THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
MZ	**v**	**Google UK Limited**

Heard at: London Central **On**: 9-10 November 2023

Before: Employment Judge Glennie

Representation:
Claimant: In person
Respondent: Ms S Belgrove (Counsel)

REASONS

1. These reasons relate to the following decisions:

   1.1 My judgment dated 13 November 2023 whereby I dismissed upon withdrawal the complaints of unfair dismissal under section 98 of the Employment Rights Act; constructive unfair dismissal; and automatic unfair dismissal under section 103A of the Employment Rights Act 1996.

   1.2 My orders dated 13 November 2023 whereby I:

      1.2.1 Refused the Claimant's application to amend claim number 2207444/2021 to plead a complaint of automatic unfair dismissal under section 104 of the Employment Rights Act 1996.

      1.2.2 Determined that the hearing would continue part-heard on 30 November 2023, on which occasion I would hear the Claimant's application for permission to call her treating consultant Dr Shanahan as an expert medical witness and the Respondent's application for permission to call an expert medical witness.

1.2.3 Refused the Claimant's application for me to recuse myself from the remainder of the hearing

1.3 My decision on the Claimant's application for specific disclosure.

2. This preliminary hearing, which took place by video, was a continuation of that which took place on 27-29 September 2023, which itself followed on from a preliminary hearing on 2 August 2023. At the commencement of the present hearing I identified the following as remaining for decision:

2.1 Whether the claims that the Claimant had withdrawn, but which had not been dismissed, should be dismissed.

2.2 The Claimant's application to amend the claim to add a complaint of automatic unfair dismissal under section 104 of the Employment Rights Act.

2.3 The Claimant's application to call her treating psychiatrist Dr Shanahan as an expert medical witness.

2.4 The Respondent's application to call an expert medical witness.

2.5 The Claimant's application for specific disclosure.

2.6 Outstanding case management issues.

3. I would usually produce as separate documents reasons relating to a judgment and reasons relating to orders, as the former would be placed on the Tribunal's register and website, while the latter would not. On this occasion I have produced a single document, which will not be placed on the register or the website, as the judgment is for the dismissal of claims on withdrawal, and the practice is that judgments of this nature are not placed on the register or the website.

4. By way of background to the applications regarding medical evidence, at a preliminary hearing on 9 February 2023 Employment Judge J Burns had previously given directions for an independent medical expert to be jointly instructed by the parties. This was done, and Dr Colwill produced a report and answers to questions. For reasons which need not be explained at this stage, both parties expressed a degree of dissatisfaction with Dr Colwill's evidence. The Claimant had applied to call her treating consultant, Dr Shanahan, on 22 September 2023. The Respondent's application for permission to call an expert on their own behalf was made shortly before this hearing, on 7 November 2023. The Claimant objected to the Respondent's application being heard in the course of the present hearing, on the grounds of lack of notice.

Account of the hearing (1)

5. In the first instance I decided to hear submissions about the issue as to dismissal of the withdrawn claims and the Claimant's amendment application. I did so as I wished to ensure that at least some substantive issues were addressed sooner rather than later.

6. I duly heard submissions on those two aspects and, without announcing any decision on them, returned to the Respondent's application about medical evidence shortly after 4pm on 9 November. Ms Belgrove stated that she did not wish to place the Claimant in a difficult position, i.e. by insisting that she should respond to an application which she had only recently received, and I said I would hear only the Claimant's application to call Dr Shanahan of the two applications about medical evidence in the first instance. In an attempt to encourage the parties to reflect on the position regarding the medical evidence I observed that, while each was advancing their own application and opposing the other party's, it was unlikely (not impossible, but unlikely) that I would conclude that one party should be permitted to call alternative medical expert evidence, but not the other. The hearing then adjourned until 10am on 10 November.

7. At the commencement of the hearing on 10 November, on my own initiative, I revisited the question of whether to hear the applications regarding medical evidence separately or together. The Claimant submitted that I should hear her application forthwith, and the Respondent's application on a later date. She said that doing so would avoid bias (although shortly afterwards she took back any suggestion of bias) and expressed concern that, if I were to hear the two applications together, I might become confused.

