



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. W Stewart

**Respondent:** Project Audio Visual Limited

**Heard at:** Reading (via CVP)

**On:** 14 October 2024

**Before:** EJ Milner-Moore

## Representation

Claimant: Mr. Dhilwayo (Legal Consultant)0

Respondent: Mr. M Green (Counsel)

**JUDGMENT** having been sent to the parties on 11 November 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. This matter was listed for a preliminary hearing in order to determine the respondent's application for an order to strike out the ET complaint as originally filed on the grounds that the complaints being advanced had no reasonable prospects of success. Alternatively, the respondent applied for a deposit order on the grounds that the complaints had little reasonable prospects of success. I received a bundle of documents of 119 pages and a short statement from the claimant addressing his financial position and ability to pay a deposit order. I heard oral submissions from both representatives.

### Background

2. The claimant was 37 when he brought his employment tribunal claim on 16 November 2023. At that time, he was still employed by the respondent as its Head of Technical Support Services. The respondent is a small company specialising in video conferencing.
3. The grounds of claim allege that the claimant was subject to age discrimination (indirect discrimination and harassment related to age), victimisation and whistleblowing detriment.

**Indirect age discrimination [paragraphs 20-30 of the grounds of claim]:  
section 19 of the Equality Act 2010.**

- a. The complaint advanced in the grounds of claim is that there was a “provision, criterion or practice” or PCP, relating to the “*incentive structure, promises and employment conditions set by [the Respondent]*” in which promises made to the claimant were not upheld and that this “*breach of promise to Mr. Stewart created a provision that allowed new hires who are notably older, to receive higher salaries, directly impacting [the claimant’s terms] of employment.*” The claim goes on to state that “*the criterion is the age based conditions applied to employees, where promises to Mr. Stewart were breached, allowing older employees to receive higher salaries*”. The grounds of claim identify three individuals who received higher salaries than the claimant: Mr. Bailey the Head of European Microsoft Alliance (whose age range was described as “*late 40s to early 50s*”), Mr. Seket, Head of European Operations (described as “*late 40s to early 50s*”) and Mr. Rampley, Head of Operations (described as “*uncertain possibly in his early/mid 40s*”).

**Harassment related to age [paragraphs 31-37 of the Grounds of Claim]  
section 26 of the Equality Act 2010**

- b. The claimant referred to two specific incidents when derogatory comments, or derogatory names, were said to have been used related to the claimant’s age. These incidents occurred on 10 October 2022, when Mr. Hudson is alleged to have made derogatory comments to the claimant during a meeting, and on 19 July 2023, when Mr. Hudson is alleged to have referred to the claimant as a “*fucking prick*” and a “*fat fuck*” and to have been physically aggressive to the claimant during an argument in the workplace. It was also suggested that the claimant had been excluded from aspects of business operations due to his age, though no details of the nature of that exclusion were provided.

**Victimisation: section 27 of the Equality Act 2010 [paragraphs 38 -44 of the  
Grounds of Claim]**

- c. A number of detriments were identified in the grounds of claim. These included the failure to address Mr. Hudson’s behaviour during the 19 July 2023 incident, an inadequate response to a September 2022 incident involving one of the Claimant’s colleagues (Mr. Long) during which the claimant considered Mr. Long to have behaved towards him in an unprofessional manner, the comments alleged to have been made by Mr. Hudson on 10 October 2022, the failure to give Mr. Stewart improvements to his pay and benefits on his promotion to Director in early 2022, an unspecified allegation of “*exclusion from key business operations and financial discussions*” and allegations regarding “*discrepancies and disputes regarding commission and dividend payments ....page 16 paragraphs (d) and (m)*”. The reference to page 16 paragraphs (d) and (m) is a reference to the grievance letter sent by the claimant on 17 August 2023. That letter indicates that the matters complained of regarding commission

and dividend payments relate to decisions taken by the respondent in January 2023. The letter also indicates that Mr. Stewart had sent an email of complaint regarding his exclusion from key business dealings in September 2021. The grounds of claim did not identify what was said to be the “protected act” for the purposes of section 27(2) of the Equality Act 2010. However, during the hearing, it was confirmed that the protected act was the sending of the claimant’s grievance letter dated 17 August 2023.

