



EMPLOYMENT TRIBUNALS

First Claimant: Ms Petia Paramova-Castano
Second Claimant: Ms Tamara Shengelia
Third Claimant: Ms Anne Gayani Fernando

First Respondent: BPP University Limited
Second Respondent Ms Sarah Mcilroy
Third Respondent Ms Sally-Ann Burnett
Fourth Respondent Mr. Garry Buick

Heard at: London South, by video

On: 19 January 2024

Before: Employment Judge G Cawthray

Representation

First and Third Claimant: Ms. M Bouffe, Counsel
Second Claimant: Dr Chandra, legally qualified in India (does not practice in the UK) – Second Claimant's husband
The Respondents: Mr. K Wilson, Counsel

RESERVED JUDGMENT (Strike out and deposit order)

1. The Respondents application for strike out of alleged protected disclosures 2.1.1.10, 2.1.1.12, 2.1.1.13, 2.1.1.16, 2.1.1.22 and 2.1.1.24 is dismissed.
2. The Respondents application for a deposit order in relation to alleged protected disclosures 2.1.1.10, 2.1.1.12, 2.1.1.13, 2.1.1.16, 2.1.1.22 and 2.1.1.24 is dismissed.
3. The Respondents application for strike out of the complaints of indirect sex and indirect race discrimination, issues 12 and 13 in the List of Issues, are dismissed.

4. The Second Claimant is ordered to pay a deposit order in accordance with the separate deposit order of the same date, in relation to indirect sex and indirect race discrimination, issues 12 and 13 in the List of Issues.

REASONS

Introduction

1. The hearing today was a public preliminary hearing that had been listed by Employment Judge Clarke following a preliminary hearing on 2 October 2023. A case management preliminary hearing had also taken place on 10 May 2023.
2. I was provided with the following documents: a skeleton argument for the Respondents, a skeleton argument for the First and Third Claimant, witness statements for the claimants regarding finances and Bundle of 554 pages. I had been provided with a Bundle, however this was provided via a link, and upon expiration of the link it was necessary for the parties to re-send the Bundle.
3. A List of Issues for determination at the final hearing was at page 422 Bundle, and is over 70 pages long, and I understand the Claimants are bringing the following complaints:

Public interest disclosure – detriment – all three claimants
Constructive unfair dismissal – first and third claimants
Automatic constructive unfair dismissal - first and third claimants
Unfair dismissal – second claimant
Wrongful dismissal/notice pay - first and third claimants
Direct sex discrimination – all three claimants
Direct race discrimination – all three claimants
Indirect sex discrimination – second claimant
Indirect race discrimination – second claimant
Harassment – third claimant
Victimisation – all three claimants.

4. The hearing had been listed to consider the Respondent's application to strike out parts of the claim, and in the alternative a deposit order. Paragraph 3 of Employment Judge Clarke's Case Management Order & Summary sets out the issues to be determined at the hearing today:
 - (i) determine the Respondent's application dated 26th July 2023 for strike out and/or a deposit order and any further application for strike out and/or a deposit order made in accordance with the directions below;
 - (ii) consider whether any amendments may need to be made to the list of issues following determination of the Respondent's strike out application(s); and
 - (iii) make any further case management orders that may be necessary to prepare the case for final hearing.

5. No attendee required any adjustment to the video hearing.
6. The parties' representatives agreed that no evidence was required in relation to strike out but each claimant gave oral evidence, and was questioned, in relation to means to pay a deposit order.
7. I read the written submissions and heard oral submissions on strike out and deposit order from Ms. Bouffe, Dr Chandra and Mr. Wilson. Unfortunately this took all the allocated hearing time, three hours, and I was not able to give an oral judgment.
8. Due to the workload in the Employment Tribunal, unfortunately there has been some delay in concluding and sending this judgment, for which I apologise.
9. The final hearing will take place at Montague Court, 101 London Road, West Croydon, CR0 2RF on **1-3, 7-10 and 13 May 2024.**

Issues

10. I discussed the issues with the parties at the outset of the hearing. Mr. Wilson confirmed that the Respondents were no longer pursuing a strike out of the Third Claimant's complaint of harassment.
11. Accordingly, the Respondents are seeking for the following alleged protected disclosures to be struck out, and in the alternative a deposit order be made:
 - 2.1.1.10
 - 2.1.1.12
 - 2.1.1.13
 - 2.1.1.16
 - 2.1.1.22
 - 2.1.1.24
12. The Respondent is also applying for Second Claimant's indirect sex and race discrimination complaints to be struck out, and in the alternative a deposit order.

