claimant had ticked the box indicating that he was bringing that complaint. The rest of the form had contained no particulars about any claim of disability discrimination. The EAT found that although a claimant could explain and elucidate a claim made in an ET1 by way of further particulars, the claim itself still had to be set out in the ET1. The EAT did however find that the tribunal in that case should have gone on to consider whether or not to allow an application to amend the claim to include a claim of disability discrimination.

24. In determining an application to amend, the tribunal has a broad discretion. It must have regard to the overriding objective set out in rule 2 of the Employment Tribunals Rules of Procedure 2013 (see ***Remploy Ltd v Abbott and ors*** UKEAT/0405/13) to deal with cases fairly and justly, including in ways which are proportionate to the complexity and importance of the issues, avoiding delay and saving expense.

25. It is essential, before allowing an amendment, that it is properly formulated and sufficiently particularised, so that the respondent can make

submissions and know the case it is required to meet (see ***British Gas Services v Basra*** [2015] ICR D5).

26. The key test for determining applications originated in ***Cocking v Sandhurst (Stationers) Ltd*** [1974] ICR 650. In that case, tribunals were encouraged to have regard to all the circumstances of the case and, in particular, they were told to consider any injustice or hardship which may be caused to any of the parties if the proposed amendment were to be allowed or refused.

27. Those principles were further developed in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836. The decision again focused on the need to balance the injustice and hardship of allowing or refusing the amendment. Tribunals were encouraged to consider three issues in particular. Firstly, they should consider the nature of the amendment. Is the proposed amendment a minor one or is it a substantial alteration pleading a new cause of action? Secondly, if a new complaint or cause of action is proposed to be added by way of amendment the Tribunal must consider whether the complaint is out of time. Thirdly, the timing and manner of the application should be considered. An application should not be refused solely because there has been a delay in making it. Amendments may be made at any time but delay in making the application is a relevant factor. It is relevant to consider why the application was not made earlier and why it is now being made. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.

28. Since the judgment in ***Selkent***, it has been clarified that the fact that an amendment would introduce a claim that was out of time is not decisive against allowing the amendment but is a factor to be taken into account in the balancing exercise (***Transport and General Workers Union v Safeway Stores Ltd*** UKEAT/0092/07).

29. On the other hand, the fact that the cause of action containing the proposed amendment could be brought as a new claim within the appropriate time limit is a ‘factor of considerable weight’ for the tribunal to take into account but is not conclusive in favour of granting the application (***Gillett v Bridge 86 Ltd*** EAT 0051/17).

30. The ‘Selkent’ factors should not be taken as a checklist to be ticked off to determine the application but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment.

31. This point was reiterated in ***Abercrombie v Aga Rangemaster Ltd*** [2014] ICR 209 CA. Tribunals were urged not to focus on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old. The greater the difference between the factual and legal issues raised by the new claim than by the old, the less likely it is that it will be permitted.

32. To amount to a mere relabelling, all the necessary facts must already be set out in the ET1 (per ***Reuters Limited v Cole*** UKEAT/0258/17/BA).

33. The ‘Selkent’ factors may not be the only factors which are relevant. They should be considered in the context of the balance of justice. As confirmed in ***Vaughan v Modality Partnership*** [2021] ICR 535, the balance of justice is always key and is the overarching question to be decided. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the amendment. The “*balancing exercise always requires express consideration of both sides of the ‘ledger,’ both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significant in the overall balance of justice.”* Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it. As stated in ***Vaughan***: *“An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice*”.

34. I note that refusal of an amendment will always cause some perceived prejudice to the person applying to amend. However, as stated in ***Vaughan***: *“Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence*”.

35. On an application to amend, the tribunal may have regard to the apparent merits of the complaint sought to be introduced via the amendment – see ***Gillett v Bridge 86 Limited***.

Strike out & Deposit Orders

36. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides, so far as is relevant, that all or part of a claim may be struck out where it is vexatious or has no reasonable prospect of success. That power should only be exercised in rare circumstances (***Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly*** [2012] IRLR 755 (at paragraph 30). In discrimination and whistleblowing claims, which can be highly fact sensitive and where findings of fact can often depend upon whether or not it is appropriate to draw inferences from primary facts, particular care needs to be taken before striking out a claim (***Anyanwu v South Bank Students’ Unio*** [2001] IRLR 305; and ***North Glamorgan NHS Trust v Ezsias*** [2007] IRLR 603.

37. It will generally not be appropriate to strike out a claim or complaint where the central facts necessary to prove the case are in dispute; and it is not the function of a tribunal in an application for strike out (or, indeed, deposit order) to conduct a mini trial.

38. The proper approach is to take the claimant's case at its highest – as it appears from the ET1 (and any permitted amendment to the ET1), unless there are exceptional circumstances. These 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***). Similar points are made in the cases relied on by the respondent (***Ukegheson*** and ***Ahir***, referred to above).

39. In particular, in ***Ahir***, the respondent directs me to paragraph 19 where Underhil LJ noted that "*where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on the claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it*". On the facts in ***Ahir***, Underhill LJ noted (at paragraph 21) that the claimant's "case theory" was "*not only speculative but highly implausible*" and, accordingly, it was wholly unsurprising that the employment judge had struck out the claimant's case, bearing in mind its "*inherent implausibility*" and the fact that "*the appellant could point to no material which might support"* or provide a basis for it (paragraph 23).

40. Therefore, even discrimination and whistleblowing claims are not immune from strike out because (per ***Anyanwu*** at paragraph 39), "*the time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail*".

41. The test, on an application to strike out on the basis that a claim or part of it has no reasonable prospect of success is not whether it is likely to fail but whether there are <u>no</u> reasonable prospects of success (***Balls v Downham Market High School*** [2011] IRLR 217). That is not the same thing as there being no prospects of success at all (see ***Ezsias*** at paragraph 25). Another way of putting the test is that the prospects are real as opposed to fanciful (see ***Ezsias*** at paragraph 26).

42. 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 ***Quereshi v Victoria University of Manchester*** [2001] ICR 863).

