EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr Saidali Khakimov		Nikko Asset Management Europe Limited

Heard at: London Central **On**: 26 April 2021

Before: Employment Judge Stout

Representations
For the claimant: In person
For the respondent: Andrew Smith (counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's application for interim relief is dismissed.

REASONS

The type of hearing

1. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was V: Fully Video. A face-to-face hearing was not held because of the pandemic and all issues could be determined in a remote hearing.

2. The public was invited to observe via a notice on Courtserve.net. No members of the public joined. There were some connectivity issues

resulting participants having to repeat themselves and in short breaks in the hearing while participants rejoined.

3. The participants were told that it is an offence to record the proceedings.

The issues

4. The issues to be determined at this hearing were identified at the start as follows:

   (1) Whether the Respondent can rely on documents served on Friday;
   (2) Whether the Claimant can bring an interim relief claim on the basis that the reason for his dismissal was that he had made protected disclosures (the Respondent asserts that no such claim is pleaded);
   (3) If not, whether the Claimant should be granted permission to amend his claim;
   (4) The Claimant's interim relief application;
   (5) The Respondent's costs application.

Background

5. Mr Khakimov (the Claimant) was employed by Nikko Asset Management Europe Limited (the Respondent) from 1 January 2013, latterly as Product Management Director, UK. He was off work on grounds of ill health from 17 April 2019.

6. By a claim form (2202809/2020) received on 17 May 2020 (the First Claim), following a period of ACAS Early Conciliation pursuant to certificate R127435/20/10 the Claimant brought claims for race and disability discrimination, holiday pay, arrears of pay and other payments and detriment because of a public interest disclosure. The Respondent denies the claims, does not admit that the Claimant is disabled, and contends that the tribunal does not have jurisdiction to hear many of the claims because they have been presented out of time.

7. There was a Case Management Preliminary Hearing (CMPH) on 2 December 2020 before Employment Judge Palca, at which orders were made to take the case to final hearing, including for disclosure of medical records and for further particularisation of the claim. The case was listed for a full merits hearing for 15 days from 5 to 25 January 2022 and for a two-day open preliminary hearing in public on 27 and 28 May 2021 to determine disability status amongst other matters, as set out in paragraph 5.3 of Judge Palca's Order.

8. With effect from 13 January 2013 the Claimant was dismissed by the Respondent, the Respondent says by reason of capability. By a claim form received on 19 January 2021 (2200247/2021) (the Second Claim) he brought claims the precise nature of which I have to determine in this hearing, but

which included unfair dismissal, race and disability discrimination. He claimed interim relief.

9. On 19 March 2021 the Tribunal wrote to the Claimant (not copying the Respondent):

> Employment Judge Brown instructs that I write as follows:
>
> You have applied for interim relief. You appear to contend that your dismissal was an act of discrimination. As Mrs S Steer v Stormsure Ltd UKEAT/0216/20/AT (V) confirms, interim relief is not available in relation to a discrimination/victimisation dismissal. Please confirm what you say the reason for your dismissal was. Please reply by 24 March 2021.

10. On 22 March 2021 the Claimant contacted ACAS again and ACAS issued a certificate the same day (ACAS EC Reference Number R123806/21/76).

11. On 23 March 2021 the Claimant replied to Employment Judge Brown's order in the following terms (so far as is relevant to the matters I need to decide today):-

> … as noted in my application there is an open legal claim with ET (Case No 2202809/2020), where one of the claim heads is "Retaliation for Protected Disclosure per 47B(1) ERA 1996". I contend that the Respondent's series of discriminations and victimisations up until the point of unfair and discriminatory dismissal on 13 January 2021 stem from that protected disclosure and subsequent chain of events over long period.
>
> Thirdly, on top administrative defficiencies, the initial case management decisions made by ET (Case No 2202809/2020) were made prematurely and without full consideration for my disability and overall negative impact of such decisions on the overriding objective of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which is to deal with cases fairly and justly, particularly in relation to (a) ensuring that the parties are on an equal footing and (d) avoiding delay, so far as compatible with proper consideration of the issues. As a result, original schedule for the final hearing was unnecessarily rescheduled from July 2021 to January 2022, which seriously prejudices my ability to stand on equal footing with the Respondent.
>
> Therefore, I request that interim relief mechanism be allowed as a step to rectify the case management to ensure that parties are able represent on equal footing.
>
> Finally, whilst it is true that EAT confirmed in the case of Mrs S Steer v Stormsure Ltd UKEAT/0216/20/AT (V), that ET and EAT are not equipped the decision of whether to extend interim relief to include discrimination/victimisation claims relating to dismissal (in order to avoid breach of EU law principle of equivalence, or of the ECHR Article 14, when read with Article 6.), EAT have held that there has been a breach of Article 14, it is appropriate to grant permission to appeal so that the Court of Appeal may have the opportunity to consider this issue and, if considered appropriate, grant the declaration of incompatibility which the EAT does not have jurisdiction to grant.

