Neutral Citation Number: [2025] EAT 51

Case No: EA-2024-000023-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 April 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

KATERINA RAINWOOD

Appellant

- and -

PEMBERTON CAPITAL ADVISORS LLP (1)
PEMBERTON OPERATIONAL SERVICES UK LTD (2)
GRAEME JOHN DELL (3)
SYMON DRAKE-BROCKMAN (4)
PAUL ALDRICH (5)

Respondents

- -
- -

Darryl Hutcheon (instructed by the Appellant) for the **Appellant**
Alexander Robson (instructed by Girlings LLP) for the **Third Respondent**
Zac Sammour (instructed by Lewis Silkin LLP) for the **First, Second, Fourth and Fifth Respondents**

Hearing date: 26 and 27 February 2025

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Strike Out

The claimant in the employment tribunal brought multiple complaints against her former employer and other respondents, including of detrimental treatment on grounds of whistleblowing. The third respondent was the claimant's former line manager. The tribunal struck out a number of specific complaints of detrimental treatment against him, on the basis that they had no reasonable prospect of success. Having regard to the content of her pleaded case, and to the further information that she had provided about the additional matters and allegations that she sought to rely upon in support of her case that he was involved in that treatment, the tribunal erred by not considering, as an alternative to strike out, permitting or requiring her to amend or particularise her complaints against him.

HIS HONOUR JUDGE AUERBACH:

Introduction and background

1. This matter is ongoing in the London Central employment tribunal. I will refer to the parties as they are in the tribunal. The claimant was formerly employed by the second respondent. By three claim forms she raised complaints of direct sex discrimination, harassment related to sex, sexual harassment, being subject to detriment on the ground of protected disclosures, and unfair dismissal for the reason or principal reason of having made protected disclosures. All of the complaints are contested. The claimant is a litigant in person in the tribunal. The first, second, fourth and fifth respondents have common representation. The third respondent is separately represented.

2. A preliminary hearing took place before EJ R S Drake on 15 and 16 November 2023. The claimant was in person. The first, second, fourth and fifth respondents were represented by Andrew Smith of counsel and the third respondent by Carl Vincent, a solicitor.

3. In the reserved decision the judge decided that a number of the claimed disclosures fell within section 43B(4) **Employment Rights Act 1996**, and so they were struck out of the claims. Section 43B(4) (omitting irrelevant words) provides as follows:

> **"A disclosure of information in respect of which a claim to legal professional privilege … 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."**

4. In that same decision the judge granted the third respondent's application to strike out certain of the complaints of detrimental treatment on the ground of having made protected disclosures, in so far as they were advanced against him.

5. The claimant appealed against both decisions. Grounds 1 – 4 relate to what I will call the LPP (legal professional privilege) appeal against the decision that section 43B(4) applied

to the disclosures in question. Grounds 5 and 6 relate to what I will call the strike-out appeal. Prior to the EAT hearing an application was made for an order allowing the LPP appeal by consent. I directed that the application would be considered at the hearing.

6. The claimant was represented by Mr Hutcheon of counsel and the third respondent by Mr Robson of counsel. Because the LLP appeal concerned material which the respondents contend attracts LLP and is confidential, they had applied for an order that any discussion of such material be in private, and that any copies of bundles provided to observers or third parties should be redacted in respect of passages referring to such material.

7. I heard that application first, in public. In addition to counsel for the other parties, Zac Sammour of counsel appeared on behalf of the first, second, fourth and fifth respondents, specifically on that application. I agreed to make an order that certain of the bundles made available to members of the public attending the hearing, or which might be made available to an interested third party, should be the subject of limited redactions, bearing upon material which the respondents assert is the subject of LPP, and therefore confidential. I gave oral reasons in public for that decision. Mr Sammour thereafter departed the hearing.

The Consent-Order Application in respect of the LPP Appeal

8. I heard the consent-order application in public. I agreed to allow the LPP appeal by consent. I gave oral reasons. Bearing in mind the observations of the EAT in **Dozie v Addison Lee Plc** UKEAT/0328/13 at [20], concerning applications to allow an appeal by consent, I think it appropriate also to set out my reasons in writing as part of this decision.

9. The key conclusions of the tribunal, as to why it found that section 43B(4) applied to the disclosures in question, were set out at [15] of its reasons as follows:

> **"The PDs challenged by the Rs, i.e. 1,2,3,5,6,9,11, 13, 15, 17, 18, 19, 20, 22, 25 and 26 all refer to (inter alia) matters which on my interpretation of them**

> **constitute advice to R1 and R2 of legal advice obtained by C from foreign lawyers (a firm called EHP), advice from C herself to her employers (as clients), information obtained in the course of obtaining C's advice, and/or communications falling within the so called continuum of privileged communications. In short, on detailed examination and consideration of the evidence before me, I accept Mr Smith's submissions as to their true nature. I do not accept C's counter submissions."**

10. At [16] the tribunal referred to features of two of the disclosures at issue which it said showed that they were clearly caught by section 43B(4). At [17] it referred to the claimant's statement, skeleton and submissions, but said that they were no substitute for argument as to why the subject matter "which prima facie fall within LPP, do not do so on proper interpretation." It referred to one particular legal argument advanced by the claimant, but considered that it was not pertinent to the pleaded nature of the disclosures at issue. At [18] the judge stated that, without going through each of them individually, he made the same findings in relation to all the disclosures in relation to which this issue had been raised.