8. Ms Belgrove submitted that the two applications were interrelated and that there was a risk that an unfair result would occur if they were heard separately. Ms Belgrove argued that factors could emerge at a later hearing which would have influenced the earlier decision, had they been known; and with some reluctance she submitted that the two applications should be heard together. The Claimant replied that these were independent applications which should be heard separately and judged on their own merits, and that it would be an error of law to decide that, if one party can have an expert, therefore so should the other.

9. I gave my decision (which was that the two applications should be heard together) and the reasons for it orally, commencing at about 10.40am.

Reasons for decision to hear the two applications regarding medical evidence together

10. On day 1 of this hearing (yesterday, 9 November 2023) I said that I would hear the Claimant's application for permission to call Dr Shanahan and deal with the Respondent's application at a later date as it had been made as recently as 7 November 2023. Overnight I began to wonder whether that

was right, and whether in fact the two applications ought to be heard together. On the morning of 10 November the Claimant produced a further skeleton argument and a letter dated 8 November 2023 from Dr Shanahan, in which the latter provided his opinions about the Respondent's application, which were in support of the argument that the Respondent should not be permitted to call a further expert.

11. Faced with the two applications the possible outcomes are that: neither application succeeds; the Claimant's application succeeds and the Respondent's does not; the Respondent's application succeeds and the Claimant's does not; or both applications succeed. When considering the applications, I will have to have in mind the requirements of justice to both parties, in the context of both applications.

12. The Claimant is concerned that hearing the applications together may cause confusion. She says, correctly in my judgement, that the respective applications must be considered on their merits and not on a tit-for-tat approach.

13. I consider that, in a sense, confusion is more likely to occur if the applications are heard separately. I agree with Ms Belgrove that, if they are heard and determined sequentially on separate dates, there is the possibility that something will emerge in the second hearing which would have made a difference to the first. There is a risk that, whichever way the first decision goes, that may have an effect on the Tribunal's exercise of discretion in the second which it would not have done had they been heard together and all options had remained open to the Tribunal.

14. Although I am reluctant to put matters over which might otherwise have been dealt with today, I find that the interests of justice are better served if I do that.

Account of the hearing (2)

15. When I had given my reasons as set out above, the Claimant stated that the risk that something might emerge was the reason why the applications should be heard separately. She said that, if there had not been an issue with insufficient time at the previous hearing, her application would have been heard then, before the Respondent had made theirs. The Claimant continued that Dr Shanahan was the most important witness in the case, as he was both an expert and a witness (the latter of which I took to mean a witness of fact).

16. I said that these matters had not persuaded me to change my mind, and that the two applications would be heard and determined on the same occasion. The Claimant said that she wanted reasons for my decision. I said that I had given them, and that she could ask for written reasons.

17. I then proceeded to give my decision on the issue as to the withdrawn claims and the amendment application, both of which I had heard the

previous day. At this point the Claimant dropped out of the hearing. I said that I would wait for 5 minutes in order to see whether she reconnected.

18. At about 11.35am Ms Davidsen, who had attended the hearing in order to provide support to the Claimant, informed the hearing that the Claimant had told her that she had disconnected in order to protect her mental health, and that she was asking for reasons.

19. Shortly after this, the Claimant rejoined the hearing and asked me to recuse myself. Ultimately I was uncertain about the extent to which this was a considered application, or something said in the heat of the moment, partly because of the way in which it was put, and partly as after I had determined this application, the hearing proceeded in a straightforward manner and I heard submissions on the specific disclosure application and on how the remaining issue about medical experts should be managed. I made a decision not to recuse myself and I said that I would (as asked by the Claimant) give written reasons for each of the decisions I had made.

Reasons for refusal of recusal application

20. The Claimant stated that she wanted a change of judge and that I had listed the two applications about medical experts together because I wanted to decide to give the Respondents their expert. The Claimant added that she was not interested in my reasons because they were biased, and that "you can give everything to Google and they can pay you. Or maybe it's racism because they are white." The Claimant concluded that "my trust and confidence in you has broken down because you are not giving objective reasons."