43. In ***ED & F Man Liquid Products Ltd v Patel and another*** [2003] EWCA Civ 472 – which concerned an application to set aside a default judgment – the test to be applied was the same as that for summary judgment under CPR Part 24: namely, whether a claim or defence has 'no real prospect of succeeding'. There is no material distinction between that test and the one under rule 37. The Court of Appeal explained what is meant by the requirement to take a case at its highest, per Potter LJ, at paragraph 10:

"….*where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in <u>Swain v Hilman</u> [2001] 1 All ER 91 at 95 in relation to CPR 24. However,* ***that does not mean that the court has to***

accept without analysis everything said by a party in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents*. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable*" [emphasis added].

Deposit Orders

44. The power to order a party to pay a deposit as a condition of proceeding with a claim or issue is contained in rule 39 of the 2013 Rules of Procedure:

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

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

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

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

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

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

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

otherwise the deposit shall be refunded.

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

45. The legal principles applicable to making a deposit order were set out clearly by the EAT in its judgment in ***Hemdan v Ishmail & Anor*** **(Practice and**

Procedure: Imposition of Deposit) [2017] IRLR 228 where the then President (Simler P) stated:

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

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. ……….

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation

or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest."

46. The threshold for making a deposit order is less than that for striking out a claim and, in considering whether or not to make such an order, a tribunal is entitled to have regard to the likelihood of a party making out any factual contention and reach a provisional view of the credibility of any assertion see ***Van Rensburg v The Royal Borough of Kingston-Upon-Thames and others*** UKEAT/0096/07.

47. In making a deposit order, it is mandatory to have regard to the paying party's ability to pay – see rule 39(2) and, if more than one deposit order is made, it may be necessary to have regard to the totality of the orders ***Wright v Nipponkoa Insurance (Europe) Ltd*** **UKEAT/0113/14/JOJ** and ***Hemdan v Ishmail***.

The claimant as a litigant in person

48. The respondent properly reminded me of the important and useful guidance in relation to litigants in person in chapter 1 of the *Equal Treatment Bench Book* (cited by HHJ James Tayler in paragraph 24 of ***Cox***) where it is stated

> "10. Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party".

49. The respondent (also quite properly) asked me to note that it may be appropriate to show less latitude towards a litigant in person who does have experience and knowledge of the law and tribunal procedure. In that regard, the respondent's skeleton argument notes a large number of previous tribunal cases pursued by the claimant since 2018.

50. The relevance of this background, in my view, is that these other cases will have given the claimant experience of litigating in the employment tribunal and, in particular, knowledge and experience of the procedure and substantive law in relation to strike out, deposit orders and amendment applications. Furthermore, various of the tribunal decisions in those other proceedings make it clear – beyond doubt in my view – that the claimant well understands that a tribunal claim must be properly particularised and is aware of the specific sort of information which must be provided in order to advance claims for discrimination, victimisation, harassment, equal pay, whistleblowing dismissal and breach of contract.

51. With the above legal principles firmly in mind, I turned firstly to decide the application to amend so that I would have a clear idea of the claims and complaints properly to be advanced by the claimant and then I considered whether any of those claims or complaints had no (for strike out) or little (for deposit order(s)) reasonable prospects of success.

Application to amend

<u>What are the claimant's pleaded claims and complaints?</u>

52. At the outset, I needed to ascertain what claims and complaints were already pleaded in the ET1 and which ones the claimant wished to introduce via her application to amend.

53. I, therefore, went through the list of issues with the parties and it was apparent (and, indeed, agreed by the claimant) that a large number of complaints contained in her list of issues were not advanced in her ET1 claim form and so she could only pursue them if granted permission to amend her claim.

54. **Race discrimination and harassment:**
None of the <u>twelve</u> complaints of direct race discrimination or <u>eleven</u> complaints of race-related harassment in the claimant's list of issues appear in the ET1 claim form. The claimant has ticked the race discrimination box (in Box 8.1) but has not asserted any specific incidents of race discrimination elsewhere in the claim form nor is there any reference to harassment, still less race-related harassment. There is simply nothing in her ET1 form (other than the box being ticked in Box 8.1) which articulates any complaint of racial discrimination or harassment. The claimant does not use the language of being treated badly because of her race or being subjected to harassing treatment relating to race. She has not even identified her race.

55. I consider that ticking the box for 'race discrimination' on the ET1 form was not sufficient in this case to assert a claim for direct race discrimination or

race-related harassment, where I could not discern any such complaints from the narrative in the claim form (per ***Baker***, cited above).

56. The claimant, therefore, can only pursue complaints of race discrimination or racial harassment if permitted to amend.

57. **Victimisation:**
In respect of the first section headed "victimisation" in the claimant's list of issues, the claimant refers to alleged protected acts from 5th to 7th January 2022 (which she clarified at the hearing should be 2023) which are not referred to in her claim form.

58. In that same section of the list of issues, the claimant refers to emails to the EHRC and ICO on 6th December 2023. Likewise, in her ET1/Claim Form, she refers to a protected disclosure "*in the public interest*" (to the ICO and EHRC) on "6.12.2023". At the hearing, she stated that this was a typo and ought to be read as "6.12.2022". However, the respondent understood "6.12.2023" to be a reference to "6.1.2023". This is an understandable assumption, since there is evidence that the claimant did email the ICO and the EHRC on 6th January 2023 (and there is no evidence of any emails to either the ICO or the EHRC on 6th December 2022).

59. In the list of issues, the claimant then refers to <u>seven</u> complaints of detrimental treatment by way of alleged victimisation, none of which are apparent from her claim form, other than potentially a complaint about retaliation possibly in respect of her employment being terminated.

60. I consider that, in her claim form, generously interpreting it in the claimant's favour, one can just about discern a claim for victimisation that, having complained about an equal pay concern, she was retaliated against by the respondent terminating her employment. At the hearing, the claimant confirmed that she had not complained about equal pay concerns to the ICO, so that leaves as the only pleaded protected act, a complaint about equal pay to the EHRC (and to the respondent). In her ET1 (Box 8.2), the only complaint to the EHRC which is referred to is on "6.12.2023". I conclude that this is a typo and ought to be read as a reference to "6.1.2023" (i.e. 6th January 2023), given that there is evidence of such an email (see page 55 of 58-page bundle). It is not to be read as a reference to "6.12.2022" as suggested by the claimant at the hearing.

61. For the claimant to rely on additional protected acts from 5th to 7th January 2023 and/or on 6th December 2022 and on the <u>six</u> other complaints of detrimental treatment (i.e. not just her dismissal), she would need to be granted permission to amend.