11. The grounds assert that the tribunal erred in respect of this issue because it failed to consider at all a number of specific distinct strands of the contentions advanced by the claimant as to why section 43B(4) did not apply to the disclosures at issue and/or because its reasons were not *Meek*-compliant, that is, not sufficient to explain its conclusions.

12. Ground 1 asserts that it was part of the claimant's case that, in respect of a number of the relevant disclosures, no claim of LPP could be maintained because either, in respect of external counsel, neither the first respondent nor the second respondent was the client, or, in so far as the claimant was providing legal advice at all, such advice was not sought by her client. The ground contends that the tribunal erred because it failed to consider this argument in its decision, and so erred in concluding, without supporting reasoning, that the subject matter of the disclosures in question included advice from the claimant herself to her employers (plural) as clients. The respondents accept that this particular line of argument *was* advanced by the

claimant before the tribunal, but not addressed in the decision.

13. The ground includes an assertion that the judge said certain things during the course of argument, said to be indicative of a refusal to consider this argument or a closed mind. However, the judge had not had an opportunity to comment on this, it was not necessary for me to form a view about it for the purposes of what I have to decide, and I have not done so.

14. Ground 2 asserts that the tribunal erred by failing to consider another contention, being that a number of the claimed disclosures related to advice derived from the fruits of the claimant's own researches and were therefore not a disclosure of information "made by a person to whom the information had been disclosed in the course of obtaining legal advice." Again it is not disputed that the claimant did advance such a line of argument in relation to certain of these claimed disclosures, and that the tribunal did not address this.

15. Ground 3 asserts that the tribunal erred by failing to address the claimant's contention that the respondents had waived privilege in respect of the subject matter of certain of these disclosures, in certain communications that she identified. Again it is accepted that the claimant did advance that argument, and that, while the tribunal noted in setting out the law that privilege can be waived, it did not address the claimant's specific argument about that.

16. Ground 4 contends that the reasons are inadequate in respect of the foregoing matters and more generally, including because paragraph [15] and the paragraphs that follow do not address specifically, or adequately, each one of the disclosures at issue.

17. I note that in order to dispose of this application it was not necessary for me to form a view on *any* factual or legal issue between the parties relating to the respondents' contested claim that section 43B(4) applies to the disclosures in question, and/or that LPP attaches to the material over which they assert it. In particular, I did not have to determine any legal issue as

to the meaning or interpretation of any part of that sub-section.

18. Having regard to the common ground and the material before the tribunal that I was shown, I was satisfied that, subject to certain revisions to the draft, which were agreed, a consent order allowing the LPP appeal was appropriate. The substantive judgment in that respect was quashed, as well as paragraph [19] of the decision, which was in effect a consequential judgment in respect of the complaints of detrimental treatment in so far as they rely upon the disclosures to which the section 43B(4) contention relates.

19. I was also satisfied that the agreed description of the issues to be remitted to the tribunal, upon this part of the appeal being allowed, fairly reflected the gist of the relevant issues relating to section 43B and/or LPP that will remain live for determination following my order. Finally, the draft order invited me to direct that these issues be remitted to be considered by a different employment judge. I note that this, too, was an agreed proposed provision. It did also appear to me that there would be no particular advantage to the matter returning to EJ RS Drake. In those circumstances I was prepared so to direct.

The Strike-Out Appeal

20. The broad background and chronology relevant to this appeal is as follows.

21. The claimant's employment with the second respondent began in October 2019. She is a qualified solicitor and was employed as Head Counsel – Funds, at Managing Director Level. From July 2021 she reported to the third respondent.

22. On 26 January 2023 the claimant raised a grievance including allegations against the third respondent. The content was later reflected in parts of her tribunal complaints.

23. On 24 February 2023 the claimant presented her first claim form against the first,

second and third respondents. There were complaints of detriment on the grounds of protected disclosures – which I will call whistleblowing-detriment complaints – and of direct sex discrimination, harassment related to sex and sexual harassment. On 12 June 2023 the claimant presented her second claim form against the first to fourth respondents. It contained further whistleblowing-detriment complaints and complaints of direct sex discrimination.

24. On 13 June 2023 the claimant's employment ended by dismissal.

25. On 22 June 2023 the third respondent's solicitors wrote indicating that they would be applying for the whistleblowing-detriment complaints against him in the second claim to be struck out under rule 37(1)(a) of the **Employment Tribunals Rules of Procedure 2013** on the grounds that those complaints had no reasonable prospect of success against him.

26. On 21 July 2023 the claimant presented her third claim, against all five respondents, including complaints of further whistleblowing-detriment, victimisation and unfair dismissal, including for the reason or principal reason of having made protected disclosures.

27. There was a case-management preliminary hearing (PH) on 24 July 2023. The judge directed a further PH, among other things to determine the LPP issue and consider the third respondent's strike-out application. The directions included that: "If any witness evidence is to be adduced at the preliminary hearing, a witness statement must be prepared by the party relying on the witness evidence and send to the other parties on 8 November 2023."

28. For that PH on 15 and 16 November 2023 the claimant produced a witness statement relating to the section 43B(4)/LPP issue and another relating to the third respondent's strike-out application. There was a statement from the third respondent, relating solely to the section 43B(4) LPP issue. There were skeleton arguments relating to his application, on both sides. By the time of the hearing the claimant had withdrawn a number of the complaints of

detrimental treatment originally asserted, as against the third respondent. The extant relevant complaints against him in the second claim, in respect of which his strike-out application was maintained, were referred to as detriments 21, 22, 24, 28 and 31.