21. Ms Belgrove submitted that the hearing should continue and that there was no reason for concern about the way in which it had been conducted so far.

22. In the absence of actual bias on the part of a judge, or the judge having a direct interest in the outcome of a case, the test is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (Lord Hope in **Porter v Magill [2002] AC 357**).

23. I do not believe that a fair-minded and informed observer would reach such a conclusion. It is true that I have decided the two substantive issues determined so far in this part of the hearing (dismissal on withdrawal and the amendment application) in favour of the Respondent and that, contrary to the Claimant's preference, I have decided that the two applications concerning medical evidence should be decided together, rather than separately. Although at the time of the recusal application I had only given reasons orally for the last-named of these decisions, I believe that a fair-minded and informed observer who had heard the parties' submissions would realise that I could legitimately come to a conclusion in favour of the Respondent's stance in respect of each of them.

24. It is also the case that I have previously decided a substantial issue – an extension of time for presenting case number 2200303/2023 – in the Claimant's favour.

25. I consider that the fair-minded and informed observer would conclude that the basis for the Claimant's application is her disappointment with, or disapproval of, the decisions I have made, rather than anything that would indicate a real possibility of bias. I should not, therefore, recuse myself from continuing to hear the case.

Account of the hearing (3)

26. As I have already indicated, after I had given my decision not to recuse myself (but not the reasons for this, on the basis that I would be providing these in writing in due course) the hearing continued at about 12.30 on 10 November with submissions about the Claimant's application for specific disclosure.

27. Before dealing with this, I will set out my reasons for the two earlier decisions, namely that concerning dismissal on withdrawal and the refusal of the Claimant's amendment application.

Dismissal on withdrawal

28. Rules 51 and 52 of the Rules of Procedure provide as follows:

51 Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end……

52 Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless –

(a) The claimant has expressed at the time of the withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
(b) The Tribunal believes that to issue such a judgment would not be in the interests of justice.

29. In **Khan v Heywood and Middleton Primary Care Trust [2007] ICR 24** the Court of Appeal considered the position under the former (2004) Rules. Although the Rules have changed, I find that the general principle stated in paragraph 79 of Wall LJ's judgment in **Khan** remains applicable. This is that when proceedings are withdrawn, they are brought to an end and cannot be revived against the Respondent; but that this does not mean that, absent dismissal, a fresh claim on the same facts cannot be made.

30. On 24 October 2022 the solicitors then acting for the Claimant sent an email to the Tribunal which included the following:

"We now write on behalf of the Claimant to:

- Clarify (and where necessary apply under Rule 30 for the amendment to reflect) the claims which are being retained ("the retained claims")
- Give notice of withdrawal of all other claims under the same claim number"

31. The email continued that the list of issues showed that the parties had agreed that the heads of claim that remained for consideration and had not been withdrawn were (in summary) those of discrimination because of something arising in consequence of disability; failure to make reasonable adjustments; and unlawful deduction from wages. It then read:

"**NOTICE OF WITHDRAWAL OF ALL CLAIMS *OTHER THAN* THE RETAINED CLAIMS**

"Strictly on the Tribunal's having noted and acknowledged that the retained claims under the above headings and on the facts listed therein set out in the above sub section of this email are **not** withdrawn, **the Claimant by this email gives notice that she withdraws all and or any *other* claims presently understood to be currently pursued in the Tribunal as set out in her 9th version Amended Grounds of Claim submitted on the 21st January 2022 and is content for the Tribunal to dismiss those claims upon withdrawal** [emphasis as in the original].

32. A preliminary hearing took place before me on 25 October 2022. In paragraph 2 of the Note to the orders made, I recorded that it was agreed that the complaints other than those listed in the orders (the same as listed in paragraph 30 above) were to be dismissed on withdrawal. I then listed the complaints that I understood were to be dismissed. These included "Unfair dismissal, including automatic unfair dismissal and constructive dismissal" and "Personal injury (with reference to the Law Reform (Personal Injuries) Act 1948 and the Offences Against the Person Act 1861)".