**Whistleblowing detriment: Sections 43A to K and section 47B of the Employment Rights Act 1996 [Paragraphs 45-52 of the Grounds of Claim]**

- d. The grounds of claim set out a complaint of whistleblowing detriment at paragraphs 45 to 52. The complaint is not clearly articulated. Reference is made to the events of 19 July 2023 bringing to light “*a series of concerns, including workplace safety, harassment and breaches of professional conduct standards*” and assert that the claimant had made “*a series of whistleblowing allegations concerning inappropriate conduct, professional misconduct and breaches of agreement by senior executives.*” A list is provided of incidents which prompted the claimant to act and which appear to be the subject of disclosures. The matters listed are: “the Joe Long incident” which occurred in September 2022, the comments made by Mr. Hudson on 10 October 2022, a failure to increase the claimant’s pay and benefits on his promotion to director in 2022 in breach of a verbal agreement, failure to resolve a dispute regarding the claimant’s commission and dividend payments, exclusion of the claimant from key business operations, an unspecified allegation that Mr. Hudson had behaved unprofessionally, used abusive language and manipulated HR processes, alleged breaches of employee privacy through covert audio recording, alleged unethical sales practices, a failure to consistently make employee pensions contributions, the creation of a culture of fear and manipulation by Mr. Hudson, a disregard for professional development, discrepancies in the claimant’s hiring agreement and a lack of transparency, missing keys and a disregard for purchasing service contracts.
- e. These matters were said to show “*serious breaches by the Respondent compromising a respectful and professional work environment*”. However, there was no clarity in the pleaded case about what information the claimant had disclosed or when, how or to whom any disclosures had been made. Nor did the claim specify which of the forms of wrongdoing set out at section 43(B)(1) of the Employment Rights Act 1996 the claimant believed his disclosures tended to show. Further, many of the concerns related to the claimant’s individual treatment by the respondent and so it was not clear how the claimant considered that the disclosures tended to show matters of public interest.
- f. The detriment alleged by the claimant was that he had been excluded from policy group discussions and workplace social events and had not been shortlisted for a promotion.

4. The claimant's representative submitted a letter of grievance to the respondent on 17 August 2023 on the claimant's behalf. The letter was a lengthy one and the letter was subsequently confirmed to be the disclosure of information relied on for the whistleblowing complaint. The letter complained primarily about the incident on 19 July 2023 involving Mr. Hudson but also alleged that this formed part of a series of events which had resulted in a toxic work environment. The letter was largely focused on complaints regarding Mr. Hudson (it alleged that he had behaved aggressively and unprofessionally not only towards the claimant but also to a number of other employees) and on alleged failures to honour agreements with the claimant in relation to his status and remuneration. It also set out complaints relating to the matters listed at 3d above. It asserted that the grievance letter should be treated as a qualifying disclosure about the respondent's "*potential failure to maintain a respectful and professional work environment*" and so "*may relate to "endangering the health and safety of an individual"*" and "*concealing information*" about such behaviour. The letter contains no suggestion that the claimant had been subject to age discrimination or that the respondent was operating any indirectly discriminatory practices or policies. Nor did it contain any assertion that the respondent had acted in breach of the Equality Act 2010 in any other respect.
5. On 9 February 2024, the respondent filed a response denying the claims, asserting that they were insufficiently particularised and that they appeared to have little, or no, merit such that an order for strike out or deposit should be made. The response noted that the grievance contained no allegations that the Respondent had engaged in discriminatory conduct and so could not be a protected act on which a complaint of victimisation could be founded.
6. On 27 February 2024, the claimant's representative made an application to amend the complaint. He did not provide any further detail in respect of the existing complaints. The amended grounds of claim added new complaints of disability discrimination (direct discrimination, indirect discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment and victimisation) and a complaint of breach of contract regarding nonpayment of commissions and bonuses.
7. On 5 March 2024, the respondent wrote to the Tribunal objecting to the application to amend and notifying that the Claimant had failed to provide clear particulars of both the original claim and the amended claim and that this was causing prejudice to the respondent.
8. On 24 April 2024, EJ Anstis wrote to the claimant's representative noting that he had directed that the case be listed for a preliminary hearing to consider the making of orders for strike out or deposit and explaining in some detail why such an approach was being adopted. The letter stated:

*"The claimant has set out his claims as being:*

- *Indirect age discrimination,*
- *Age related harassment,*
- *Victimisation, and*

- *Whistleblowing detriment.*

*As presently set out, there appear to be a number of problems with the claims:*

- *Indirect age discrimination: the PCP alleged is entirely unclear, including how it is that such a PCP disadvantages people in a particular age group.*
- *The Harassment allegation is said to be based on derogatory names relating to age being used during the incident on 19 July 2023, but despite the claim form giving an account of the incident, no such names are mentioned in the account of the incident.*
- *It is not clear what the protected act is for the purposes of the victimisation claim. If it is the grievance of 29 July 2023 the claim form has not set out what allegations of discrimination are contained in that grievance. The respondent says that there are none.*
- *Para 46 of the particulars of claim seem to set out 13 separate protected disclosures, but do not give any particular detail of what was said nor how they could fall within the protected disclosure rules. The scope of any resulting detriments is entirely unclear.*

*Given this, Employment Judge Anstis has listed a public preliminary hearing of his own motion to consider striking out all or part of the claimant's claim on the basis that they have no reasonable prospect of success or are not within the jurisdiction of the tribunal. Alternatively, this hearing will consider whether a deposit order should be imposed in respect of any allegation. Depending on the outcome of this, the parties should then expect there to be general case management, including listing any remaining parts of the claim for a final hearing. The parties should note that this is not intended to be a detailed investigation of the underlying merits of any claims. The hearing has been established to consider whether the claimant's claim, as presently set out, brings claims with a reasonable prospect of success within the jurisdiction of the tribunal.*

*The claimant is invited to consider ahead of this meeting whether his claim can be clarified through the addition of further particulars or the making of an application to amend his claim.*

*Any such particular or application to amend should be provided or made in good time before the hearing. To the extent that the claimant wishes his means to be taken into account on any consideration of a deposit order, he must submit any evidence he wishes to provide in relation to that (including a witness statement of any oral evidence) to the tribunal and the respondent no later than 14 days before the preliminary hearing".*

9. On 1 June 2024, the claimant's representative submitted a second application to amend the claim. This time the proposed amendment added a new complaint of constructive unfair dismissal, the claimant having resigned his employment on 17 May 2024. The amended grounds did not contain any further clarification of the original grounds of claim, despite the need for such clarification having been raised by this time on three occasions, twice by the respondent and once by EJ Anstis.

## Representatives' submissions

10. The respondent's representative submitted that the claims should be struck out on the grounds that they had no reasonable prospects of success, noting the problems that had been identified by EJ Anstis and that the claimant had not attempted to provide any further clarification to address those deficiencies. The respondent also noted that, of the three comparators identified by the claimant in support of the indirect age discrimination complaint, two of those named were, in fact, younger than the claimant. The claimant's representative accepted that the claimant did not know their ages and that the claimant had no reason to believe that the respondent's representative was not correctly representing the position.
11. I asked the claimant's representative to address the points raised by EJ Anstis and to explain why the claims should not be struck out. In relation to the complaint of indirect discrimination, the claimant's representative was unable to articulate any PCP which was, or would have been, applied by the respondent both to the claimant and to others in relation to pay and which placed the claimant at disadvantage due to his age/age group as compared with others who were older. The claimant's representative appeared to maintain that the respondent had chosen to pay the claimant a lower rate of pay because of his age. I suggested that such an allegation seemed better put as a complaint of direct age discrimination. Although, assuming that the respondent was correct that at least two of the higher paid comparators relied on by the claimant were, in fact, younger than him, a direct age discrimination complaint seemed unlikely to succeed. However, the claimant's representative nonetheless maintained that the complaint in relation to pay was a complaint of indirect discrimination, but could not explain what the PCP was beyond observing that the claimant received lower pay and that this must therefore be indicative of a PCP relating to the claimant's age.
12. I asked the claimant's representative to clarify matters in relation to the complaint of harassment and to explain the basis on which it was said that the treatment complained of was related to age. He confirmed that, contrary to the impression given in the grounds of claim, it was not being said that the language used in the two incidents in question overtly referenced the claimant's age. It was being said that, in treating the claimant in the manner complained of, the respondent did so because of the claimant's age.
13. In relation to the complaint of victimisation, the claimant's representative confirmed that the "protected act" relied upon was the submission of the claimant's grievance on 17 August 2023. However, that was problematic for two reasons. First, the grievance, despite being very lengthy, makes no allegation that the respondent was contravening the Equality Act. Second, the detriments that are complained of pre-date the submission of this grievance and so it is difficult to see how it can be said that the claimant was subjected to the detriments because he had done a protected act. The claimant's representative suggested for the first time that there might have been a further protected act, when the claimant had been supportive of another employee (Ms. Bailey) who had reported being spoken to aggressively by Mr. Hudson. However, when asked about what that the claimant had done and whether he had raised any concern about a breach