The Employment Tribunal's Decision

29. In its self-direction as to the law the tribunal set out the relevant texts of section 47B(1A) **Employment Rights Act 1996** and rule 37(1)(a) and referred to a number of authorities on the strike-out jurisdiction, and the principles to be derived from them: **Swain v Hillman** [1999] EWCA Civ 3053; [2001] 1 All ER 91; **A v B and C** [2010] EWCA Civ 1378; **Anyanwu v South Bank Students' Union** [2001] UKHL 14; [2001] ICR 391; **Community Law Clinic Solicitors v Methuen** [2012] EWCA Civ 571; **Ezias v North Glamorgan NHS Trust** [2007] EWCA Civ 330; [2007] ICR 1126.

30. The tribunal then wrote this (which I reproduce as it appears):

> **"27. I considered the balance of prejudice facing C if I struck out only parts of her claims of detriment levelled at R3 which I concluded did not leave her with no further way of arguing here hers views as to what has happened or remedies, or to R3 if the challenged detriments were not struck out causing him to have to devote considerable time and energy to meeting claims which on what I have seen and heard today, and also based on C's admissions, have no prospect of success."**

31. Under the heading: "Findings and Application of Law" the tribunal wrote the following (which I reproduce as it appears):

> **"28. In each of the allegations of detriment, I find it hard, not to say impossible, to find on the pleadings that the allege detriments are said to have been perpetrated by R3 specifically. I accept Mr Vincent's submissions of this point. I do not find C's counter arguments persuasive. Her Skeleton is largely an exposition on the law and is limited as to references to the case as pleaded and relies heavily on generalised assertions against the corporate Rs and others, but significantly not against R3 specifically.**
>
> **29 In this case there is clearly on my examination no conflict of pleading on the key points such as would necessitate ventilation of evidence necessary to make factual findings on contested allegations at a full hearing. On C's own pleadings, there are no such factual disputes to be determined one way or another at a full hearing. This meets the Swain point.**

> **30. If a point is clear cut to show that a case as pleaded is such that R3 is not in practical relationship with C during the time a detriment is alleged, then C's claim of detriment allegedly perpetrated by R3 MUST be doomed to fail. I conclude that this is a clear example of no prospect as opposed to no more than a fanciful prospect of success. This meets the AvB point.**
>
> **31. facts so as to properly consider whether age discrimination could be inferred. C's case before me today as currently pleaded is easily distinguishable from Methuen because though C has pleaded acts of detriment clearly, in relation to those against R3 which he challenges, she has not pleaded sufficiently any form of argument to show that he perpetrated them. On her on pleading (M99), C acknowledges that R3 had no involvement with determination of the grievance she raised about him. This meets the points elaborated in both the cited cases.**
>
> **32. In the current case, C's claim as pleaded against R3 in respect of the challenged detriments and as responded to does not show that central facts are in dispute. This meets the Ezsias point.**
>
> **33. Limited to the challenged detriment claims which I describe as D21, D22, D24, D28, D31, such claims are Struck Out as having no reasonable prospect of success. C's arguments against R3 sound principally under the other heads of claim not the whistleblowing detriment claims. She is not deprived by this application or my judgment therein of the right to pursue those other claims where she does cite R3 as an individual party. Accordingly, R3's application, limited though it is, succeeds in full."**

The Grounds of Appeal

32. The relevant grounds of appeal are 5 and 6. In summary, ground 5 contends that the tribunal erred by conducting a mini-trial, permitting oral evidence to be led from both the claimant and the third respondent, including cross-examination of the claimant. This is said to have been particularly inappropriate, as this was a whistleblowing claim, the complaints were said to have no reasonable prospect of succeeding on the basis of causation, which is a fact-sensitive issue, and given that there had yet to be any standard disclosure of documents.

33. I should set out the text of ground 6 in full. It asserts that:

> **"…the ET failed to give proper reasons for striking out the Appellant's claims of whistleblowing detriment against the Third Respondent. In particular, the ET should have identified each separate detriment claimed by the Appellant against the Third Respondent, identified the evidence relevant to each such detriment, and explained why such evidence was determinative of each separate detriment claim against the Third Respondent. Instead, insofar as the ET adopted any reasoning process at all, it proceeded by way of an amorphous summary of its overall conclusions. Not only is such an approach a manifestly inappropriate way of explaining the draconian step of striking out a claimant's case, but it is aggravated**

> **in this instance by the typographical carelessness littering this part of the Judgment (see, by way of example only, §31).”**

The Law

34. The principles governing the approach to be taken to a strike-out application on the basis that a complaint has no reasonable prospect of success are well-established. They were summarised by HHJ James Tayler in **Cox v Adecco** [2021] ICR 1307:

> **“21. The President of the EAT, Choudhury J, helpfully summarised the current, and well-settled, state of the law on strike out in Malik v Birmingham City Council UKEAT/0027/19:**
>
> > **“29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure)**
> > **Regulations 2013 provides:**
> >
> > **“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...”**
> >
> > **30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see *Anyanwu & Another v South Bank University and South Bank Student Union* [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of *Mechkarov v Citibank N.A* [2016] ICR 1121, which is referred to in one of the cases before me, *HMRC v Mabaso UKEAT/0143/17*.**
> >
> > **31. In *Mechkarov*, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:**
> >
> > **(1) only in the clearest case should a discrimination claim be struck out;**
> >
> > **(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;**
> >
> > **(3) the Claimant’s case must ordinarily be taken at its highest;**
> >
> > **(4) if the Claimant’s case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out; and**
> >
> > **(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.”**

> **32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In *Community Law Clinics Solicitors Ltd & Ors v Methuen* UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that *"the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."***
>
> **33. A similar point was made in the case of *ABN Amro Management Services Ltd & Anor v Hogben* UKEAT/0266/09, where it was stated that, "*If a case has indeed no reasonable prospect of success, it ought to be struck out*." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council* [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out."**

22. A similar approach to that taken to strike out in discrimination claims is taken in protected disclosure claims: Ezsias v North Glamorgan NHS Trust [2007] ICR 1126.