Facts

13. I have only set out limited facts necessary to make a decision in relation to the applications of strike out, and in the alternative, deposit orders.
14. The First Claimant has a gross annual income of £21,469.60 which equates to a monthly take home pay of £1,479.16. She lives with her husband and one dependent child and her husband earns a salary, the sum of which is not known. The First Claimant's family/household outgoings are £5,876.08.

15. The Second Claimant has a new employer and has two roles with this employer. In one role she has a gross annual income of £51,823 and in the other a gross annual income of £12,260.95. However, the role in which she earns £51,823 is a fixed term role and due to end at the end of March 2024. She also earns £1,866 per annum as a Guest Lecturer at a different university.
16. The Third Claimant has a gross annual income from the First Respondent of £56,000.00 which equates to a monthly take home pay of £3,330.00. She also earns a gross annual income of £22,822.00 which equates to a monthly take home pay of £1,551.06 from a different employer, the University of Westminster. She lives with her husband and two dependent children and her husband earns a salary, the sum of which is not known. The Third Claimant's family/household outgoings are £5,900.00.

The Law

Strike Out

17. Under Rule 37 a claim or part of a claim can be struck out on grounds that include it has no reasonable prospect of success. A claim cannot be struck out unless the party has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.
18. Rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

Striking out

37.

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c) or non-compliance with any of these Rules or with an order of the Tribunal;*
- (d) that it has not been actively pursued;*

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

19. Operation of rule 37(1)(a) requires a two stage test.

20. Firstly, has the strike out ground (here “no reasonable prospect of success”) been established on the facts.

21. If so, secondly is it just to proceed to a strike out in all the circumstances (which will include considering whether other lesser, measures might suffice).

22. When assessing whether a claim has no reasonable prospect of success the Tribunal must be satisfied that the claim or allegation has no such prospect, not just that success is thought to be unlikely (*Balls v Downham Market High School and College [2011] IRLR 217*). The Tribunal must take the allegations in the claimant’s case at their highest. If there remain disputed facts there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible (*Ukegheson v Haringey London Borough Council [2015] ICR 1285; Merchkarov v Citibank NA [2016] ICR 1121*). In other words a strike out application has to be approached assuming, for the purposes of the application, that the facts are as pleaded by the claimant. The determination of a strike out application does not require evidence or actual findings of fact.

23. In *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330* the Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in *Ezsias*,

where the facts sought to be established by the claimant were *'totally and inexplicably inconsistent with the undisputed contemporaneous documentation'* (para 29, per Maurice Kay LJ).

24. A strike out application succeeds where it is found that, even if all the facts were as pleaded by the claimant, the complaint would have no reasonable prospect of success. It was said by Underhill LJ in *Ahir v British Airways [2017] EWCA Civ 1392* that “Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment... Nevertheless it remains the case that the hurdle is high, and specifically that it is higher than the test for making a deposit order, which is that there should be “little reasonable prospect of success.”
25. There is a special need for caution in strike out discrimination cases, and similarly whistleblowing claims, because they are generally fact sensitive, because of the public interest in examining the merits at a final hearing, and because of the shifting burden of proof.
26. Where a litigant in person is involved the tribunal should not simply ask the question orally to be taken to the relevant material in support of the claim but should also carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding there is nothing of substance behind it; *Cox v Adecco Group UK [2021] 1CR 1307*.
27. If a strike out application fails the argument about the overall merit of the claim is not decided in the claimant’s favour. Both the claimant and the respondent argue their positions on the merits in full and afresh at the full hearing.
28. The EAT, in the case of *Mechkarov v Citibank NA [2016] ICR 1121*, summarised the approach to be followed by a Tribunal when faced with an application to strike out a discrimination claim as follows:
 - a) Only in the clearest case should a discrimination claim be struck out.
 - b) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.
 - c) The Claimant’s case must ordinarily be taken at its highest.