62. **Equal pay:**
The claimant's equal pay complaint is apparent from her claim form (that she was paid less than her male colleague); although she does not name a comparator (only referring to a "male colleague"). However, the claimant refers to that colleague as "GG", in her list of issues; and, at the hearing, she clarified that he was doing the same job as her – purchase ledger accountant.

63. As the respondent acknowledged in its Skeleton Argument, the claimant referenced a colleague called "George" in her email of 21st February 2023 sent to the respondent and Acas, amongst others, and they understood that to be a reference to a male employee, called "GG".

64. I consider that the claimant does not need to apply to amend her claim to advance the equal pay claim that she was paid less than her male colleague, "GG".

65. **Whistleblowing:**
In respect of the second section headed "victimisation" in the list of issues, the claimant clarified at the hearing that this section was intended to deal with whistleblowing detriment complaints.

66. In her claim form, she stated that her employment was terminated because she had made protected disclosures to the ICO and the EHR on "6.12.2023" (which is clearly a typo since the claim form was presented on 12th January 2023). As with her victimisation claim, at the hearing, the claimant sought to assert that the reference in her ET1 to "6.12.2023" should be read as a reference to "6.12.2022". However, there is no evidence of any email from the claimant to the ICO (or the EHRC) on 6th December 2022 but there are emails from her to these organisations on 6th January 2023. I have, therefore, concluded that the reference in her ET1 (Box 8.2) to protected disclosures on "6.12.2023" ought to be read as "6.1.2023" (i.e. 6th January 2023), not "6.12.2022".

67. On its face, that is a complaint of automatic unfair dismissal under s103A of the Employment Rights Act 1996 and the claimant is accordingly not required to amend her ET1 to advance such a claim, in reliance on alleged protected disclosures to the ICO and the EHRC on 6th January 2023.

68. However, in her list of issues, the claimant refers to having made a complaint to her manager (Georgia) about her sensitive information being sent to her colleague (Rahul) whilst she was off sick and of raising "concerns" to the ICO on 5th January 2022 (which she clarified at the hearing, should have been a reference to a single email on 6th December 2022, sent to the ICO and copied to her manager); and she says that she was then subjected to a detriment in that the respondent's internal counsel intimidated her with a costs warning.

69. That claim of post-termination whistleblowing detriment (contrary to s47B Employment Rights Act 1996) is not in her claim form and she can only pursue it if granted permission to amend.

70. A protected disclosure made to her manager (whether on 5th January 2022 or 2023 or 6th December 2022) about sensitive information having been disclosed to the claimant's colleague is not apparent on the face of the ET1 (which specifically refers to a protected disclosure to the ICO and the EHRC only, on "6.12.2023", which ought to be read as "6.1.2023").

71. The claimant can only rely on a protected disclosure to her manager (on 5th January 2023 and/or 6th December 2022) if granted permission to amend.

72. **Disability discrimination:**
There is no claim at all of any type of disability discrimination asserted by the claimant in her ET1. She ticked Box 12.1 to say that she has a disability which means that she would need certain adjustments, such as remote hearings and frequent breaks. However, there is nothing in the ET1 which properly asserts any claim for disability discrimination.

73. In her list of issues, the claimant states that she disclosed her disability to her manager in December 2022 and, thereafter, "no reasonable adjustments were provided"; "no referral to OH" and "not paying" the claimant sick leave when she was off sick.

74. At the hearing, I sought to clarify what claims and complaints the claimant wished to pursue by reference to her asserted disability (which she explained was sciatica and depression which she had suffered since 2010). The claimant stated that she wished to pursue claims of direct disability discrimination (in respect of a failure to pay sick pay) and of failure to make reasonable adjustments (in respect of office-working and a failure to make an occupational health referral).

75. As regards the direct discrimination claim which she wished to pursue by amendment, the claimant explained that, having disclosed her alleged disability (of sciatica and depression) by email to her line manager in mid-December 2022, she was then not paid sick pay, which she would have been paid had she not been a disabled person.

76. In respect of the failure to make reasonable adjustments claim which she wished to advance, the claimant said that the respondent had a provision, criterion or practice (**PCP**) of requiring employees to work two days per week from the office and the reasonable adjustment would have been to continue to work from home; and she said that the respondent also failed to make a reasonable adjustment by not referring her to OH. I pointed out that, whilst a referral to OH can assist an employer to ensure it has a proper understanding of an employee's health conditions, particularly as regards any impact on their ability to work; not consulting OH is not usually, in and of itself, a failure to comply with any duty to make reasonable adjustments (per ***Tarbuck v Sainsbury's Supermarkets Ltd*** [2006] IRLR 664 and ***Watkins v HSBC Bank Plc*** UKEAT/0018/18/DA). The claimant appeared to accept that point but nevertheless was clear that she wished to apply to amend her ET1/Claim Form to include it, along with the assertion that she was required to work in the office.

77. Since there was no disability discrimination claim asserted at all in the ET1, the claimant could only pursue the complaints of direct disability discrimination and failure to make reasonable adjustments if granted permission to amend.

78. **Breach of contract:**

The breach of contract claims asserted in the claimant's list of issues are said to be for: (i) notice pay; (ii) the respondent not following their own contractual policies (which are not specified); (iii) the respondent not following the Acas code of practice on grievance and disciplinary; (iv) pension pay; (v) sick pay; (vi) benefits (which are not specified).

79. In her ET1/Claim Form, the claimant has ticked the boxes for notice pay, arrears of pay and other payments (Box 8.1); and referred to "breach of contract" by reference to her employment being terminated "earlier" in breach of the terms and conditions of her contract and "with no policy followed as per acas code on grievance and disciplinary" (Box 8.2). She makes no reference to what terms and conditions were breached by the respondent in terminating her contract but a fair reading of the ET1 overall is that this is a claim for notice pay (wrongful dismissal).

80. The claimant, however, makes no reference to any other contractual breaches in relation to pension, sick pay or benefits; nor to any contractual policies (the only reference being to the Acas Code of Practice on grievance and disciplinary proceedings).

81. At the hearing, the claimant said that she was dismissed by telephone at around 4:30pm on 6th January 2023 but was not paid her two weeks' notice pay.

82. I have concluded that the claim form includes a breach of contract claim in respect of notice pay but that the claimant would need to be granted permission to amend her claim to pursue breach of contract claims in respect of pension pay, sick pay, benefits and/or breach of any contractual internal policies.