23. In addition to the summary of the current state of the law on strike out, I consider that Malik is important because of the consideration the President gave to dealing with strike out of claims made by litigants in person.

[At 24. And 25. The EAT set out, and commented upon, passages from the Equal Treatment Bench Book concerning litigants in person.]

26. I consider that the ETBB provides context to the statement by the President of the EAT in Malik about the importance of not expecting a litigant in person to explain their case and take the employment judge to any relevant materials; but for the judge also to consider the pleadings and any other core documents that explain the case the litigant in person wishes to advance:

> **"50. The claimant was not professionally represented. He had, however, produced a detailed witness statement which, as I set out above, contained some material which might support an allegation of race discrimination. He also placed before the Tribunal other documents in which he attempted to set out his case. These included documents entitled "Additional information", which are appended to the claim form and which contained some of the matters referred to in his witness statement.**
>
> **51. In my judgment, the obligation to take the Claimant's case at its highest for the purposes of the strike-out application, particularly where a litigant in person is involved, requires the Tribunal to do more than simply ask the claimant to be taken to the relevant material. The Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it. Insofar as it concludes that there is nothing of substance behind it, it should, in accordance with the obligation to adequately explain its reasoning, set out why it concludes that there is nothing in the claim."**

27. Because the material that explains the case may be in documents other than the claim form, whereas the employment tribunal is limited to determining the claims in the claim form (Chapman v Simon [1994] IRLR 124 consideration may need to be given to whether an amendment should be permitted, especially if this would result in the correct legal labels being applied to facts that have been

> **pleaded, or are apparent from other documents in which the claimant seeks to explain the claim. The fact that a claim as pleaded has no reasonable prospect of success gives an employment judge a discretion to exercise as to whether the claim should be struck out: HM Prison Service v Dolby [2003] IRLR 694; Hasan v Tesco Stores Ltd UKEAT/0098/16. Part of the exercise of that discretion may involve consideration of whether an amendment should be permitted should the balance of justice in allowing or refusing the amendment permit if it would result in there being an arguable claim that the claimant should be permitted to advance. In Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18, HHJ Eady QC held at para. 21:**
>
> > **"Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in Hassan - the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form." "**

35. In **Mechkarov v Citibank NA** [2016] ICR 1121 (EAT), drawing on his review of the authorities, Mitting J said, at [14]:

> **"On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."**

36. In **Twist DX Ltd v Armes** [2020] UKEAT/0030/20, 23 October 2020, at [43(c)] Linden J put it like this:

> **"The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of Ezsias."**

Presentation of the tribunal's decision

37. As Mr Robson rightly submitted, a tribunal's decision should be read as a whole and not over-pedantically. The EAT's focus should not be on odd infelicities of expression, or, for example, glitches in numbering or layout, but on whether what the tribunal is saying can be clearly understood. I also recognise that employment tribunals work under the pressure of having to produce written judgments expeditiously within the context of a heavy overall workload. Nevertheless, carrying out the necessary checks to minimise presentational errors in a written decision is an important part of the process, particularly because such errors can sometimes make it difficult for a reader clearly to understand the meaning of a passage.

38. In this case there were quite a number of typos, or other mistakes, in the relevant passages, but the sense is generally clear. On a first reading the most troubling feature is the fact that paragraph [31] begins in mid-sentence – but I agree with Mr Robson (as did Mr Hutcheon in the course of argument) that what appears to have happened is that the last part of paragraph [25] (part of the tribunal's exposition of the law, which I have not set out) has ended up tacked on to the beginning of paragraph [31] – presumably because in an earlier draft they formed part of a single block of text, which was then broken in two in the wrong place. Ultimately these presentational errors have not affected the outcome of this appeal.

The claimant's pleaded case

39. The particular complaints that the tribunal was asked to strike out formed part of the second of the claimant's three claims. The grounds of complaint (GOC) referred back to, or repeated, various matters set out in the first claim. The first claim set out that the third respondent is the COO of the first respondent and was the claimant's line manager from July 2021. It set out allegations of discrimination or harassment by him, that the claimant had blown the whistle to him and that he had subjected her to detriments for so doing. It referred to the

claimant having raised a grievance on 26 January 2023 including allegations against the third respondent. It claimed that the grievance also included protected disclosures.

40. The second claim identified that, following the raising of the grievance, Olivier Renault took over the claimant's line management. It raised matters relating to the grievance process. It alleged that, following departures from the claimant's team, it had been agreed to hire new members, but in January 2023 the third respondent froze all new legal hires. It gave the claimant's account of her annual review for 2022, conducted by the fourth respondent on 14 March 2023, and events leading up to it. It complained that the review meeting was unfair and had been materially influenced by prior protected disclosures.