- d) If the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.
- e) A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

29. In *Yorke v Glaxosmithkline Serviced Limited*, at paragraph 51, HHJ Tayler states: *"Where the parties are represented it is the representatives that bear the principle responsibility for ensuring that the list of issues is up to the job"*.

30. Although a poorly pleaded case presents difficulties for the tribunal, striking out the claim is rarely the answer. In case where there is a litigant in person, as established in *Mbuisa v Cygnet Healthcare Ltd EAT 0119/18* the proper course of action would be to record how the case was being put, ensure that the original pleading was formally amended so as to pin that case down, and make a deposit order if appropriate.

Deposit Order

31. The power to make a deposit order is provided by rule 39 of the ET Rules, as follows:

"(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.”

32. The test for the ordering of a deposit is therefore that the party has little reasonable prospect success. It was said by the Employment Appeal Tribunal in *Hemdan v Ishmail [2017] IRLR 228* 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” and it is “ emphatically not...to make it difficult to access justice or effect a strike out through the back door.” A deposit order should be capable of being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise.
33. As for the approach the Tribunal should take, in *Wright v Nipponkoa Insurance [2014] UKEAT/0113/14* and *Van Rensburg v Royal Borough of Kingston-UponThames and others [2007] UKEAT/0095/07* it was said, a Tribunal is not restricted to a consideration of purely legal issues; it is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. That said there is a balance to be struck as to how far such an analysis can go. It was also made clear in *Hemdan* that a mini-trial of the facts is to be avoided. If there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested.
34. The Respondent pursues the application as an alternative to their strike out application. The test is therefore one of “little reasonable prospect of success” as opposed to “no reasonable prospect of success” for a strike out application.
35. Rule 39 allows a tribunal to use a deposit order as a less draconian alternative to strike-out where a claim or response (or part) is perceived to be weak but could not necessarily be described as having no reasonable prospect of success.
36. In *Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames UKEAT/0096/07*, the EAT observed: “27. ... the test of little

prospect of success ... is plainly not as rigorous as the test that the claim has no reasonable prospect of success ... It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.”

37. A deposit order application has a broader scope compared to a strike out application and gives the Tribunal a wide discretion not restricted to considering purely legal questions. The Tribunal can have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it.

38. In a case where a Tribunal concludes that a claim or allegation has little reasonable prospect of success, it does not mean that a deposit order must be made. The Tribunal retains a discretion in the matter and the power to make such a deposit order has to be exercised in accordance with the overriding objective and with having regard to all of the circumstances of the particular case.

39. The statutory provisions relevant to whistleblowing detriment are set out below.

43B Disclosures qualifying for protection.

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “ worker ”, “ worker’s contract ”, “ employment ” and “ employer ” have the extended meaning given by section 43K.

40. The statutory provisions relevant to indirect discrimination are set out below.

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

- age;*
- disability;*
- gender reassignment;*
- marriage and civil partnership;*
- race;*
- religion or belief;*
- sex;*
- sexual orientation.*

Conclusions

41. In reaching my conclusions I have kept in mind the legal principles as set out above.
42. Dealing firstly with the application to strike out the alleged protected disclosures detailed at paragraph 11 above. I have set out the parties general positions and then deal with each alleged protected disclosure in turn.
43. In general, the Respondent submits that the alleged protected disclosures listed above should be struck out as they have no reasonable prospects of success because they are matters regarding a private personal dispute, are not capable of fulfilling the requirements in section 43B of the Employment Rights Act 1996 on the grounds that they do not relate to a breach of legal obligation and/or were not made in the public interest.
44. In general, the First and Third Claimant submit that it is not appropriate to strike out the 5 alleged disclosures and that the Respondents are asking the Tribunal to conduct a mini trial, which is inappropriate and consideration of evidence at a final hearing is required. They submit the pleadings provide a reasonable basis for the allegations, that legal obligations have been identified and consideration of reasonable belief is required after hearing evidence, that the Respondents contention that personal complaints cannot be a matter of public interest is wrong in law.
45. The First and Third Claimant submit that this is not a case where there is no identified breach of a legal obligation and that determination of whether the allegations amount to protected disclosures needs to be done at a final hearing after considering evidence.
46. The Second Claimant submits that the personal differences were routed in what was happening in the department, which was a department more regulated than the Business School. They submit there is public interest in being told there were not enough students. They made submissions in relation to the fact that if the Psychology Department merged with the Business School there would be over 20 employees and collective consultation would be required and referenced a belief there was a crime. They submit there was a cover up and processes were not being followed.
47. Any specific oral submissions have been referenced in brief under each alleged protected disclosure.