of the Equality Act 2010 on that occasion, the claimant's representative did not provide any information to indicate that the claimant had done any act that would potentially engage section 27(2) of the Equality Act 2010.

14. In relation to the complaint of whistleblowing detriment, I noted that the claimant had not clarified the complaints in response to the issues identified by EJ Anstis. I asked the claimant's representative what clarification he could provide about those matters now: what information had been disclosed, what category of wrongdoing was said to be engaged by the disclosure and why did the claimant think that the matters disclosed potentially engaged the public interest? I allowed him some time to take instructions from the claimant. At that point, the claimant's representative said that the whistleblowing detriment complaint had not been correctly set out in the grounds of claim and that what currently appeared was not the case that the claimant wanted to advance. I asked whether the whistleblowing complaint was being withdrawn. The claimant's representative said that it was not and that he would want to apply to amend the complaint. I asked for a summary of the proposed amendment but he was not in a position to indicate what the amended case would be and simply said that he would want to submit an amended claim.

## Law

15. Section 19 of the Equality Act 2020 provides as follows

### *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.*

16. Section 26 of the Equality Act 2010

### *26 Harassment*

- (1) *A person (A) harasses another (B) if—*
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
  - (b) the conduct has the purpose or effect of—*
    - (i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*(2) A also harasses B if—*

- (a) A engages in unwanted conduct of a sexual nature, and*
- (b) the conduct has the purpose or effect referred to in subsection (1)(b).*

*(3) A also harasses B if—*

- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and*
- (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

- (a) the perception of B;*
- (b) the other circumstances of the case;*
- (c) whether it is reasonable for the conduct to have that effect.*

**17. Section 27 of the Equality Act 2010**

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

- (a) B does a protected act, or*
- (b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*

- (a) bringing proceedings under this Act;*
- (b) giving evidence or information in connection with proceedings under this Act;*
- (c) doing any other thing for the purposes of or in connection with this Act;*
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.*

*(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

*(4) This section applies only where the person subjected to a detriment is an individual.*

*(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

**18. Section 43 B of the Employment Rights Act 1996 provides:**

**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 ]<sup>2</sup> 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

19. Section 47 B of the Employment Rights Act 1996 provides

**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).*

20. Rule 37 of the 2013 Employment Tribunal's Rules of Procedure provides as follows:

*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;*

...

*(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*

21. In applying rule 37, I had regard to the principles established in case law in relation to the approach to be adopted when considering an application to strike out complaints of discrimination or whistleblowing detriment on the grounds that they have no reasonable prospects of success.

- a. A complaint of discrimination should not be struck out for having no reasonable prospects of success save in the most plain and obvious cases. Discrimination claims are usually fact sensitive and their proper determination, following a full hearing at which the facts can be carefully considered, is a matter of high public interest (**Anyanwu and another v South Bank Student Union** and another [2001] W.L.R. 638).
- b. It would only be in an exceptional case that it would be appropriate to strike out a case where the central facts are in dispute. Such a case might arise, for example, where the facts sought to be

established by a claimant were “*totally and inexplicably inconsistent with the undisputed contemporaneous documentation*”.