41. At [42] detriment 21 was set out in the following terms: "The conduct of [the fourth respondent] during the claimant's annual review and the other events set out in paragraphs 22 to 41 also suggest that the Firm or employees or agents of it were manufacturing a case to push the Claimant out for alleged poor performance or another unfair reason."

42. At [43] it was stated that the claimant was assigned another new line manager, Harriet Steel, on 3 April 2023. "It is now clear from the 5 June 2023 at risk letter from Harriet Steel that the manufactured case for dismissal referred to in paragraph 42 above is to be a sham redundancy dismissal." This was said to be detriment 22.

43. At [44] it was contended that Ms Steel had engaged with the claimant only minimally and that the claimant was ostracised. That was said to be detriment 23. It was also said that as result of such ostracism the claimant had been excluded from information on management or 'Funds Legal' work – said to be detriment 24.

44. At [48] it was alleged that on 25 May 2023 a partner, Mr Hickey, had initiated a hurried review of the firm's legal spending, that, unusually, this was truncated and focused on 'Funds

Legal', and that on each previous occasion when similar analysis was sought the claimant would have been involved – said to be detriment 28.

45. Earlier, at [18], detriment 31 had been set out. It was alleged that on 5 June 2023 a partner, Mr Aldrich, and the claimant's new line manager, told her that her role had been put at risk of redundancy "due to an apparent plan to remove the Funds Legal team (which comprised of her alone)". The pleading anticipated that dismissal was imminent.

46. Paragraph [60] of the GOC read as follows:

> **"The Claimant avers that Mr Drake-Brockman, Mr Dell, PCA and/or POS took the decision to subject her to Detriments 9 – 31 directly or manipulated, misled or instructed appointed decision makers to do so, and that the decision to do so was materially influenced by the fact the Claimant had made protected Disclosures 1 – 25, to the extent each Protected Disclosure predated each Detriment."**

The third respondent's strike-out application and related correspondence

47. Having been sent the second claim, the third respondent's solicitors advanced their strike-out application in a letter of 22 June 2023. While noting the contents of [60] of the GOC, the letter stated that, when detriments 9 to 30 were considered, there was no pleaded act or deliberate failure to act by the third respondent. This was said to be unsurprising given that, following the grievance, the claimant's reporting line had changed and the third respondent was not involved in its investigation or determination.

48. In a reply of 16 July 2023 the claimant accepted that a number of the then claimed detriments did not appear to involve conduct by the third respondent. But others, including the five at issue in this appeal, were maintained. As to detriment 22, she said that this was "in relation to the relevant Management Committee meetings of which your client is a member." As for detriment 24 this was "in relation to the CF OpCom Meetings and related matters which I was excluded from but which were under the control of your client." As to detriment 28 this was said to be "instigated by a Management Committee meeting of which your client is a

member". As to detriment 31 she wrote that "Paul Aldrich says [this] was endorsed by a Management Committee meeting of which your client is a member."

49. The letter continued that, as the second claim was currently pre-disclosure, it was hard to narrow down the detriments further "as I am not aware what was discussed behind the scenes and because the above Detriments have points of contact or are otherwise related to activities undertaken by your client." The claimant suggested that strike out in advance of disclosure would therefore be both unnecessary and premature, adding: "If necessary, I can further amend the claims after disclosure."

50. In a reply of 21 July 2023 the third defendant's solicitors indicated that the strike-out application was maintained. The basis of detriment 21 was the conduct of the fourth respondent. Detriments 22 and 24 made no mention of the third respondent. Detriment 28 was an allegation against Mr Hickey and detriment 31 was an allegation against Mr Aldrich and Ms Steel. The claims against the third respondent were based on mere speculation.

51. In a reply of 23 July 2023 the claimant referred to paragraph [60] of the GOC. She continued: "To further assist the Tribunal I have provided additional relevant information below" for each of the detriments still at issue. The letter including the following assertions.

52. As to detriment 21: "there is evidence that your client suggested to [the fourth respondent] that he should terminate my employment"; and: "the feedback given by [the fourth respondent] in the review referred to statements your client had made [to him] which were incorrect and which feedback was materially influenced by your client"; and "your client was present at the Management Committee meeting that subsequently endorsed the sham redundancy and the termination of my employment."

53. As to detriment 22: "Please see also the 'Third Claim' in relation to the sham

redundancy and the influence/involvement of your client on that process. Ms Steel signed the 'at risk' letter but the letter conveyed a decision endorsed by the Management Committee meeting which your client attended." I interpose that the GOC of the third claim (presented on 21 July 2023) included the allegation at [40] that, at the Management Committee meeting which endorsed the decision to dismiss the claimant, the third (and fourth) respondents did not leave the meeting and did not recuse themselves from the decision.

54. As to detriment 24: "a significant part of the information from which I was excluded was solely under the control of your client. For example, I should have been rotated in to the 'CF OpCom Meetings' that were convened by your client. I was no longer invited to them, nor was any information about such meetings shared with me [as previously]." As to detriment 28: "the process was instigated by a Management Committee meeting of which your client was a key member and played a key role." As to detriment 31: "this relates to the endorsement by the Management Committee including your client … of the restructuring decision and termination of my employment – please also see Detriments 21 and 22 above."

55. At the PH on 24 July 2023 the judge set the agenda for the PH on 15 and 16 November, including consideration of the third respondent's strike-out application, determination of the LPP issue and of "any application from the claimant for specific disclosure." The directions included that relating to witness statements, to which I have already referred. The minute does not record any aspect of the discussion.