Alleged Protected Disclosure 10

48. For ease, I have extracted and summarised below and in italic only the key points in relation to alleged protected disclosure 10 as set out in the List of Issues.

6 December 2021 - Information Disclosed - The Psychology Department being moved into the Business School meant that a restructure and possible redundancies were being pushed through without consultation.

Legal obligations relied upon – The First Respondent’s obligation to comply with employment law (relating to redundancy) and comply with regulatory obligations to operate with integrity. The Second and Third Respondent’s regulatory requirements to act with integrity.

49. The Respondents say that this is not set out in the claim form, that paragraph 19 of the claim form references the concern but this is not a disclosure of information tending to show a breach of a legal obligation, is not specific and the Claimants will not be able to show they reasonably believed it showed one of the relevant failures or that they believed a disclosure was in the public interest. The Respondents submit that this related to a department with fewer than 20 staff and therefore would not engage the public interest element.
50. The First and Third Claimants say that the basis of the Respondents oral submissions was that the List of Issues does not marry up with the pleadings, but suggest that the List of Issues was agreed, and the Respondents have had chance to comment on the list before the hearing today. The say alleged protected disclosure 10 is about a number of people, namely the people in the Psychology Department (which includes 400 students), and the case law does not require a minimum number of people and that a situation involving just one person may satisfy the public interest element. The say the Tribunal needs to make findings of fact after hearing evidence.
51. I have considered the law alleged protected disclosure and the law on striking out and deposit orders.
52. On the information before me, I cannot say at this stage there is no reasonable prospect of success. The application is refused. The first stage of the test for strike out has not been met. I consider it will be necessary to look carefully at what information was disclosed and what the claimants beliefs were at the time. This will require consideration of evidence and making findings of fact. I do not consider this allegation to be one where it can be said that it can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible.
53. Further, in relation to this allegation, at this stage and for the same reasoning as per the application to strike out, I cannot reach a conclusion that there is little prospect of success, and therefore a deposit order is not appropriate.

Alleged Protected Disclosure 12

54. For ease, I have extracted and summarised below and in italic only the key points in relation to the alleged protected disclosure 12.

13 December 2021 - Information Disclosed - R2's view of student number projections being low was based on incorrect use of 'Funnel' reports.

Legal obligations relied upon - The First Respondent's regulatory obligations to operate with integrity, to comply with other obligations to the British Psychological Society and its obligations to its employees generally to comply with employment law (relating to redundancy). The Second Respondent's obligations to act with integrity and Tim Stewart's other obligations to the British Psychological Society in respect of their standards for accreditation.

55. The Respondents say this was a standard interaction between senior people discussing student numbers and that seeking to bring this as a protected disclosure seeks to make a mockery of the legislation and there is no link with the legal obligations now sought to be relied on. They say there is no reasonable prospect of the Claimants showing that they either reasonably believed this was information tending to show a wrongdoing or that it was made in the public interest.

56. On behalf of the First and Third Claimants it is submitted they gave information about staff to student ratios and that the First Claimant considered the Second Respondent made efforts to show a false reduction in student numbers. It says consideration of such facts sit behind the pleaded case, require determination at a final hearing, and demonstrate this is not a matter suitable for strike out.

57. On the information before me, I cannot say at this stage there is no reasonable prospects of success. The application is refused. The first stage of the test for strike out has not been met. Again, as per my conclusion in relation to alleged disclosure 10, in relation to this alleged disclosure 12, I consider it will be necessary to look carefully at what information was disclosed and what the claimants beliefs were at the time regarding the student numbers ad funnel reports. This will require consideration of evidence and making findings of fact. I do not consider this allegation to be one where it can be said that it can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible.