33. In paragraph 3 of the Note I stated that I had asked the parties to check the list of complaints to be dismissed on withdrawal and to inform the Tribunal of any changes required, or that it was correct, within 7 days, whereupon I would issue a judgment dismissing the claims on withdrawal. It seems that the parties did not write to the Tribunal about the list: in any event neither I nor any other judge took any further action at that stage.

34. Following the preliminary hearing on 23 February 2023 EJ J Burns annexed to his orders a list of issues, which did not include any reference to any form of unfair dismissal complaint. At a further preliminary hearing on 28 July 2023 Employment Judge Snelson directed the provision of written

submissions on the withdrawn claims. The Claimant responded to this on 10 August 2023 saying that she did not agree to the dismissal of the complaint of unfair dismissal, including automatic unfair dismissal and constructive dismissal.

35. Given her solicitor's email of 24 October 2022, what is it that leads the Claimant to say that the unfair dismissal complaints should not be dismissed? She argues that, pursuant to rule 52(b), it would not be in the interests of justice for the Tribunal to do this, the reason for this being that she wishes to bring a complaint of automatic unfair dismissal under section 104 of the Employment Rights Act (as identified in her application to amend the claim). The Claimant emphasised this position with the rhetorical question, "if the amendment is allowed, would I accept dismissal on withdrawal?" I have described this question as rhetorical because the Claimant did not give a definitive answer to it; however, it helps to explain her opposition to a dismissal on withdrawal.

36. In this context of what it is that the Claimant wishes to achieve, I have given consideration to what two possible interpretations of what the withdrawal, and any consequent dismissal, of the unfair dismissal complaints might entail. One involves taking the view that withdrawing and dismissing a complaint of unfair dismissal involves withdrawing and dismissing all varieties of unfair dismissal complaints, whether or not pleaded; or, on a narrower approach, that withdrawing or dismissing a complaint of automatic unfair dismissal involves withdrawing and dismissing all varieties of automatic unfair dismissal complaints, whether or not pleaded. The other view would be that a withdrawal or dismissal only applies to the specific complaints made, such that (in the circumstances of the present case) dismissing a complaint of automatic unfair dismissal under section 103A would not mean that the dismissal also applied to a potential complaint under section 104.

37. I am unaware of any authority on the point. However, I find that in principle, a claimant can only withdraw a complaint that she has in fact made, and that any consequent dismissal on withdrawal would be similarly limited. I find that a complaint of automatic unfair dismissal under section 103A is different from a complaint of automatic unfair dismissal under section 104, such that withdrawing and dismissing a complaint under section 103A would not affect a complaint under section 104. I consider that this would clearly be the case if both complaints had been pleaded in the first instance, and only one of them withdrawn. Where (as here) only one was pleaded in the first instance, I find that a withdrawal of the complaint of "automatic unfair dismissal" should be interpreted as meaning the complaint of that nature that had in fact been made.

38. My conclusion, therefore, is that the Claimant does not need to rely on Rule 52(b) and the interests of justice in order to oppose a dismissal on withdrawal, with a view to raising a complaint under section 104. A dismissal of the complaint she has made under section 103A would not, in my judgement, operate to dismiss a complaint she has not yet made under

section 104. In order to make the latter complaint, the Clamant needs to apply to amend the claim (as she has done), and the withdrawal and any dismissal of the section 103A claim might or might not be relevant to the exercise of discretion in that regard. There is not, however, any need for the Tribunal to refrain from dismissing the complaint under section 103A with a view to preserving the Claimant's ability to seek to raise a complaint under section 104.

39. There is no other reason why it would not be in the interests of justice to dismiss the withdrawn complaints.

40. I therefore conclude that it is not the case that it would be in the interests of justice to refrain from issuing a judgment dismissing the unfair dismissal complaints as originally pleaded. The Claimant does not need to prevent or avoid a dismissal in order to apply to amend the claim in order to bring in a complaint under section 104.

Amendment application

41. As already explained, the Claimant seeks to bring in by amendment a complaint of automatic unfair dismissal under section 104 of the Employment Rights Act.