- c. The comments made by the Court of Appeal in **Anywanwu** in relation to the strike out of discrimination complaints apply with equal force to complaints raised by whistleblowers (**Eszias v North Glamorgan NHS Trust** [2007] I.C.R 1126.)
- d. The EAT’s judgment in **Cox v Adecco** [UKEAT/0339/19/AT (V)] helpfully summarises the core principles that should inform consideration of an application to strike out as follows:

*“28. From these cases a number of general propositions emerge, some generally well- understood, some not so much:*

- (1) No-one gains by truly hopeless cases being pursued to a hearing;*
- (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;*
- (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;*
- (4) The Claimant's case must ordinarily be taken at its highest;*
- (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;*
- (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;*
- (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;*
- (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;*
- (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.”*

## **Conclusions**

22. In reaching my decision on strike out, I applied the provisions and legal principles set out above. I also considered the grounds of claim as originally

submitted and as subsequently amended. I also reviewed the grievance letter which had been submitted on the claimant's behalf by his legal representative on 17 August 2023 and which provided further context not contained in the grounds of claim.

23. I had regard to the fact that the claimant was on notice that the claims were not adequately pleaded following the submission of the response, following the respondent's objection to the first application to amend and, most critically, as a result of the letter written at EJ Anstis's direction. That letter pointed out a number of problems with the grounds of claim as pleaded and effectively invited the claimant to cure these deficiencies by providing an amended pleading or by providing further information. The claimant then submitted two amendments to the claim but chose to add new causes of action rather than to address the points identified by EJ Anstis. I noted that the claimant and his representative have had several months to prepare for the preliminary hearing and should have been well placed to address the points identified by EJ Anstis, either by producing a draft amended grounds of claim or, at the very least, by ensuring that they were in a position to explain during the hearing how, were an amendment to be permitted, the deficiencies identified could be addressed such that any amended claim might have reasonable prospects of success.

24. **Indirect age discrimination:** I considered that the complaint of indirect age discrimination should be struck out for the following reasons:

- a. The claim as currently set out does not identify any viable PCP that accords with section 19 of the Equality Act 2010. Any PCP must be one that the respondent applies, or would apply, to other employees who are not of the same age/age group as the claimant and where there is evidence to suggest that the PCP places persons of the claimant's age/age group at particular disadvantage when compared with others not of the same age/age group. The claimant's representative had been unable to explain during the hearing what the PCP was, despite being on notice that this would be an issue for consideration. His explanation seemed to boil down to the fact that the claimant was younger and received less pay therefore there must be a policy of some kind to that effect.
- b. I considered whether that deficiency could be cured by an amendment, either to identify a different PCP, or to reformulate the claim as a complaint of direct discrimination if that was, in reality, the complaint being advanced. However, the claimant could not offer any satisfactory explanation of the proposed PCP and there was no reason to think that allowing further time to submit an amended case would lead to a properly formulated PCP being set out. Furthermore, the claimant's representative was not seeking to advance a complaint of direct discrimination.
- c. The claimant had essentially pinned his complaint of age discrimination on his assumption that three higher paid colleagues were older than him. However, the respondent had explained during the hearing that two of the individuals in question were in fact younger than the claimant. This did not appear likely to be a matter of factual dispute. The claimant's representative accepted that the claimant had no reason to believe that the respondent's explanation

as to their ages was incorrect. In drafting the grounds of claim, the claimant had proceeded from assumptions rather than any actual knowledge of the ages of his comparators. On that basis, there appeared to be a situation where there were three individuals, each with different job titles, each with different rates of pay, all of whom were paid more than the claimant, one of whom was older than the claimant and two of whom were younger. I did not consider that any complaint of age discrimination in relation to pay, however formulated, would have any reasonable prospects of success in the circumstances. There would be no basis for concluding that any PCP (were the claimant to identify one) placed younger staff at disadvantage and no basis for asserting that the claimant had been less favourably treated on grounds of age.

**25. Harassment related to age:** I reached a different conclusion in relation to the complaint of harassment related to age and decided not to strike the claim out but made it subject to a deposit order.

- a. I noted that the claimant was not suggesting that he had been the subject of any overtly derogatory language relating to his age in the two specific incidents complained of. However, I recognized that a complaint of age-related harassment might nonetheless be made out if the treatment complained of was accorded to him because of his age.
- b. I did not consider that it could be said that, taking the claimant's case at its highest, there were no reasonable prospects of success with such a complaint. I considered that it was a matter that would turn on disputed facts as to the treatment accorded to the claimant and the reasons for it and so could only properly be resolved on hearing oral evidence from the parties at a full hearing. However, I did consider that there were little reasonable prospects of success with such a complaint and that it would be appropriate for a deposit order to be made. I have set out my reasons for doing so in a separate order.