58. Further, in relation to this allegation, at this stage and for the same reasoning as per the application to strike out, I cannot reach a conclusion that there is little prospect of success, and therefore a deposit order is not appropriate.

Alleged Protected Disclosure 13

59. For ease, I have extracted and summarised below and in italic only the key points in relation to the alleged protected disclosure 13.

15 December – Information Disclosed - C1 and C2 were not being included in weekly meetings of R2's direct reports without justification.

Legal obligations relied upon - The First Respondent's regulatory obligations to operate with integrity and good management, to comply with other obligations to

the OfS to comply with conditions of registration. The Second Respondent's obligations to act with integrity.

60. The Respondents say this was a management gripe and saying that people have not been included in a meeting cannot possibly amount to a whistleblowing matter and makes the same submissions as in relation to alleged protected disclosure 12, namely there is no link with the legal obligations now sought to be relied on and there is no reasonable prospect of the Claimants showing that they either reasonably believed this was information tending to show a wrongdoing or that it was made in the public interest.
61. The First and Third Claimants say this involves what should happen in terms of 1 to 2 meetings in a regulated setting and the claimants considered that regulations were being breached in this respect.
62. On the information before me, and in particular the wording in the List of Issues, I have had some difficulty in understanding what the information disclosed specifically is. However, taking this into account in view of the claimants' submissions and the high threshold for striking out, I cannot say at this stage there is no reasonable prospect of success. The application is refused. The first stage of the test for strike out has not been met. Again, as per my conclusion in relation to alleged disclosures 10 and 12, in relation to this alleged disclosure 13, I consider it will be necessary to look carefully at what information was disclosed and what the claimants beliefs were at the time regarding regulatory requirements. This will require consideration of evidence and making findings of fact. I do not consider this allegation to be one where it can be said that it can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible.
63. Further, in relation to this allegation, at this stage and for the same reasoning as per the application to strike out, I cannot reach a conclusion that there is little prospect of success, and therefore a deposit order is not appropriate.

Alleged Protected Disclosure 16

64. For ease, I have extracted and summarised below and in italic only the key points in relation to the alleged protected disclosure 16.

Multiple throughout December 2021 to February 2022 (including 15 and 16 December 2021, 10 and 11 February 2022) – Information Disclosed – C1 and C2s concerns about the direction in which R2 was taking the Psychology department including: - R2's lack of belief in merit of Psychology programmes or prospects of growth - R2's lack of knowledge of Psychology domain and erratic proposals - R2's practices including removing access to information to exercise control, such as with Funnel reports - Belief that R2 did not plan to grow Psychology and it was a wrap-up operation.

Legal obligations relied upon - The First Respondent's regulatory obligations to operate with integrity and good management, to comply with other obligations to the OfS to comply with conditions of registration, to comply with obligations to the QAA, to comply with obligations to the British Psychological Society in respect of

their standards for accreditation, to provide teaching and course content to a high standard, its duties to its students, to comply with employment law relating to redundancy. The Second and Third Respondents' obligations to act with integrity and Tim Stewart's other obligations to the British Psychological Society in respect of their standards for accreditation.

65. The Respondents say that although it appears that there is extensive information being said to be disclosed the substance is nothing more than the First Claimant and Second Claimant complaining about engagement with the psychology department. They reference paragraph 71 of the claim form at best this is a situation where the First and Second Claimant expressed reservations and repeated the same general submissions as made in relation to alleged protected disclosures 12 and 13 and should be struck out.
66. The First and Third Claimants say that the business decisions in this allegation need to be considered in the regulatory context and evidence need to be heard on this matter and the number of staff within the Psychology Department does not operate to prevent that.
67. On the information before me, and in particular the wording in the List of Issues and paragraph 70 of the claim form, I have had some difficulty in understanding what the information disclosed specifically is. However, taking this into account in view of the claimants' submissions and the high threshold for striking out, I cannot say at this stage there is no reasonable prospect of success, I consider this demonstrates why witness evidence is required. The application is refused. The first stage of the test for strike out has not been met. Again, as per my conclusion in relation to alleged disclosures 10, 12 and 13, in relation to this alleged disclosure 16, I consider it will be necessary to look carefully at what information was disclosed and what the claimants beliefs were at the time regarding regulatory requirements. This will require consideration of evidence and making findings of fact. I do not consider this allegation to be one where it can be said that it can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible.
68. Further, in relation to this allegation, at this stage and for the same reasoning as per the application to strike out, I cannot reach a conclusion that there is little prospect of success, and therefore a deposit order is not appropriate.