42. Although both the Claimant and Ms Belgrove addressed the application by reference to the long-standing authority of **Selkent**, the principles to be applied when considering an amendment application have received more recent attention from HHJ Tayler in **Chaudhry v Cerberus Security [2022] 172**. HHJ Tayler emphasised the paramount importance of balancing the injustice or hardship of allowing or refusing the application, taking account of all relevant matters, including to the extent appropriate, those referred to in **Selkent**.

43. The Claimant presents the application as one in which no new factual allegations arise, as she relies on the facts pleaded in relation to the (withdrawn) complaint under section 103A. Those factual allegations remain in the pleading, although the section 103A complaint itself has gone. The Claimant submits that the interactions relied on can also be understood as allegations that statutory rights had been infringed under section 104(1)(b) and/or that, assuming that she was dismissed on 17 December 2021, presenting the claim on 8 December 2021 fell within section 104(1)(a).

44. As HHJ Tayler observed in **Chaudhry**, there will always be an element of at least perceived hardship when an amendment application is refused. This is that the claimant is not able to put forward a complaint that he or she wishes to pursue. I find that there would be such hardship to the Claimant in the present case were I to refuse the application.

45. Conversely, when looking at the position as it affects the Claimant, it is also relevant that she was legally represented when the unfair dismissal

complaint was withdrawn in October 2022. There was no suggestion then of wishing to retain or bring in a complaint under section 104, even though (as the Claimant now points out) the facts that are now relied on in that regard had already been pleaded. (To use **Selkent** terminology, this could be regarded as relating to the timing and manner of the application).

46. The Claimant further submitted that an important issue in any complaint of unfair dismissal would be as to her mental capacity to resign, and that she did not have the evidence available to form a judgement about this until July 2023. She made the reasonable observation to the effect that it would have been wrong to make the application before having the information to justify it.

47. The Claimant then addressed the question as to why it was she did not make the application in July 2023, but in October. She said that making the application then would have derailed the hearing listed in October. She therefore took the alternative approach of seeking a declaration that she lacked capacity to resign, but once there was no longer the prospect of a full hearing in October, made the application to amend. I found that all of this showed that the Claimant took an informed decision not to apply in July or August 2023, because she considered that it was more in her interests to retain the full hearing if possible. That is an approach that she was entitled to take, but it indicates that the hardship to the Claimant of refusing the application would not be great, as it was something she was prepared to sacrifice in order to pursue a different aim.

48. Turning to the Respondent's position, I find that it is not sufficient to say that there would be no hardship as the final hearing has been postponed to October 2024 and they now have ample time to prepare for the new claim.

49. I accept that it is unlikely that time to prepare as such would be a problem. Having said that, as there is usually a degree of hardship to a claimant in not being able to bring a new complaint, so there is usually a degree of hardship to a respondent in allowing a new complaint to be brought. In the present case, this would be a new complaint which bears a degree of resemblance to one that was originally brought in December 2021 and subsequently withdrawn in October 2022. I find that, following that withdrawal, the Respondent was entitled to proceed on the assumption that it was not facing any complaint of unfair dismissal.

50. I find that there would be hardship to the Respondent in having to prepare to meet such a complaint. The case was approaching a full hearing which would have been taking place at the present time, but which I postponed on 29 September 2023. I accept, because it must be the case, that the Respondent's preparations for the full hearing were well advanced, and that they would not have included any preparations to meet a complaint of unfair dismissal. The hardship concerned is not (as I have said) that of lacking sufficient time to prepare, but that of having to revisit work already done from a new perspective. Witnesses would have to be asked about events which occurred around 2 years ago, in relation to a complaint of

unfair dismissal which normally has to be brought within the statutory time limit of 3 months (plus any extension by virtue of early conciliation).

51. I find that the hardship and injustice that would be caused to the Respondent if I were to allow the application outweighs that which would be caused to the Claimant if I were not to. I therefore refuse the application.