83. **Unlawful deduction from wages:**
During the hearing, the claimant stated that she wished to pursue two complaints of unlawful deduction from wages:

i. Failure to pay her wages on 15th December 2022 (she initially thought this was in November 2022 but clarified during the hearing that it was the December date); when she took a day's leave due to a train strike. She says that a day's pay was deducted from her December salary.

ii. Failure to pay her for three days' compassionate leave which she was required to take unpaid at the end of November 2022.

She says that deductions were made from her salary in respect of these days at the end of December 2022.

84. Neither of these complaints are particularised in her claim form (although she has ticked the boxes "arrears of pay" and "other payments"). I consider that the details in the list of issues and as clarified at the hearing are not sufficiently asserted in the ET1. Whilst it is not unusual for a claimant litigant in person to clarify a wages claim at an early case management stage I consider that the basic, necessary facts of any "arrears of pay" / "other

payments" are not articulated in the ET1/Claim Form. No-one reading the form could discern the complaints of unpaid wages which the claimant now says she wishes to pursue – that is, in relation to a day's leave on a train strike day in December 2022 and three days compassionate leave (in November 2022). The claimant, therefore, needs to apply to amend her claim to advance these two unlawful deductions complaints.

85. **Unfair dismissal:**
Finally, the claim form could be read as asserting a claim for ordinary unfair dismissal, although that box is not ticked (in Box 8.1) and such a claim is not included in the claimant's list of issues. Since, on both parties' case, the claimant did not have sufficient qualifying service, I consider that such a claim was (quite properly) not advanced and nor is there any application to amend to include it.

86. Consequently, the claimant's ET1/Claim Form only asserts the following claims and complaints:

(1) A claim for **automatic unfair dismissal** contrary to s103A Employment Rights Act 1996, reliant on an alleged protected disclosure to the ICO and EHRC on 6th January 2023 (in the ET1, the date reads, "6.12.2023"; but I have concluded that this ought to be read as "6.1.2023");

(2) A claim for **victimisation** under s27 and s39(2)(c) Equality Act 2020 – namely, that the claimant's employment was terminated on 6th January 2023 because she had done a protected act by raising equal pay concerns with the EHRC and the respondent on 6th January 2023 (again, in the ET1, this is referred to as "6.12.2023" but I have concluded that this was intended to be a reference to "6.1.2023");

(3) An **equal pay claim** – namely, that there was a breach of the sex equality clause, contrary to s66(1)(a) in that the claimant was paid less than her male comparator, "GG", who was doing 'like work' to her.

(4) **Wrongful dismissal** (breach of contract) – namely, that the claimant was dismissed in breach of the notice clause in her fixed term contract by which the respondent was required to give (and/or pay in lieu) two weeks' notice.

87. As such, the claimant's application to amend would need to be granted for her to be able to pursue the following claims/complaints:

(1) **Direct race discrimination** – all twelve complaints in the list of issues;

(2) **Race-related harassment** – all eleven complaints in the list of issues;

(3) **Victimisation** claim – in respect of newly alleged **protected acts** via emails sent from 5th to 7th January 2023 and 6th December 2022 to the EHRC, the ICO, ACAS, the tribunal and the pension regulator (the only pleaded protected act, being an alleged complaint about equal pay made to the EHRC and copied to the respondent by email on 6th January 2023); and six complaints of **victimisation detriment** in the list of issues

(the only pleaded victimisation complaint being in respect of the claimant's dismissal);

(4) **Whistleblowing detriment** claim – in respect of the newly alleged threat of costs (post-termination) which the claimant says was made in response to a newly alleged **protected disclosure** made to her manager by email on 6th December 2022 about her sensitive data having been disclosed to her colleague;

(5) **Disability discrimination** – both the alleged failures to make reasonable adjustments (in respect of working at the office and a failure to make a referral to OH) and the direct disability discrimination complaint in respect of non-payment of sick pay;

(6) **Breach of contract** claims – namely, in respect of pension pay, sick pay, benefits and/or breach of any contractual internal policies.

(7) **Unauthorised deductions from wages**, contrary to s13 Employment Rights Act 1996 – namely, that in her end of December 2022 pay, the respondent failed to pay her for (i) one day's leave on 15th December 2022, instead deducting one day's pay for this date; and (ii) three days' compassionate leave from 28th to 30th November 2022 inclusive, instead deducting three days' pay for these dates.

Submissions

88. At the hearing, the claimant said that she should be granted permission to amend to include the claims and complaints (i.e. as set out in the preceding paragraph) because she had the right to access the tribunal and give oral evidence.

89. She explained that she had emailed the respondent (HR) and the ICO (using her work email) on 6th December 2022 about her personal data being disclosed in breach of the GDPR. She said she emailed the respondent and the EHRC on the same date about her equal pay complaint, also using her work email. She said that she did not have copies of these emails.

90. When I asked her why she had not applied to amend earlier, rather than leaving it to the day of the hearing (some nine months after presenting her ET1 claim form), the claimant said that she did not know that she could make an application to amend because she thought that the preliminary hearing could only deal with the strike out application. She explained that she wished to amend her claim form to rely on the matters in her list of issues which we had discussed. She said that she would be prejudiced without the amendments as she would not have a fair hearing and would not be able to present all the claims and complaints which she wanted to.

91. When I asked her why she did not include all of these claims and complaints in her ET1, the claimant said that she did not remember them at the time.

92. The claimant also referred me to her email to the tribunal (copied to the respondent) on 10th October 2023 (which was contained in the 142-page

bundle, at pages 135 to 138) and her email of 17th October 2023 to the tribunal (copied to the respondent) in which she forwarded an email of 21st February 2023 which she had sent to the respondent with the subject, "*Here is the grievance I raised in which you denied in the ET3 – no acas code on grievance and disciplinary was followed and dismissal was unfair*" (which is in the respondent's preliminary hearing bundle, at page 139).

93. In her email of 10th October 2023, the claimant referred to the judgment in ***Cox*** (referenced above), particularly in respect of how rare it was to strike out discrimination and whistleblowing claims and how an amendment application may need to be considered before considering whether a claim would have reasonable prospects of success.