12. There was another CMPH in the First Claim on 1 April 2021 before Employment Judge Elliott. Employment Judge Elliott did not have the Second Claim before her, and it had not at that stage been served on the Respondent. She made orders including for further and better particulars to be provided bt the Claimant by 1 June 2021, and for an unless order in respect of disclosure

of the Claimant's medical evidence. She noted that the Claimant had received legal advice and suggested that he should consider seeking further legal advice to assist him with particularising his case.

13. On 6 April 2021 the Tribunal wrote to the Claimant regarding the Second Claim (not copying the Respondent):

> Your email of 23 March 2021 at 21:41 hours has been considered by Employment Judge Elliott who notes that you rely on the reason for your dismissal being because of a protected disclosure. For this reason, an interim relief hearing will be listed.
>
> Please note that your claims for race and disability discrimination cannot go ahead in these proceedings because they require an Early Conciliation certificate from ACAS. The tribunal notes what you say about the case of Steer v Stormsure Ltd but at present the Employment Tribunal does not have jurisdiction to hold an interim relief hearing or give exemption from Early Conciliation claims for discrimination claims. It is only your whistleblowing dismissal claim that can be subject to an interim relief hearing.

14. On 7 April 2021 the Tribunal served the Second Claim on the Respondent and sent Notice of the Interim Relief hearing. That Notice included the following orders:

> Witnesses will not be permitted to give oral evidence at the hearing unless the Employment Judge directs otherwise.
>
> If you intend to rely on any documents at the hearing you must send copies to all other parties not later than 3 working days prior to the hearing and bring 3 copies with you.

15. On 13 April 2021 the Respondent wrote to the Claimant putting him on notice that it considered his interim relief application to be misconceived and warning him that it might seek to recover its costs if he proceeded with it. The email included the following:-

> We note that the Application has been made on the basis that your dismissal was automatically unfair due to discrimination (which the Respondent denies). The Tribunal does not currently have jurisdiction (i.e. the power) to make an Order for interim relief in such circumstances. Although the Court of Appeal is being asked to consider whether such a position is lawful in *Steer v Stormsure Ltd* (the case you refer to in your Application), that appeal is not due to be heard until after the hearing to decide your Application. Even if the appeal in Stormsure is successful, this will not lead to any immediate changes in the law. This means that the Tribunal simply does not have the jurisdiction to make an Order for interim relief in the circumstances.

16. The Claimant provided the impact statement and medical evidence in the First Claim on 14 April 2021 as ordered by Employment Judges Palca and Elliott in the First Claim. The Respondent is considering those and they were not before me.

17. On 21 April 2021 at 16:21 the Claimant submitted a witness statement and accompanying documents running to 193 pages. At 16:51 the Respondent

provided the Claimant with a hearing bundle running to approximately 170 pages.

18. On 22 April 2021 the Respondent filed its ET3 and Grounds of Resistance in relation to the Second Claim.

19. On Friday, 23 April 2021 at 18:36, the Respondent filed with the Tribunal, copying in the Claimant, a witness statement for Elizabeth Marks, Mr Smith's Skeleton Argument and an amended version of the bundle, running to 216 pages. This included at least two new documents: the Respondent's ET3 and Grounds of Resistance and the email warning Mr Khakimov that his interim relief application was misconceived. It may also have included some other changes. Mr Khakimov had pulled out of the bundle the documents that he said had changed and showed me on screen during the hearing. It was a small number.

Adjustments for the Claimant and the conduct of the hearing

20. At previous case management hearings, the Claimant explained that given his claimed disability, he was concerned that what he said may be misinterpreted because of his difficulty in expressing himself. He said he had difficulty with real time conversation and discussions. For this hearing, he requested by email of 24 April 2021 that *"the hearing proceeds step by step and slower paced manner"*. He also said at the start of this hearing that real-time and multi-layered thinking and conversation is difficult for him and as a result he loses track of his speaking especially when interrupted. He requested the parties to speak slowly step by step and in short sentences and allow him time to digest and take notes where necessary. He asked that we show patience while he was trying to speak. He said that he may have to interrupt other parties where necessary.

21. I agreed to follow these ground rules and asked Mr Smith to confirm that he would to, which he did. I did, however, explain to the Claimant at the outset that if at any point I considered it was not possible to follow that approach I would let him know.