Alleged Protected Disclosure 22

69. For ease, I have extracted and summarised below and in italic only the key points in relation to the alleged protected disclosure 22.

2 March 2022 – Information Disclosed by C1 and C2 - That assessment process did not comply with regulatory frameworks; - that they had been subjected to bullying due to raising these concerns; - that the restructuring process was being used to dismiss them due to raising these concerns; - that they intended to raise a grievance against R2 including a whistleblowing complaint.

Legal obligations relied upon - The First Respondent's obligations to students, its regulatory obligations including to the OfS, the QAA and the British Psychological Society, its obligations to comply with employment law, including to not subject whistleblowers to detriment and in relation to redundancy. The Second and Third Respondents' regulatory obligation to act with integrity. Tim Stewart's other obligations to the British Psychological Society in respect of their standards for accreditation.

70. The Respondents submit that the alleged information disclosed are personal complaints, and that if not struck out they should be subject to a deposit order as are plainly weak.

71. No specific oral submissions were made on behalf of the First and Third Claimant, but the general submissions, in particular public interest, have been considered.

72. On the information before me, I cannot say at this stage there is no reasonable prospect of success. There appears to be some possible overlap in the detail in the box headed Information Disclosed with information and possible detriment. However, the application is refused. The first stage of the test for strike out has not been met. Again, as per my conclusion in relation to the above alleged disclosures, I consider it will be necessary to look carefully at what information was disclosed in regard to non-compliant assessment processes and what the claimants beliefs were at the time regarding requirements. This will require consideration of evidence and making findings of fact. I do not consider this allegation to be one where it can be said that it can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible.

73. Further, in relation to this allegation, at this stage and for the same reasoning as per the application to strike out, I cannot reach a conclusion that there is little prospect of success, and therefore a deposit order is not appropriate.

Alleged Protected Disclosure 24

74. For ease, I have extracted and summarised below and in italic only the key points in relation to the alleged protected disclosure 24.

9 March 2022 – Information Disclosed – within grievance - the bullying and harassment that the claimants and other colleagues had experienced from R2, in the form of exclusion, micromanagement, blaming, restructuring, encouraging malicious grievances, veiled threats and creating untrue performance issues.

Legal obligations relied upon – The First Respondent's obligations to students, its regulatory obligations including to the OfS, and its obligations to comply with employment law, including to not subject whistleblowers to detriment and in relation to redundancy. The Second and Third Respondents' regulatory obligation to act with integrity. Tim Stewart's other obligations to the British Psychological Society in respect of their standards for accreditation.

75. The Respondents submit that alleged information disclosed is about how the claimants feel they have been treated and that there is no public interest in what they say is a private dispute.
76. No specific oral submissions were made on behalf of the First and Third Claimant.
77. On the information before me, I cannot say at this stage there is no reasonable prospect of success and the application is refused. The first stage of the test for strike out has not been met. Again, as per my conclusion in relation to the above alleged disclosures, I consider it will be necessary to look carefully at what information was disclosed, in this allegation by careful consideration of what is said within the grievance and what the claimants beliefs were at the time regarding requirements. This will require consideration of evidence and making findings of fact. I note that the grievance, on the face of the claim form and the List of Issues, appears to relate to the three claimants, but without full consideration I cannot reach any safe conclusion that there is no reasonable prospect of success and do not consider this allegation to be one where it can be said that it can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible.
78. Further, in relation to this allegation, at this stage and for the same reasoning as per the application to strike out, I cannot reach a conclusion that there is little prospect of success, and therefore a deposit order is not appropriate.