56. The Grounds of Resistance to the second claim, of 17 August 2023, at [7] – [9], restated the third respondent's case that: "In summary the Claimant does not plead any facts which show any act, or any deliberate failure to act, by the Third Respondent which was done on the ground that the Claimant made a protected disclosure".

57. In a letter to the tribunal of 6 October 2023 the claimant raised various matters in relation to the forthcoming hearing. This included asking the tribunal to request specific disclosure from the respondents in relation to the five detriments that were the subject of the third respondent's strike-out application "to ensure that [the application] can be fairly heard."

58. In an email of 18 October 2023 the claimant postulated that the strike-out issue was whether the third respondent could show that she had no reasonable prospect of proving that he "took the decision to subject" her to detriments 21, 22, 24, 28 and 31, or the appointed decision-makers decided to subject her to those detriments "having been manipulated, misled or instructed" by him to do so "as is averred" at [60] of the GOC of the second claim.

59. In a letter of 24 October 2023 the third respondent's solicitors indicated that the strike-out application was maintained, in particular as no allegation was made in the GOC that the third respondent was involved in any of the matters giving rise to the alleged detriments "beyond the bald, unsubstantiated and unparticularised" assertion at [60]. They went on to state that the strike-out application was based upon an analysis of the GOC of claim two "coupled with the context in which the detriments are alleged to have occurred" including that, following the grievance, the claimant's reporting line was changed, that the third respondent was not involved in the investigation or determination of it, other than as a witness, and that he was thereafter "excluded from decisions about you or your work."

60. Those same three points were relied upon in the third respondent's skeleton argument for the strike-out hearing itself, with further details given of decisions affecting the claimant from which the third respondent was said to have been excluded. The skeleton noted that this third aspect was not accepted by the claimant, but invited the tribunal to weigh it in the balance because it went hand in hand with the first two points, which she did accept, there was support for it in the claimant's GOC and because the third respondent relied upon it.

61. With reference to [60] of the GOC the third respondent's skeleton asserted that the claimant had had ample opportunity to amend or provide further particulars. She should not be indulged in the hope that something might turn up. The skeleton asserted that the third respondent had recused himself from the Management Committee vote on the restructure.

62. In her skeleton for the strike-out PH the claimant referred to material in the limited disclosure of documents thus far made, including a text in which the third respondent had described her as "an enemy within" and as "unmanageable and a credible threat to our organisation" and had offered to "action her suspension, investigation and termination". I interpose that the third respondent's skeleton, apparently referring to the same text, submitted that it was sent 10 months before the claimant was put at risk, and in the context of a discovery that she had downloaded emails to her personal account.

63. Further on, the claimant's skeleton referred to her pleaded case "as supplemented by her further correspondence with R3 and her witness statement" as explaining the basis on which she contended that the third respondent was involved. She also submitted that whether he was involved in the relevant decisions, and motivated by her disclosures, were disputed questions of fact, the determination of which was likely to turn on inferences from primary facts, that the strike-out application had been made when disclosure was incomplete, and that there was no document that was inconsistent with, or contradicted, her case.

64. In her witness statement the claimant referred to her correspondence, which she described as setting out her understanding of the third respondent's involvement in the detriments at issue. She also stated that she had offered that she no longer pleaded detriment 31 separately against him, as detriment 22 relied largely on the same facts. She referred to various other evidence which she said showed that the third respondent was very close to the

fourth respondent and "inextricably linked" with the overall management of the group.

Ground 5 – discussion and conclusions

65. A tribunal considering a strike-out application should not be drawn in to conducting a mini-trial, nor should it make findings about materially disputed factual matters. In support of the contention that the tribunal had erred in that way, Mr Hutcheon relied on two principal features. First, witness statements had been produced for the PH, and it was not disputed, as such, that the claimant had been deposed, and been asked questions. Secondly, the judge referred at [27] to "what I have seen and heard today", which suggested that whatever was said in live evidence had influenced the judge's conclusion on the strike-out application.

66. My conclusions are as follows.

67. Generally it will not be necessary, or appropriate, for witness statements to be directed for, or for witnesses to be called to give oral evidence and be cross-examined at, a PH, for the purposes of determining an application to strike out a complaint (or response) as having no reasonable prospect of success. See the discussion in **Caterham School Limited v Rose**, UKEAT/0149/19 and **E v X**, UKEAT/0079/20. It is therefore of concern that at the previous PH a general direction permitting witness statements was given, without restricting this to the substantive LPP issue. Further, without any comment or notes having been obtained from the tribunal judge, I am not able to resolve the issue between respective counsel before me, as to the nature, or extent, of what was covered in questions to the claimant and her answers.

68. However, the tribunal's self-direction as to the law referred to the warning in **Anyanwu** against striking-out discrimination complaints except in the most obvious cases because of their fact sensitive nature, and that they "usually require full examination"; and to similar strictures in **Methuen**. It also referred to **Swain**, a decision which warned against conducting a mini-

trial when considering an application for summary judgment.

69. I am not persuaded that the reference by the judge at [27] to "what I have seen and heard today" shows that reliance was placed on the claimant's oral evidence at this PH on some disputed factual issue. This was an entirely general observation within a paragraph preceding the section setting out the tribunal's conclusions. Further, in the dispositive reasoning in that section, the tribunal repeatedly referred to its consideration, and the content, of the *pleadings* or, more specifically what was pleaded by the claimant: at paras. [28], [29], [30], [31] and [32]. There is no finding of fact in relation to a material disputed factual issue in that section, or elsewhere in the decision on the strike-out application.