**26. Victimization:** I considered that the claim of victimisation should be struck out on the grounds that it had no reasonable prospects of success for the following reasons:

- a. The claimant put his case on the basis that he had performed a protected act through the submission of the grievance letter of 17 August 2023. However, having carefully reviewed that letter it made no allegation that the respondent had contravened the Equality Act 2010 and so did not engage section 27(2)(d) of the Equality Act 2010. Nor were its contents, in any other respect, connected with the Equality Act 2010 such that it could be said that sections 27(2) (a), (b) or (c) of the Act were potentially engaged.
- b. Furthermore, even taking the claimant's case at its highest and assuming that the matters said to be detriments had occurred, the detriments appeared to predate the grievance letter and so could hardly have been caused by it.
- c. I considered whether there was reason to think it likely that any deficiency could be cured by an amendment but concluded that there was not. The claimant had been on notice of the issue relating to the

grievance letter since receiving the grounds of resistance and the point was also identified in the letter sent at EJ Anstis's direction. The claimant had not provided any written further information or submitted proposed draft amended grounds of claim to address the issue. The suggestion was made in oral submissions that there was a different protected act (the provision of support for Ms. Bailey) that could be relied on. However, the claimant's representative was unable to provide any specific information about what the claimant had done in supporting Ms. Bailey or how any support offered potentially constituted a protected act as defined at section 27(2) of the Equality Act 2010. It was not being said that the claimant had, for example, reported that he considered that Ms. Bailey had been subject to discrimination. (I also noted from the grievance letter that the issue with Ms. Bailey had occurred in early July 2023 and so any potential protected act would still post-date most of the detriments.)

**27. Whistleblowing detriment:** I considered that the whistleblowing complaint should be struck out for the following reasons:

- a. I had some reservations as to whether the disclosures made by the claimant were likely to constitute qualifying disclosures within the meaning of section 43(B) of the Employment Rights Act 1996. In many instances it was not clear what form of wrongdoing was said to be engaged by the disclosures. Further, the bulk of the disclosures appeared to relate to the claimant's individual treatment by the respondent. It was therefore not clear on what basis the claimant reasonably believed himself either to have disclosed information that tended to show one of the categories of wrongdoing listed at section 43(B)(1) of that Act, or to have made any disclosure in the public interest. I therefore wanted to establish the claimant's position in relation to these points, recognising that I would need to take the claimant's case at its highest, that any points of factual dispute were best resolved at a full hearing given the public interest in the proper determination of such complaints, and that consideration would need to be given as to whether any deficiencies in the pleaded claim could be remedied by provision of further information or by an amendment.
- b. When I attempted to go through the disclosures point by point in order to clarify the claimant's position in relation to these matters the claimant's representative was unable to provide further clarification, despite being allowed time to take instructions from his client. The claimant's representative then said that the whistleblowing complaint was not correctly set out in the grounds of claim as currently pleaded. He made clear that he was not withdrawing the complaint. He stated that it was the claimant's intention to amend the claim to correctly set out a whistleblowing detriment complaint. However, he gave no indication of what the amended claim would be likely to consist of and how it would differ from what was currently pleaded
- c. In the circumstances, I considered that it would be right to strike out the whistleblowing detriment complaint on the grounds that it had no reasonable prospects of success. The claimant was no longer advancing his complaint by reference to the existing grounds of claim on the basis that these did not correctly set out the claim that he

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wished to bring. I considered whether it would be better to allow the claimant time to submit amended grounds of claim but I considered that the claimant had already had more than sufficient opportunity to clarify his claims. I was also concerned that the claimant's representative had been unable to give any indication of what an amended claim might consist of. I did not therefore consider that there was reason to think that, were the claim to be amended and properly pleaded, it might have reasonable prospects of success.

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Employment Judge Milner-Moore

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Date 16 December 2024

REASONS SENT TO THE PARTIES ON

17 December 2024

FOR THE TRIBUNAL OFFICE