22. I accordingly ensured that at each stage of the hearing I explained to the Claimant in simple terms what issue we were considering and I tried to identify for him, step by step, the points that he needed to address. For example, in relation to the question of whether he had pleaded a case of automatic unfair dismissal I identified for the Claimant that he needed first to point me to where he considered he had included that claim in his claim form and then to address me on why (if I did not agree with him) I should now allow him to amend his claim. I sought to guide the Claimant through his submissions on the substantive interim relief application in a similar way during the hour that the parties had agreed in advance the Claimant should have for those submissions. Then, when Mr Smith was making submissions, we took each stage of his submissions separately and I gave the Claimant an opportunity to respond after each 'topic'. Thus Mr Smith made

submissions about the Claimant's alleged protected disclosures and then stopped so that the Claimant could respond. He then made submissions about the reason for dismissal and stopped so that the Claimant could respond.

23. Despite these efforts, it was not always possible to keep to the ground rules set by the Claimant. In particular, although I tried to avoid interrupting the Claimant and let him speak 'off topic' or read out documents for longer than I would normally do with a litigant in person, it was ultimately not possible to run the hearing within the time available (as the Claimant confirmed he wished to do as he did not want an adjournment) without interrupting the Claimant. The Claimant appeared when speaking to be unaware of the passage of time and often spoke at length on issues that were not relevant to what I had to decide. I therefore had to interrupt him and provide guidance as to the matters on which he needed to address me in order to ensure that he had a fair hearing and had the opportunity to address me on the relevant issues.

24. During the course of the hearing, the Claimant frequently sought to interrupt Mr Smith as soon as he had started speaking, often in the middle of a sentence. Even when we had agreed that Mr Smith would take one section of his submissions at a time, the Claimant would say immediately Mr Smith started speaking *"objection"* or *"lies"* or *"misrepresentation"*. Mr Smith tolerated this behaviour with good grace.

25. The Claimant also interrupted me on a number of occasions, including when I sought to give oral reasons for my decision on what documents to admit. He challenged me on various points and said that he did not understand my reasons, so I explained them again in shorter form and said that my full reasons would be set out in this written decision. After giving my decision on the admission of the additional documents, I offered the Claimant half an hour additional reading time, but he said that he only needed 15 minutes, which I agreed to. In the end, we adjourned for 20 minutes.

26. Although the Claimant did, after warnings from me, stop his initial submissions on the interim relief application after about 1 hour and 15 minutes (15 minutes longer than he had agreed), in the afternoon, he insisted that he had to make more submissions to respond to the Respondent's Skeleton Argument and Ms Marks' witness statement, which I permitted him to do, though I sought to limit the time he spent on this and provided further direction as to relevance, explaining that the purpose of this hearing was to make a high level assessment of the merits of his automatic unfair dismissal case and not to consider the detail of all the claims. The Claimant was reluctant to accept my direction. In total, I estimate that the Claimant spoke for about 4 hours out of the 6 hours of hearing time that we had.

Issue (1): Whether the Respondent can rely on documents served on Friday

27. Mr Khakimov applied to exclude from consideration at this hearing the documents that the Respondent had submitted at 18:39 on Friday 23 April 2021, the last working day before this hearing. For reasons which I gave orally at the hearing and indicated I would set out in this order, I decided, having regard to the over-riding objective, that the Respondent should be permitted to rely on those documents.

28. The Notice of Hearing was emailed to the parties on 7 April 2021. This was the first notice the Respondent had of the second claim or the interim relief application. It provided that witnesses will not be admitted to give oral evidence at the hearing unless the employment judgment directs otherwise and that if you intend to rely on any other documents at the hearing, you must send documents to all other parties not later than 3 working days before the hearing. Having regard to the provisions of Rule 4(1), that required the parties to provide documents by midnight on Wednesday 21 April 2021[1].

29. Both parties supplied their initial documents in accordance with that deadline.

30. The Respondent then submitted further documents on 23 April 2021 at 18:36, the last working day before the hearing. The documents were: Ms Marks' witness statement, Mr Smith's Skeleton Argument and another version of the bundle. This included two new documents: the Respondent's Grounds of Resistance, which had been prepared on 22 April 2021 (without any order to do so) and the email of 13 April warning Mr Khakimov that his interim relief application was misconceived. It may also have included some other changes. Mr Khakimov had pulled out of the bundle the documents that he said had changed and showed me on screen. It was a small number.

31. Mr Khakimov told me that over the weekend he skim read the documents and took some high level legal advice from a solicitor in relation to them. I asked Mr Khakimov if he was ready to proceed with this hearing if I did admit the documents or whether he wanted an adjournment. He said that he did not want an adjournment and would proceed with the hearing if he had a little more time to read the documents, although he said that he would not be able to respond to all of the Respondent's evidence and was concerned not to be prejudiced by this.

My decision

32. I decided that, although there had been no specific order on 7 April 2021 for witness statements or skeleton argument, these were still 'documents' within the terms of that order which should have been provided three working days before the hearing. However, even though submitted in breach of the order,

[1] At the hearing I indicated that interpreting the order of 7 April 2021 in the light of Rule 4 meant that the documents had to be filed by Tuesday 20 April 2021. On reflection, I am not sure that is correct and in any event the point is immaterial to the issue I had to decide so I have not included it in these written reasons.

the question for me was what the consequences should be, in accordance with the over-riding objective.