70. Notwithstanding my misgivings about the approach to ordering witness statements and witness evidence in this case, I therefore do not uphold ground 5.

Ground 6 – the substantive challenge

71. I will consider first the substantive thrust of the challenge advanced by Mr Hutcheon under this ground, and then a procedural objection raised by Mr Robson.

72. In summary, Mr Hutcheon contended that the tribunal had erred because: (a) it did not consider separately whether each of the detriments at issue was arguable, but throughout referred to the claimant's pleading in general terms; the decision did not even set out or summarise what the five alleged detriments were; (b) the decision did not refer at all to the fact that the GOC *did* include, at [60], an allegation that the third respondent was involved in all five detriments; and (c) the tribunal did not address the further matters or allegations on which the claimant relied to support the conclusion that he was involved in each of those detriments, as set out in her correspondence, witness statement and skeleton argument.

73. In reply, in summary, as to (c) Mr Robson contended that the tribunal correctly focussed

on the claimant's *pleaded* case. In the absence of an application by her to amend, or further particularise, her pleadings, and such application being granted, it was not an error not to take her other materials into account. As to (b), this did not show that the tribunal was wrong to strike out, because para. [60] was a mere generalised assertion, and pleaded no specific *facts* in relation to any of the five detriments. All of that being so, the criticism at (a) fell away. What the tribunal said was true of all five detriments, and it did not need to address each one separately in order to explain its decision.

74. My conclusions on this substantive challenge are as follows.

75. First, if all of the more particular allegations and points that the claimant had set out in the correspondence leading up to the PH in question *had* formed part of her pleaded grounds of claim (across the three claims), then it would in my view plainly have been wrong for the tribunal to strike out these five complaints. That is having regard to the following.

76. First, as I have set out, the matters that *were* already pleaded included, in substance: that the claimant had blown the whistle to the third respondent as her line manager; that he had engaged in discriminatory or harassing conduct towards her; that she had raised those allegations in a grievance; that there had been a significant *volte face* on new legal hires; that she had received an unfair annual review because she had blown the whistle; that she had been ostracised and excluded from work following her grievance; and that a sham redundancy process had been set up based on a sham review of the Funds Legal team.

77. Secondly, what the correspondence in the run-up to the hearing and other materials then set out were the further alleged matters that she sought to rely upon as supporting the inference and conclusion that the third respondent was implicated in the detriments at issue; in particular: that the adverse performance review, while not conducted by him, had relied upon false or

misleading information supplied by him; that the key decision leading to the (on her case) sham redundancy consultation being put into motion was taken at a meeting of the Management Committee of which he was a member and at which he was present; and that she had been excluded from meetings convened by him and work controlled by him.

78. Thirdly, these further matters, if true, when taken together with the matters already pleaded, if true, were certainly at least arguably capable of supporting an inference that the third respondent had been materially involved in the conduct of which the claimant sought to complain in these five detriments.

79. The third respondent factually disputes much of the claimant's case, as set out in this material, it being his case, for example, that he had recused himself from the relevant decision at the Management Committee meeting. But resolution of such factual disputes would have been matters for trial. Further, the undisputed facts highlighted by his solicitors, such as that others dealt with the claimant's grievance, and that he stood down as her line manager following the tabling of her grievance, were not, as such, inconsistent with her pleaded case or the further allegations she advanced in respect of these detriments.

80. Mr Robson submitted, however, that, in line with established authority, the tribunal was right to focus – solely – on the claimant's pleaded case. She had not even applied to amend, let alone been permitted to amend. While she is a litigant in person, and not an employment law or litigation specialist, she is a lawyer who was plainly able to produce a properly-drafted pleading, and engage with the law and the rules of procedure in this area.

81. I do not think that is a sufficient answer. As the authorities show, it is correct that when considering a strike-out application of this sort, the focus, in the first instance, should be on whether the pleaded complaint, as it presently stands, has no reasonable prospect of success.

If its prospects are better than that, it should not be struck out. But if the pleaded complaint does not, by itself, surmount that threshold, the tribunal still has a discretion whether or not to strike it out, which must be exercised judicially. As the authorities explain, where there are other materials before the tribunal, which advance relevant contentions or information, the tribunal should consider whether, rather than striking out, it should direct or permit the pleaded case to be amended or particularised, so as to incorporate these.

82. It is no answer in this case to say that the tribunal was not obliged to do that because the claimant made no application to amend or particularise. The tribunal gave no consideration to this alternative approach at all. There is no reference to this possibility, or to the discussion of it in any of the authorities; and the tribunal's substantive decision began and ended with a discussion which was avowedly all about the pleaded case. Nor did the discussion of a balancing exercise, in the earlier paragraph [27], refer to this aspect.

83. It is certainly right that not all litigants in person have the same capacity to articulate their case, or to make applications when apposite to do so or in the appropriate way. However, had the tribunal turned its mind to this question, relevant considerations would not have been confined to the fact that the claimant is a lawyer with the particular skills and abilities that she had demonstrated in her pleadings and correspondence in the litigation.

84. Also relevant considerations would have been that: (a) she *had* pleaded the third respondent's involvement, in general terms, at GOC [60]; (b) in response to the criticism that this lacked factual particulars, she had set out what she described as additional information and particulars on which she plainly wished to rely; (c) she had requested that the respondents provide specific disclosure in relation to the five detriments, to be given prior to the November PH, and indicated a willingness to review her complaints following disclosure; and (d) she *had* pleaded *some* basis for asserting that the third respondent wanted her gone, might have been

influenced by her whistleblowing to him, and allegations against him, and that he was in a position in the group to exert his influence behind the scenes.