94. She asked me to note that, if her claims were struck out, she would be denied her right to a fair hearing.

95. The respondent relied on its Skeleton Argument and supplemented that with oral submissions focussing mainly on the amendment application. It was submitted that:

    95.1. The ET1 did not properly assert claims for race discrimination or harassment. Ticking the race discrimination box was insufficient to bring such claims; there needed to be enough detail in the claim form to enable such claims to be discerned and there was not.

    95.2. The amendments sought were all substantial, with new causes of action relied on in the case of the race discrimination, race-related harassment and disability discrimination claims as well as the whistleblowing detriment claim. In addition, there were new factual complaints now alleged by the claimant (in her list of issues), under various heads of claim, which would significantly extend the factual and legal enquiry (for example, in relation to complaints about training, micromanagement, removal of IT access, compassionate leave etc).

    95.3. The claimant had advanced no good reason for the delay in seeking to amend her claim form. These were not new matters which she did not previously know about. They were all within her knowledge and could have been included.

    95.4. The claimant well understood from her numerous prior experiences of tribunal litigation that it was important to properly particularise tribunal claims. Even if she had failed to include the claims she wished to advance in her ET1 claim form, they could have been identified in subsequent correspondence. Whilst there was some additional information in her emails in February 2023 (at pages 31 to 42 of the hearing bundle), there were a large number of completely new matters introduced via her list of issues, sent the night before the hearing (including new protected disclosures/acts not previously mentioned).

95.5. Whilst the claimant said that she did not understand that the preliminary hearing could involve an application to amend, that was contradicted by her own email of 10th October 2023, in which she cited paragraph 28(9) of the Judgment in ***Cox v Adecco*** and, in particular, that when addressing an application to strike out, the tribunal may need to consider the question of amendment. Furthermore, the respondent pointed to her previous tribunal claims (including against All People Employment Ltd and FedEx Express UK Transportation Ltd), noting that – in those proceedings – the employment judge had (at an early case management hearing) advised the claimant to make an application to amend if she wished to add to the “limited” narrative in her ET1 in that case. Consequently, the claimant well understood that she could and should apply to amend her claim form if she wished to add to it.

95.6. If the amendments were granted, that would cause serious prejudice to the respondent by reference to the additional cost caused by the delay and the fact the final hearing would need to be lengthened; there would need to be extensive further Grounds of Resistance and new witnesses to speak to the numerous new complaints which the claimant was seeking to rely on. New disclosure searches would need to be undertaken and it would not be possible to complete the list of issues without a further preliminary hearing, at which the respondent may wish to make further strike out or deposit order applications. In addition, counsel for the respondent emphasised the prejudice which the respondent would face in having to defend many of the complaints by proving negatives in respect of documents (such as emails) that do not exist.

95.7. When considering the balance of prejudice, that came out heavily against allowing the amendments. The prejudice in refusing them was limited given the apparent lack of merit in the claimant’s newly asserted claims / complaints – in particular:

i. There was no obvious link to disability or race. The new discrimination claims / complaints were an assertion of treatment and the protected characteristics, without more.

ii. The harassment allegations did not meet the threshold test for harassment, let alone relating to race.

iii. The claimant was paid for three days compassionate leave from 28th to 30th November 2022 (as per page 5 of bundle: claimant’s email to her line manager dated 1st December 2022, timed at 13:30).

iv. The claimant did not take sick leave at the end of November 2022 (page 56 of the bundle); and her pension contributions were paid, as per her payslips (pages 58 and 59 of the bundle); and she had not specified nor clarified which policies were said to be contractual nor which benefits were contractual and had not been provided to her.

v. In relation to the disability discrimination complaints, these were not even properly particularised in the claimant's list of issues (which was being treated as her amendment application); either as to her asserted disability or the PCP she seeks to rely on. The list of issues also failed to include any reference to an alleged disclosure by the claimant about her disability to her line manager (Georgia). In any event, the complaints have no apparent merit. A failure to make an OH referral cannot be a failure to make a reasonable adjustment; the claimant was paid sick pay; her time off in December 2022 was in respect of covid-symptoms (not her newly asserted disability) and the alleged PCP (of being required to work in the office) is undermined by the evidence before the tribunal of the claimant's line manager looking forward to seeing her at a team lunch on 22nd December 2022 (the inference being that the claimant was not usually in the office) (page 14 of the bundle).

vi. As regards the claimant's newly alleged protected disclosure(s) and protected act(s) on 6th December 2022 (to the ICO, EHRC and the respondent); and/or on 5th and 7th January 2023; and any email disclosing that the claimant was disabled by reason of sciatica/depression, it was entirely implausible that any such emails were sent because:

a) The claimant was not off work with any symptoms connected to sciatica/depression:

- The claimant had compassionate leave from 28th to 30th November and was then on unpaid leave from 1st to 6th December 2022;
- She was on pre-booked annual leave from 7th to 14th December 2022 (see page 5 of bundle);
- She took a further day's unpaid leave on 15th December 2022 due to the train strike (see page 13 of bundle);
- On 22nd December 2022, the claimant was off work with "runny nose, headache, body aching and not feeling well" (see email at page 14 of bundle);
- She was "still not feeling well with covid symptoms" on 23rd December 2022 (see page 15 of bundle);
- She continued to be unwell until she resumed working on 29th December 2022 (page 17 of bundle)I
- The respondent's leave records showed the claimant's absence from work and reasons from 28th November to 28th December 2022 (page 58 of the bundle).

b) There was no reference to the claimant taking any time off work for sciatica or depression; and there was no need for the claimant to email her line manager to disclose any alleged disability by reference to sciatica/depression.

c) Furthermore, there was no need for any fit notes and, as there was no fit note provided by the claimant, she would not have messaged the ICO about any fit note having been improperly disclosed to her colleague.

d) In addition, no emails of 6th December 2022 had been found by the respondent, whereas there were emails to the ICO and EHRC on 6th January 2023 (but sent after the claimant had been informed of her dismissal) (pages 53 to 55 of the 58-page bundle enclosed with the respondent's application letter).

e) The emails from the claimant of 6th January 2023 made no reference (expressly or impliedly) to any earlier emails or communications from the claimant to either the ICO or the EHRC.

f) Moreover, in the ICO's reply email (on 31st January 2023), (page 32 of the bundle), reference was made to just one email (that is, 6th January 2023) – no earlier email was referred to by the ICO.