Claimant's application for specific disclosure

52. This application has undergone some refinement and amendment in the course of correspondence since it was first made. The Respondent's solicitor had prepared tables showing the current position as the Respondent understood it, including the parties' respective stances, and had updated these when appropriate. The Claimant asked me to use as the basis of her application not the latest version of the Respondent's table but paragraph 49 of her skeleton argument for the present hearing, plus her second skeleton argument, sent on the morning of 10 November.

53. I decided that I would use the Claimant's skeleton arguments as setting out the application she was making, and the Respondent's table for the purpose of identifying the Respondent's position on the different elements of the application. The Claimant and Ms Belgrove also made oral submissions.

54. The principles to be applied by a Tribunal when considering an application for specific disclosure were summarised by Linden J in **Santander v Bharaj [2021] ICR (Employment Appeal Tribunal)** as follows:

"(a) There can be no order for specific disclosure unless the documents to which the application relates are found to be likely to be disclosable in the sense that, in a standard disclosure case, they are likely to support or adversely affect etc the case of one or other party and are not privileged. Similarly, if disclosure is sought in relation to a category of documents, it must be shown that the category is likely to include disclosable documents.

"(b) Even if this question is answered in the applicant's favour, specific disclosure will only be ordered to the extent that it is in accordance with the overriding objective to do so. The "necessary for the fair disposal of the issues between the parties" formulation……..[is] shorthand for this second question."

"(c)…….the greater the importance of the disclosable documents to the issues in the case, the greater the likelihood that they will be ordered to be disclosed, but subject always to any other considerations which are relevant to the application of the overriding objective in the circumstances of the particular case and in particular the principle of proportionality."

55. Similar observations were made by Choudhury P in **Tesco Stores Limited v Element [2021] UKEAT 0228/20/1301** as follows:

"(a) The Tribunal's powers……are coterminous with those of the Court under CPR 31.

"(b) As such, the guiding principle is not relevance but whether the documents are relied on by a party, or are likely to support or be adverse to a party's case. A document falling within that description will be relevant.

"(c) If relevance in that sense is established, the test for making an order for disclosure is whether it is necessary for the fair disposal of the proceedings.

"(d) The Tribunal has a discretion as to whether to order disclosure. Such discretion must be exercised in accordance with the overriding objective."

56. The Claimant seeks disclosure of the following documents or categories of documents.

57. **(a) Internal communications around disciplinary and resignation in October – December 2021.** The Claimant refers to a disciplinary process, her resignation and the Respondent's refusal to accept her retraction of the latter. She asserts that the Respondent has not disclosed any internal communications about these matters, and argues that it is unrealistic to suggest that none exist. The Respondent's position is that it has conducted a reasonable and proportionate search and has provided all relevant documentation.

58. The limitations on a Tribunal's ability to determine applications of this nature include that the parties are necessarily better informed than the Tribunal as to what has been disclosed so far, and that it is impractical for the Tribunal to conduct an exercise of going through all the documentation with a view to forming its own conclusions about what further documents might exist.

59. Having said that, I note that the Respondent has not expressly disputed the assertion that no internal communications about these matters have been disclosed. It is possible that there were no such communications, but (in my judgement) more likely that there would have been some. The Claimant's case is that the disciplinary proceedings and the refusal to accept the retraction of her resignation were acts of discrimination. The documents sought, if they exist, would be likely to support, or be adverse to, the Claimant's case. I consider that if there are such documents, their disclosure would be necessary for the fair disposal of the case, as they would be likely to cast light on the reasons why the relevant decisions were made. I find that it would be proportionate to make an order for disclosure as the issues are important and the categories sought not excessive in ambit. I therefore consider that I should make an order for disclosure of this category.

60. I then have to consider what form of order to make. A simple order for disclosure by way of list and copies is unlikely to be of any real use when a

party says that they have already complied with their disclosure obligations. I have therefore ordered that the Respondent shall carry out a further search for these specific categories of documents and, in addition to disclosing any documents found, shall provide a disclosure statement summarising the nature of the search made.

61. **(b) Slack messages between the Claimant and Rosalia Schneider.** The Claimant states that Ms Schneider was a senior employee with whom she shared her difficulties in the workplace via the "Slack" messaging system, and who provided insight into the Respondent's culture and prevalent practices. She argues that the chats would establish discriminatory practices in the workplace. The Respondent contends that these documents would not be relevant or necessary; and in any event, that its data policy is such that they would no longer exist.