85. All of this would have been relevant to a consideration of whether, rather than striking out these parts of her claim, the tribunal should have permitted or required the claimant to amend and/or formally further particularise her grounds of complaint. If so, it would of course have been fair then to permit the third respondent to amend and particularise his pleading in response, including in relation to his case on factually disputed points that had thus far been advanced by his representatives only in their own letters and skeleton.

The Procedural Issue

86. Mr Robson contended that it was not open to the claimant to run this line of argument at all before me, because it was not within the scope of her live grounds of appeal. Specifically, ground 6 did not include any contention to the effect that the tribunal erred by not considering the option of permitting or requiring the claimant to amend or particularise her claim to reflect the points that she had advanced in other materials. The claimant should not, he submitted, be permitted to run it by way of amendment of her grounds now.

87. My conclusions on this aspect are as follows.

88. Ground 6 is expressly framed as a *Meek* challenge. Specifically, the reasons are said to be inadequate because they do not address the position separately in relation to each of the detriments. The tribunal should have "identified the evidence relevant to each such detriment, and explained why such evidence was determinative of each separate detriment claim". This is not as clearly drafted as it might have been. Although it is perhaps a launching off point for the challenge in the form advanced by Mr Hutcheon, it does not set out the specific contention that, having regard to the materials before it, pertaining to each detriment, the tribunal should

have considered permitting or requiring the claimant to amend or particularise her relevant pleadings, rather than striking them out.

89. In so far as permission is therefore required to enable the claimant to rely on the challenge to that effect, the exercise of the EAT's discretion must turn on the particular facts and circumstances of this case. But guiding principles are to be found in **Khudados v Leggate** [2005] ICR 1013 as further illuminated by the discussion in **Readman v Devon Primary Care Trust** UKEAT/0016/11, 1 September 2011.

90. In this case I note that the original pleading was not settled by Mr Hutcheon. I do not know what materials or information were provided to counsel who drafted it. I accept from Mr Hutcheon that he had considered (and indeed maintained before me) that the point was within scope of ground 6, and therefore did not apply (in the alternative) for permission to amend until the contention that it was required was raised in argument at my hearing.

91. Despite this line of challenge being expressly raised for the first time only in Mr Hutcheon's skeleton for this appeal hearing, this did not cause any delay. The substantive and procedural arguments were advanced within the time allocated for the hearing, and I would not in any event have been in a position to give an oral decision on the substantive appeal. It has not materially affected the allocation of the EAT's judicial or other resources.

92. Mr Robson suggested that, had this line of argument been advanced in the original notice of appeal, and allowed to proceed on the sift, the third respondent might have invited a *Burns/Barke* or other reference to the tribunal, to seek further information about what consideration had been given to the point. However, it is not contended that the claimant specifically applied to the tribunal for permission to amend or formally particularise her pleadings; and, as I have described, I think it is clear from the decision itself, that this alternative

to striking out these parts of her claim was simply not considered by the tribunal.

93. Mr Robson submitted that the proposed amendment should have been tabled by way of draft amended grounds of appeal. That is, in principle, right; but in substance the terms of the challenge were clearly set out in paragraphs [43.2.2], [43.2.3] and [43.2.4] of Mr Hutcheon's skeleton argument. Further, Mr Robson accepted that, having read that skeleton argument, he had been able to, and did, respond to the challenge in substance, as to the relevant authorities, and their application to the particular facts of this case.

94. Finally, for reasons I have set out, I consider the challenge in principle to this aspect of the tribunal's decision to have been meritorious.

95. For all of these reasons, I have concluded that the balance of justice in this particular case is in favour of permitting amendment to the grounds of appeal, so far as required, to enable this challenge, as set out by Mr Hutcheon, to be adjudicated on its merits.

Outcome

96. The overall conclusion is that the tribunal erred by failing to consider the option of permitting or requiring the claimant formally to amend and/or particularise her pleadings in relation to the claimed detriments at issue, as against the third respondent, by reference to the further information and contentions as to why he was liable in respect of them, that she had advanced in her materials in opposition to the strike-out application.

97. Mr Robson acknowledged during argument that, were I so to conclude, the appropriate outcome might well be that the decision to strike out the complaints at issue against the third respondent should be substituted with a decision refusing to strike them out. In light of the features I have discussed I do conclude that, had it properly considered the alternatives, and the relevant material, the tribunal could not properly have struck out these complaints as against

the third respondent. The next order of business when the matter returns to the tribunal should therefore be the formalisation of amendments to the grounds of claim, to capture the relevant points raised by the claimant in her materials; and the respondents should then be permitted consequentially to amend their grounds of resistance.

98. As I have noted, in her witness statement for the PH before the tribunal, the claimant indicated that she was not seeking to maintain detriment 31 separately against the third respondent, on the basis that the ground was already covered by detriment 22. At the hearing before me Mr Hutcheon confirmed that this remained her position, as it were without prejudice to the general scope of the other detriments. I have noted also the claimant's indication of preparedness to review whether all of these detriment complaints are maintained as against the third respondent, once relevant disclosure has been given by the respondents. The tribunal may wish to consider, therefore, giving timetabled directions to cover that aspect as well. These, however, will be case-management matters for the tribunal.