g) At this hearing, the claimant stated that she no longer had copies of her alleged emails of 6th December 2022 and her email to her manager allegedly disclosing her disability. She said that this was because she had used her Coremont email account for these emails. However, counsel for the respondent pointed out that the claimant had normally used her Hotmail email account when emailing the respondent (and also when emailing the ICO and the EHRC on 6th January 2023); so it was very unlikely that she had used her Coremont email account as she now alleged (even more so given that, on 30th December 2022, she had been asked to use her work email account, which would not have been requested if the claimant had been using her work email, as she now asserts) (page 17 of the bundle).

h) If the claimant had done any protected disclosure or protected acts via email(s) on or around 6th December 2022 (copying in the respondent, as she now alleged) and/or on 5th or 7th January 2023, it is very likely she would have asked for copies of these emails in her data subject access request (**DSAR**) dated 8th January 2023, which included a detailed list of documents/information requested (see page 2 of DSAR bundle). That she did not ask for these alleged emails tends to demonstrate that they do not exist. Counsel for the respondent submitted that the newly alleged protected disclosures and protected acts had been falsely asserted by the claimant after she had read the respondent's Skeleton Argument and recognised the difficulty of claiming that she had been

dismissed by reason of any protected disclosure/act on 6th January 2023. Whilst these emails of 6th January 2023 do exist, they post-date the claimant's dismissal (by several hours) and so cannot have been any part of the reason for her dismissal.

96. The respondent, accordingly, submitted that none of the newly asserted complaints in the claimant's list of issues should be permitted by amendment.

97. In response to the respondent's submissions, the claimant stated that it was not fair for the respondent to say that documentation does not exist; that the respondent was simply seeking to discredit her and her claims and that it was not up to the respondent to say that her claims had no prospects. She stated that, as a litigant in person, she should have the chance to put her claim forward and, if not afforded that opportunity, she would have to appeal to the Employment Appeal Tribunal.

Decision

98. I have considered matters in the round, as well as reviewing each requested amendment on its own and I have concluded that none of the requested amendments should be permitted because the balance of hardship and prejudice points against any of the amendments being allowed.

99. The claimant has delayed making her amendment application; which was only pursued after I asked the claimant at the hearing whether she wished to apply to amend her ET1/Claim Form in respect of the numerous complaints included in her list of issues but not in her ET1.

100. The claimant's explanation for not including these complaints in her ET1 and not making an application sooner is unsatisfactory. She told me that she did not know that she could make an amendment application. However, in her correspondence with the tribunal, the claimant herself referred to ***Cox v Adecco*** (which specifically addresses how an amendment application may need to be considered before determining an application for strike out or deposit orders). She is a litigant in person but is well-versed in many aspects of employment tribunal procedure, including in respect of amendment and striking out, given her previous claims (against a number of different respondents and in other tribunal regions). I note, for example, in the Costs Order decision and written reasons (of EJ Goodman and members) in the case brought by the claimant against Pret-a-Manger (Europe) Ltd (sent to the parties on 1st July 2021), the claimant is recorded as having placed reliance on the judgment ***Cox v Adecco***, so she was clearly familiar with that case; and, in her claim against All People Employment Ltd and FedEx Express UK Transportation Limited, in the Judgment of EJ Robison (sent to the parties on 11th February 2022), there is reference to the claimant having been informed of her right to make an amendment application, so she clearly did know of a party's entitlement to make such an application.

101. The manner and timing of the amendment application militates against granting it, particularly as the delay of over nine months since the claimant presented her ET1/Claim Form causes prejudice to the respondent who can have had no idea (until seeing her list of issues on 17th October 2023, the night before this hearing) that the claimant would be seeking to raise wide-ranging and out-of-time complaints of race discrimination, race-related harassment, disability discrimination, pay complaints, breaches of contract and wider victimisation and public interest disclosure detriment claims (relying on detriments other than the decision to dismiss her and on protected disclosures/acts in December 2022 and/or on 5th and 7th January 2023). The respondent understandably assumed that the reference in the ET1 (Box 8.2) to protected disclosures on "6.12.2023" must be a typo and a reference to "6.1.2023" (when the claimant did in fact email the ICO and the EHRC, copying in the respondent, albeit after her dismissal had been communicated to her). I consider that this assumption was properly made, given that emails dated 6th January 2023 to the ICO and EHRC do exist (and were put in evidence at the hearing), whilst there is no evidence that any relevant emails were sent to either the ICO or the EHRC on 6th December 2022.

102. Furthermore, and in my view most importantly, the claimant's newly advanced claims / complaints are substantial changes to her pleaded case and would significantly increase the complexity and scope of the litigation (including the need for amended Grounds of Resistance, a further preliminary hearing at which further applications of strike out or deposit orders may properly be made, a much-expanded disclosure exercise, significantly more documentary and witness evidence and a substantially increased enquiry required by the tribunal, including a much longer trial than would otherwise be needed for the claimant's extant claims). This would clearly prejudice the respondent, in respect of the time and cost that would be demanded (and, as regards the costs that would be incurred by the respondent, if the claimant was ultimately not successful in respect of these newly asserted complaints, I have real doubts that any costs order would be able properly to remedy that prejudice).

103. In any event, looking at each of the newly asserted complaints on its own apparent merit, I consider that the claimant would be likely to face real difficulty with each complaint. Whilst I cannot conduct a mini-trial of the merits of each complaint which she seeks to introduce by amendment, I can have regard to the apparent lack of merit when deciding whether the respondent and the tribunal should be put to the time and effort (at the expense of other tribunal users) required to address the new complaints. I note, in particular, that:

    103.1. In order to get round the difficulty that, on her extant pleaded case, the claimant's dismissal pre-dates her protected disclosure / protected act, the claimant now seeks (via amendment) to rely on earlier ones on 6th December 2022 and/or on 5th January 2023.

    103.2. The respondent denies that the claimant made protected disclosures or did protected acts on or around 6th December 2022 or 5th January 2023 (whether to the ICO, the EHRC, to the

respondent or more widely) and I accept that seeking to prove a negative is a time-consuming exercise and potentially prejudicial. Furthermore, I am persuaded that it is very unlikely that there were emails constituting protected disclosures and/or protected acts earlier than the ones I have seen (dated 6th January 2023, after the 4:30pm dismissal conversation). The claimant was not able to produce the alleged emails, stating (at the hearing) that this was because they were sent from her Coremont email. However, I accept the respondent's submission that she appears to have mainly or always used her Hotmail account. Furthermore, I note that the claimant made no reference to any such protected disclosures or acts in her emails to the ICO and EHRC on 6th January 2023 nor in her DSAR on 8th January 2023 (nor, indeed, in any of her correspondence). I also note that the first time she mentioned protected disclosures or acts on 6th December 2022 was at this hearing. Even her list of issues does not include these (referring, as did in her ET1/Claim Form, to 6.12.2023; and to emails sent from 5th to 7th January 2022 to various recipients, which are not mentioned in her ET1).