Indirect sex discrimination

79. In relation to the Respondents application to strike out the Second Claimant's complaints of indirect sex and race discrimination the Respondent submits that the position was summarised by Employment Judge Corrigan at the first preliminary hearing on 10 May 2023 and as recorded at paragraph 66 of the Case Management Order and Summary:

"The claimants had also included indirect race and sex discrimination claims. I explained this involves a neutral provision or practice or similar applied by the respondent(s) to those that share the same protected characteristic as the claimant(s) and those in the comparison group but that but has a disproportionate impact on those that share the same protected characteristic as the claimants, and the claimants themselves. The matters raised by the claimants do not appear to be claims of indirect discrimination but rather to be some of the evidence they rely on to argue that they have been directly discriminated against. Nevertheless the claimants were given time to reflect on this claim and whether it is pursued. If it is pursued they are to provide the information identified in square brackets below in respect of the indirect discrimination claims, in pursuance of the order to provide further information above."

80. The Claimants are all pursuing complaints of direct sex and race discrimination, and on the face of it there appears to be some overlap and the allegations of whistleblowing detriment are also relied upon as allegations of direct discrimination.
81. The indirect discrimination complaints are recorded in the List of Issues at pages 486 and 488 of the Bundle. Only the Second Claimant is now pursuing indirect race and sex discrimination complaints.
82. Dr. Chandra made some oral submissions on behalf of the Second Claimant. He submits that the PCPs have been properly identified and that indirect discrimination is a better case for the Second Claimant, however, he also said that the PCPs may be reframed, but did not specify this further.
83. He considered there is a case of indirect discrimination and referred to the lack of women and ethnic minorities at the top of university structures. He did not make specific submissions in response to the particular comments made on behalf of the Respondents but made reference to migrants requiring higher qualifications in higher education and that not being able to job share disadvantages women. He submits that all the requirements of section 19 are met.
84. The PCPs relied upon in the indirect sex complaints are as set out below, and I have labelled them A – C for ease of reference:
- “A - The respondent applied the **critterion** of lower qualifications to select individuals for higher positions.”*
- “B - The respondent applied the **critterion** of reporting to Dean to the exclusion of reporting to the Deputy Vice Chancellor, to select individuals for higher positions.”*
- “C - The respondent applied the **practice** of selective redundancies without collective consultation where more flexible alternative proposals could be made to share jobs to avoid redundancies.”*
85. The Respondents say the PCPs will not be established on the facts. I am not in a position to make this conclusion or otherwise.
86. On an initial reading, the group and individual disadvantage in both complaints is not entirely clear from the way the Second Claimant has provided information in the form of notes in the List of Issues, the Second Claimant has not provided the information in the exact form ordered.
87. The alleged disadvantage contained in the list of issues for each PCP appears to be as below:
- A - The application of the **critterion** had a disproportionate adverse effect on staff who are females who had risen to positions of influence in R1.*
- B - The application of the **critterion** had a disproportionate adverse effect on staff who are females who had risen to positions of influence in R1.*

*C - Application of the **practice** had a disproportionate adverse effect on staff who are females and more likely to share a job.*

88. In relation to the first two PCPs in the indirect sex complaint, the Respondents submit that the alleged disadvantage is on females who have risen to a position of influence in the First Respondent and that this narrows the pool – it is not all females but a sub-set of females – suggesting that the reference to sex is weak. There is also reference to the reporting to the Dean and exclusion of reporting to the Deputy Vice Chancellor, and the Respondents submit it is wholly unclear how reporting to one and not the other can give rise to a particular disadvantage and does not make sense.
89. The Respondents says this appears to be a complaint about how the Second Respondent treated the Second Claimant, and has nothing to do with sex, and that on the Claimant's own case the Second Respondent favoured a number of women, and an indirect sex discrimination complaint cannot succeed without establishing group disadvantage.
90. In relation to the third PCP, the Respondents submit that the PCP of not undertaking a collective consultation impacts all staff, both male and female, and this allegation is not one of indirect sex discrimination.
91. Further they say that the Second Claimant was a full time employee and that the suggestion that a collective consultation would mean more women would be open to flexible working and job sharing is a strange and speculative claim and would be impossible for the Second Claimant to evidence.
92. The Respondents submit that the references to 3 or 4 comparators indicates the indirect complaints are actually more to do with individual treatment of people, and that is not a situation where group disadvantage will be established.
93. Section 19 of the Equality Act 2010 is set out above. Indirect sex discrimination complaints are complicated, but they require a PCP to be applied to a group that includes persons not sharing the same characteristic, in this case men and women, but put all women, including the Second Claimant at a disadvantage.
94. As set out above, I am not in a position to conclude whether or not the alleged PCPs were in place, and this needs determining after hearing evidence. However, I do find the both the alleged PCPs and the associated disadvantages difficult, namely for the reasons set out by the Respondents. I have dealt with A, B and C separately.
95. In relation to A, it is not clear what the group disadvantage is said to be, and further, it is not clear how the alleged PCP is said to have disproportionate adverse effect. It is further challenging that the adverse effect seems to be limited to females in positions of influence in the First Respondent, and not all females.