62. On the latter point, if a party states that it has made a proper search for a class of documents, and that they no longer exist, that will usually be taken as conclusive. The Tribunal will usually (not invariably) take that statement at face value and will not make an order for disclosure. The position in the present case is not quite the same as this, as the Respondent is not asserting that it has made a search. I take the assertion that the documents "would no longer exist", however, as meaning that the Respondent states that its data policy is such that they should have been destroyed, and so cannot now exist unless there has been some failure of the policy. It seems to me that, while it is possible that the documents have somehow survived, it is unlikely, and that any order for disclosure would be unlikely to achieve anything. This is a factor to be considered when exercising the discretion as to whether to make an order, although I do not consider that, standing alone, it is determinative of the application.

63. A further consideration is that the issues to be determined by the Tribunal concern matters affecting the Claimant, rather than more general issues as to alleged discriminatory practices. I accept that evidence beyond that as to what happened to a claimant, and demonstrating the culture or practices in a workplace, may in appropriate cases be of assistance in determining, as a matter of probability, what occurred in relation to a claimant. I do not, however, find that such documents (if, which seems unlikely, they still exist) would be necessary for the fair determination of the issues before the Tribunal. The issues in the discrimination complaints arising from the period when the Claimant was employed by the Respondent broadly concern the disciplinary process undertaken by the Respondent; the Claimant's resignation and attempted retraction of that; and the Claimant's treatment in connection with a presentation. These issues are all particular to the Claimant, and I do not consider that an extensive investigation of the workplace culture is likely to assist the Tribunal in reaching its conclusions about them.

64. I do not, therefore, consider that these documents are necessary for the fair disposal of the issues between the parties, and I do not make an order for their disclosure. I should add that, if I had found disclosure of the

documents to be necessary in that sense, I would not have made a straightforward disclosure order, given the probability that the documents no longer exist. I would have made an order in similar terms to that under (a) above.

65. **(c) Policies**. The Claimant seeks the Respondent's policies on neurodiversity, stress risk management, work capability assessment, employee training, dismissals (terminations and resignations), manager and HR training, interviewing and hiring, and capacity assessments. The Respondent states that no such policies exist.

66. I find no reason to doubt the Respondent's assertion. The position is different from that under category (a) above, in that the Respondent's stated position there was that a proper search had been carried out and all relevant documents disclosed – which is not the same as a positive assertion that there are no documents of the type sought. Unless there is reason to doubt it, a party's statement to this effect is usually taken to be conclusive, and an order for disclosure will not be made. I find that to be the position here.

67. **(d) Training**. The request is for "the date when their employees took the respective training. The Respondent is also requested to confirm whether any colleague of the Claimant from Interactive Agents team took any relevant training and if yes which one and which date". Put in these terms, it is not entirely clear whether this is a request for disclosure of documents, or for the provision of information, or both. In any event, the Claimant contends that documents / information is necessary in order to understand whether there was appropriate support for disabled employees. The Respondent addresses the point in a different way, stating that it has carried out a reasonable and proportionate search for the training records of key custodians relevant to the issues.

68. Whether viewed as a request for disclosure or for information, I do not consider that what is sought is necessary for the fair disposal of the proceedings, or proportionate to order. The central issues in the case concern what happened in relation to the Claimant and why those things happened. Understanding what training relevant individuals undertook can assist in assessing what they are likely to have done in particular situations, and why they might have done it. The Tribunal will not, however, be engaged with wider questions along the lines of whether the Respondent's employees were properly trained, or whether there was appropriate support for disabled employees in general, as opposed to for the Claimant specifically.

69. **(e) A higher resolution copy of the video of the meeting on 11 November 2021.** The video itself has been disclosed. The Claimant contends that the picture quality is poor, and that it is difficult to see individuals' facial expressions, which are relevant in order to tell how they were reacting to her. The Respondent disputes the relevance of facial expressions, but says that in any event they cannot produce a higher

resolution version. The Claimant argues that they can, and maintains that they have admitted that they know how to do this. The Respondent denies admitting this.