103.3. The claimant also seeks to rely on newly asserted protected acts (in respect of emails sent on 5th and 7th January 2023, to the EHRC, ICO, ACAS, the ET and the pension regulator). She did not provide copies of alleged emails to these recipients dated 5th January 2023. Any emails after 16:30 on 6th January 2023 cannot have been a real or effective cause of her dismissal (as they will have post-dated it).

103.4. Accordingly, I consider that the claimant would face an uphill struggle in evidencing that she did any protected disclosure / act prior to the evening of 6th January 2023.

103.5. The claimant seeks to rely on six newly asserted victimisation detriments (not transferring or redeploying her into a different role after deciding to dismiss her, not extending her contract, excluding her from team meetings during her notice period, being ignored by the finance team during her notice period, making unlawful deduction from wages in January 2023 and not paying her notice pay). These detriment complaints appear to be an attempt to get round the difficulty in her existing pleaded claim that the victimisation detriment (the act of dismissal) pre-dated the protected act (which was done on 6th January 2023, some hours after her dismissal). The newly alleged detriments are in respect of matters post-dating that dismissal (no doubt so that the claimant can rely on her existing pleaded protected act – that is, her email to the EHRC on 6th January 2023 at 22:42 about unequal pay). I consider that the amendment has been contrived by the claimant to get round the clear difficulty caused to her by her pleaded case. Furthermore, the claimant has not pointed to any factors from which a tribunal could conclude that the email to the EHRC of 6th January 2023 at 22:42 was an effective cause of any newly

asserted act or failure to act on the part of the respondent thereafter.

103.6. As regards her whistleblowing claim, the claimant seeks to rely on an earlier protected disclosure to the ICO and her line manager (by copy) on 6th December 2022. This raises the same difficulties for the claimant as with the victimisation amendment. There is no evidence of any such email to the ICO (copied to management) and I conclude that she is unlikely to be able to evidence any such alleged protected disclosure on that date.

103.7. In addition, the claimant seeks to rely on a post-termination detriment in respect of her whistleblowing detriment claim. Again, this appears to me to be contrived by the claimant to get round the difficulty that her existing whistleblowing claim (of automatic unfair dismissal) has the same conceptual (and probably fatal) difficulty that the alleged protected disclosure (an email to the ICO on 6th January 2023 at 19:18) post-dated the dismissal decision. As such, the amendment seeks to rely on a post-termination detriment (in respect of an allegation that the respondent "intimidated" the claimant with a cost warning). Such a complaint is highly unlikely to succeed since a tribunal is likely to consider that it is part and parcel of ordinary litigation tactics for a respondent's legal representative (at this time, its in-house counsel) to point out that complaints are unmeritorious and that, if pursued, may trigger a costs application. I consider that the claimant would face an uphill struggle in showing that this was a detriment, let alone done by reason of any protected disclosure.

103.8. In respect of the twelve race discrimination complaints and the eleven harassment complaints which the claimant seeks to advance by way of amendment, there are no factors which the claimant has been able to point to from which a tribunal could conclude that the reason for any of the matters complained of was because of or related to sex. The claimant refers only to incidents of alleged ill-treatment (which are far from clear) and her protected characteristic, without more. This suggests that she may face real difficulty in proving a *prima facie* case of race discrimination and race-related harassment.

103.9. As regards the disability discrimination claim, there is no evidence that the claimant ever disclosed any alleged disability (by reference to sciatica/depression) to the respondent in December 2022 as she now alleges (and this is not even referenced in her list of issues, filed the night before the hearing). Furthermore, the information before me tends to show that the claimant was working from home in any event so there is no evidence that there was a PCP of required office working. As for her claim that she was not paid sick pay because she was disabled; firstly, there is no evidence that the respondent knew or ought to have known that she was a disabled person and, in any event, the evidence suggests that she was paid sick pay. Furthermore, her sickness

absence in December 2022 appears to have been by reference to covid-type symptoms and/or a cold (not sciatica or depression). These complaints have every appearance of being unmeritorious.

103.10. The payslips I have seen indicate that pension contributions were made in respect of the claimant (both employer and employee contributions); and that she was paid sick pay. The claimant has not outlined any contractual benefits to which she was entitled but not granted; nor has she set out any arguable case that the respondent had contractual policies which were breached. Accordingly, the breach of contract claims which she wishes to pursue via her amendment application appear doomed to fail.

103.11. Finally, in respect of the two complaints of unauthorised deduction from wages (in respect of a day's leave on 15th December 2022 and three days' compassionate leave from 28 to 30 November 2022), I have been shown emails and payslips which tend to indicate that the Claimant was granted and paid for three days' compassionate leave at the end of November 2022 (page 5 of the bundle). As regards 15th December 2022, I have been shown an email of 14th December 2022 showing that the claimant did not work on 15th December due to weather conditions and a strike. She did not ask to take this as paid leave and had, in any event, used up her holiday entitlement by that date (given that she only started to work for the respondent on 4th November 2022). I have seen an email dated 1st December 2022 in which the claimant's accrued holiday entitlement was explained to her (pages 4 and 5 of the bundle) and she replied to indicate that she understood that she was not entitled to further paid holiday until the next holiday year (starting in January 2023). I, therefore, consider that these complaints appear to lack merit.

For these reasons, all of the requested amendments appear to lack any real merit. I also note that all of the claims which the claimant wishes to pursue by way of the amendment application are now significantly out of time which also undermines their merit (since, at any final hearing, a tribunal would need to consider whether to extend the statutory time limits to even have jurisdiction to determine them). The lack of apparent merit are clearly factors in the balance weighing against granting the claimant permission to amend

104. I have concluded that allowing any of these amendments (in whole or in part) would, on balance, undermine rather than promote the overriding objective (which requires me to deal with cases fairly and justly including in ways which are proportionate to the complexity and importance of the issues, avoiding delay and saving expense). I have, accordingly, decided not to grant any of the amendments sought by the claimant.