96. On the basis of the information before me I cannot reach a conclusion that there is no prospect of success but I do consider that there is little prospect of success of this allegation as I am struggling to see the link to sex, in particular in view of the reference to females in the position of influence. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order, including the range of allegations and proximity to the final hearing. The Claimant is ordered to pay a deposit.

97. In relation to B, I have reached the same conclusion as A, for the reasons set out in paragraphs 95 and 96 above.

98. In relation to C, I find it difficult to see how the Claimant will establish group and individual disadvantage based on the alleged PCP. I cannot reach a conclusion that there is no prospect of success but I do consider that there is little prospect of success of this allegation. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order, including the range of allegations and proximity to the final hearing. The Claimant is ordered to pay a deposit.

Indirect race discrimination

99. In relation to the indirect race discrimination complaint the Second Claimant relies on two alleged PCPs, I have labelled them as D and E for ease:

*“D - The respondent applied the **critterion** of lower qualifications to select individuals for higher positions.”*

*E - The respondent applied the **practice** of selective redundancies without collective consultation.”*

100. As above, I have set out the alleged disadvantage below.

*D - The application of the **critterion** had a disproportionate adverse effect on staff with ethnic minority backgrounds who are associated with and had higher qualifications.*

*E - Application of the **practice** had a disproportionate adverse effect on staff with ethnic minority backgrounds who are deemed 'difficult' when they make protected disclosures.*

101. The Respondents submit that in relation to the alleged criteria of lower qualifications that there is no discernible link to

race and would, in theory, disadvantage all people with higher qualifications. They say the Second Claimant asserting that she is an ethnic minority with higher qualifications is an individual complaint, and not one that falls within the remit of an indirect discrimination complaint.

102. The Respondents submit that in relation to E, the alleged disadvantage being referenced to whistleblowers makes no sense, and that an automatically unfair dismissal complaint is already being pursued and this does not fit as a section 19 complaint.
103. I have set out my conclusions in relation to D and E below.
104. In relation to D, the basis of the information before me I cannot reach a conclusion that there is no prospect of success but I do consider that there is little prospect of success of this allegation as I am struggling to see the link to race, in particular in view of the reference to ethnic minorities associated with and having higher qualifications. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order, including the range of allegations and proximity to the final hearing. The Claimant is ordered to pay a deposit.
105. In relation to E, again the basis of the information before me I cannot reach a conclusion that there is no prospect of success but I do consider that there is little prospect of success of this allegation as I am struggling to see the link to race and in particular I consider it challenging to understand how group disadvantage will be demonstrated in view of the fact the disadvantage appears to be linked to *ethnic minority backgrounds who are deemed 'difficult' when they make protected disclosures*. This appears to be an argument that any treatment flows from being considered to be difficult due to having made a protected disclosure, and not race.
106. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order, including the range of allegations and proximity to the final hearing. The Claimant is ordered to pay a deposit.
107. If the Second Claimant pays the deposit, all allegations will continue to a final hearing, if the Second Claimant does not pay the deposit the indirect sex and race discrimination complaints will not continue. I have

issued a separate Deposit Order, and have purposely set a short deadline for payment in view of the proximity of the final hearing. As set out in paragraph 3 above, there are number of allegations that need to be considered at the final hearing and I do not consider that the final hearing needs adjusting in any way in view of my decision to order a deposit.

Employment Judge G Cawthray

Date 2 April 2024

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