70. I am not in a position to make a finding of fact about the Respondent's technical capacity in this regard, or what may have been said about that. Nor do I find that being able to see individuals' facial expressions at a meeting is something that is necessary for the fair disposal of the proceedings, or that it would be proportionate to order the video to be enhanced in order to achieve this, even if I were to be satisfied that this would be technically feasible.

71. I do not therefore order the preparation or disclosure of a higher resolution copy of the video. I would comment that, if the Tribunal hearing the claim in due course considers that it would be helped by this, having presumably seen the video and what it does and does not show, it could pursue this further with the parties.

72. **(f) Employee statistics.** The Claimant seeks documents or information (in the event it makes no material difference to my decision how the request is regarded) concerning the following:

72.1 Total number of employees, and ratio of males to females in the company.

72.2 Number of employees with a disability with a breakdown by disability group (mental and physical) and male to female ration for each group.

72.3 Percentage of employees with autism as a known disability, ratio of autistic males to autistic females in the company.

72.4 Percentage of employees with bipolar / schizoaffective disorder as a known disability, ratio of bipolar / schizoaffective males to bipolar / schizoaffective females in the company.

72.5 Number of misconduct cases involving employees with depression and/or anxiety and/or mental disability, ratio of male to female employees and how these were handled along with final resolution / conclusion.

72.6 Number of misconduct cases involving non disabled employees, ratio of male to female employees and how these were handled along with the final resolution / conclusion.

72.7 Research software engineers' pay scales for bands L3, L4, L5, L6, L7.

72.8 Average time to promotion between bands L3 to L4, to L5, to L6, to L7.

72.9 Data / documents / records showing length of service of ex-employees with disability (mental and physical) in the firm along with gender, type of disability and reason for termination of employment.

72.10 Number of cases where requests to rescind resignation were made and outcome of each with reasons. Number of cases where such request were made with an overlap of mental illness and/or any disability (mental or physical) along with the decision of the firm on them and male to female ratio.

73. I find that disclosure of documents of this nature, and/or the provision of information of this nature, is not necessary for the fair disposal of the proceedings. The Claimant's argument is essentially that documents or information of this nature would show the Respondent's practices in general with regard to disabled people; would show whether or not her case was a "one off"; and would show the interplay (if any) within the Respondent's organisation of the characteristics of disability and sex.

74. The difficulty with the Claimant's argument is that the Tribunal is not directly concerned with the Respondent's practices in general: it is concerned with the complaints of unfavourable treatment because of something arising in consequence of disability; failure to make reasonable adjustments; and unlawful deduction from wages (in the first claim); and of discrimination because of something arising in consequence of disability and/or victimisation (in the second claim). These complaints all arise from events affecting the Claimant, not the workforce at large.

75. I consider it unlikely that broad statistics such as the ratio of males to females in the company, the number or percentage of employees in the company with particular or any disabilities, or the number and outcome of disciplinary proceedings involving male, female, disabled and non-disabled employees would demonstrate anything that would assist the Tribunal in its task. It is also likely that, as an exercise of locating, considering and disclosing documents, or of gathering and presenting information, this would consume extensive resources. On that point, it is not sufficient in my judgement to say that the Respondent has extensive resources: that is not enough to justify requiring it to use resources on such an exercise.

76. I accept that there are occasions when a Tribunal can draw inferences from statistics such as the percentage of employees with particular protected characteristics at particular levels within an organisation's structure, or from pay levels, which bear on an individual's complaint, perhaps about indirect discrimination or matters such as not being promoted when that might otherwise have been expected. The issues in the present claims are not, however, of that nature. I do not consider that documents or information of this nature are necessary for the fair disposal of the issues; nor that it would be proportionate to require the Respondent to conduct such an exercise.

77. I therefore make the order indicated above under category (a), but make no order in respect of the other categories.

Employment Judge Glennie

Dated: ……19 January 2024……..

Judgment sent to the parties on:

19th Jan 2024

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For the Tribunal Office