Application for strike out and/or deposit orders

105. My rulings on the amendment application mean that the sole claims for consideration in respect of the respondent's application for strike out and/or deposit orders are:

i. Automatic unfair dismissal by reference to protected disclosures made to the ICO and EHRC (copied to the respondent) on 6th January 2023;

ii. Victimisation (in relation to dismissal), by reference to a protected act to EHRC (copied to the respondent) on 6th January 2023;

iii. Equal pay (in respect of being paid less than "GG", a male colleague);

iv. Wrongful dismissal (in relation to two weeks' notice pay).

106. Applying the test under rule 37(1)(a) of the Rules of Procedure 2013, and having regard to the relevant case law (set out above and, in particular, keeping in mind that it is a draconian power and it is rare to strike out claims especially for whistleblowing or under the Equality Act 2010), I have concluded that each of the four claims identified above have no reasonable prospects of success, meaning that none of them have a real (as opposed to fanciful) chance of succeeding. I have, therefore, not gone on to determine whether the claims are also "vexatious" in that they are an abuse of the tribunal's process and/or pursued with no expectation of success but rather to harass the respondent.

107. I have decided to strike out the four claims on the basis that they have no reasonable prospects of success for the reasons set out below.

<u>Automatic unfair dismissal and victimisation dismissal claims</u>

108. The claimant was dismissed in a phone call with Human Resources on 6th January 2023 at 16:30.

109. Her pleaded protected disclosures (to the ICO and EHRC) and her protected act (to the EHRC), copied to the respondent, happened ***after*** her dismissal (by way of an email to the ICO and copied to the respondent, on 6th January 2023 at 19:18) (page 53 of 58-page bundle); and an email to the EHRC and copied to the respondent, also on 6th January 2023 at 22:42 (page 55 of 58-page bundle).

110. Whilst the claimant, at the hearing, sought to argue that the reference in her ET1 (Box 8.2) to "6.12.2023" ought to be read as a reference to "6.12.2022", I have rejected that assertion. It was made at the hearing, only after appreciating the conceptual difficulty with her claim caused by the fact that her alleged protected disclosures/acts had been done via emails sent ***after*** her dismissal. As set out above, I have concluded that the reference in the claimant's ET1 to "6.12.2023" was clearly intended to be a reference to "6.1.2023" which is the date that the clearly evidenced emails were in fact sent to the ICO and the EHRC. There is no evidence whatsoever that emails were sent to these organisations on 6th December 2022 (as the claimant sought to assert at the hearing).

111. The claims for automatic unfair dismissal and victimisation only have a chance of succeeding if the dismissal was because of the protected disclosures/act in that the protected disclosures were the reason or principal reason for dismissal (for the automatic unfair dismissal claim) and the protected act was an effective cause of the decision to dismiss (for the victimisation claim). Since the protected disclosures/act happened after the decision to dismiss, they cannot have been any part of the reason for dismissal.

112. Accordingly, these two claims are bound to fail and accordingly I strike them out under rule 37(1)(a) of the Rules of Procedure 2013.

Equal pay

113. The claimant alleges that she was doing the same work as “GG”, a male colleague and was paid less. The respondent accepts that she was paid less than “GG” but argues that there is clear evidence that they were not doing the same or broadly similar (that is, like work) or equal work so that her equal pay claim is bound to fail.

114. I accept that indisputable documentation shows that “GG” was doing a different role to the claimant. He was employed as a part-qualified accountant (see page 54 of the bundle) whilst the claimant was employed as a purchase ledger accountant (page 29 of the bundle and page 34 of the 58-page bundle). They also worked different hours; with the claimant contracted to work 9am to 5pm (page 35 of 58-page bundle) and “GG” contracted to work 8am to 6pm (page 54 of bundle). In addition, the documentary evidence shows that the part-qualified accountant role carried out by “GG” was at a higher level – he was required to have undertaken his initial accounting qualification exams (page 55 of the bundle) whilst that was not required for the Claimant’s role; and, by reference to his job description, “GG” had greater responsibilities (for example, in relation to the preparation of financial statements for the Respondent and associated companies and dealing with audit requests), which duties were not required of the Claimant.

115. Having considered these documents and the respondent’s submissions, which the claimant did not dispute, I have concluded that the claimant will not be able to show a prima facie case of unequal pay. This is because she has no reasonable prospect of demonstrating that “GG” is an appropriate comparator for an equal pay claim as the evidence demonstrates that he was not doing the same work (whether like work or work of equal value) as the claimant.

116. Accordingly, the equal pay claim has no reasonable prospects of success and I strike it out.

Wrongful dismissal

117. The claimant alleges that, when she was told of her dismissal by phone on 6th January 2023 (at 4:30pm), she was not given notice of dismissal nor a payment in lieu of notice.

118. That allegation is contradicted by indisputable documentation. Her payslip for January 2023 and an email from the respondent dated 25th January 2023 demonstrate that the claimant received salary up to 20th January 2023. A full month's gross salary was £2333.33 (see, for example, payslip for December 2022) (pages 58 and 59 of the bundle); and the claimant's contract indicates that her annual gross pay was £28,000, which is equivalent to £2333.33 gross pay per month. The Claimant was entitled to two weeks' notice or payment in lieu of notice from 6th January 2023, which she received as confirmed in her January payslip (she was paid gross pay totalling £1636.78, including gross salary of £1590.91 for the period up to 20th January 2023).

119. Accordingly, the claimant continued to be paid from 6th January 2023 and up to and including 20th January 2023 and her wrongful dismissal claim is without merit. Since it has no reasonable prospects of success, I have decided that it should be struck out.

120. Because the four pleaded claims have no reasonable prospects of success and are struck out, I do not need to determine whether they should have been struck out as being vexatious nor the application for deposit orders.

121. However, for the same reasons, I would have held that the four claims have little reasonable prospects of success such that the gateway for deposit orders would have been satisfied, under rule 39 of the Rules of Procedure 2013. I would have concluded that it was appropriate to make deposit orders, subject to the claimant's ability to pay which I would have considered at a further preliminary hearing for case management (as there was no time at the hearing to obtain information about the claimant's means). This is not necessary as I have concluded that the four claims are entirely without merit and should be struck out.

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Employment Judge **McCann**

___4th December 2023_________

Date