33. It seemed to me that the additional documents should be admitted. The additional documents were not voluminous (Ms Marks' statement was 9 pages, the skeleton argument was 11 pages and the changes to the bundle were minimal). The documents were all (I considered at the start of the hearing) necessary to the hearing as Ms Marks' statement provided a helpful summary of the Respondent's case with reference to the documents in the bundle, and the skeleton argument set out the arguments that the Respondent intended to make and it was of assistance both to me and the Claimant that these were provided in writing in advance of the hearing.

34. I did not consider that the Claimant was significantly prejudiced by their admission. He had had an opportunity to read the documents over the weekend and could have read them in full rather than merely skim-reading them if he chose to do so. He had taken high level legal advice on them. The content of Ms Marks' statement is essentially a summary of the documentary evidence that was in the bundle that had been provided to the Claimant and the documents were for the most part (possibly all) documents that were sent to the Claimant previously in the course of correspondence prior to his dismissal. The Claimant himself said he is ready to proceed at this hearing even with the additional documents if he had additional time to read and respond to them. I considered that the Claimant could be given additional reading time and that little additional response was required because the Claimant's witness statement already sets out his case and this hearing is concerned with a high level assessment of the merits of his claim, so that I will not need to consider the detail of the evidence.

35. After giving my decision on the issue of documents, I offered the Claimant half an hour additional reading time, but he said that he only needed 15 minutes, which I agreed to. At this point the Claimant also indicated that in relation to the interim relief application, he was relying on orders by Employment Judges Brown and Elliott which neither the Respondent or I had seen. I said that if he wished to rely on them, he should email them to me and the Respondent in the break. In the end we adjourned for 20 minutes and when we returned the Claimant was still looking for the documents, so we waited in the hearing room while he looked for them. He then found them and emailed them.

36. I should make clear at this point that although at the start of the hearing I considered for the reasons I gave orally at the hearing and set out above that it was necessary to admit Ms Marks' statement as it was a helpful summary of the Respondent's case and the documents in the bundle, in the event I have not found it necessary to have recourse to anything in that statement in order to reach decisions on the issues that arose for determination at this hearing.

Issue (2): Whether the Second Claim includes a claim for automatic unfair dismissal

37. I heard oral submissions from both Mr Smith and the Claimant on this point.

38. Mr Smith submitted (in summary) that there was no automatic unfair dismissal claim in the Second Claim, that it is clear that the Claimant did not intend to bring such a claim since at no time in correspondence has he asserted such a claim and he did not include one in his Second Claim. He pointed out that the Claimant's witness statement, which sets out five alleged categories of protected disclosures (each of which is said to have been made on multiple occasions), plainly went beyond the scope of both the First and Second Claims which refer only to one alleged protected disclosure to Ms Marks and Steve Worrall on 17 January 2021. He submitted that it was clear that the Claimant had considered that *Steer v Stormsure* was authority for the proposition that an interim relief claim could be brought in relation to a discriminatory dismissal, and that was the interim relief claim he had sought to bring, only changing his case after the Respondent (and the Tribunal) pointed out that was not the effect of *Stormsure*. He submitted that the Claimant should not be permitted to amend his claim because it was insufficiently particularised, it would be out of time, without merit, and the prejudice to the Respondent of allowing it outweighed that to the Claimant of refusing it given that the Claimant still had claims for unfair dismissal and (uncapped) claims for discriminatory dismissal.

39. The Claimant's position was that Employment Judges Brown and Elliott had already decided in their orders of 19 March and 6 April that he had brought a claim for automatic unfair dismissal and that I could not go 'behind' that. I explained to him that that was not the effect of their orders. They (or, specifically, Employment Judge Elliott) had simply accepted on the basis of his email of 23 March 2021 that he was contending that he had been automatically unfairly dismissed and accordingly listed the case for this hearing. Whether or not that is the claim he brought is a matter for me. I explained to the Claimant that he needed to show me where in his claim he had set out such a claim. After I drew the Respondent's attention to paragraph 18, the Claimant also said that was the paragraph and also that the automatic unfair dismissal claim was what he meant by "unfair dismissal". He did not accept that he needed to apply to amend because he maintained that Employment Judge Elliott had already decided the point. I nonetheless invited him to address me on the issues relevant to the question of amendment, including the balance of prejudice (in response to Mr Smith's submissions). He submitted (in summary) that he had been very prejudiced all along by the Respondent's actions and that there was no prejudice to the Respondent.

My decision

40. I consider that the Claimant's Second Claim does not include a claim that he was automatically unfairly dismissed for making protected disclosures; nor does it include any protected disclosures other than that of 17January 2017

that he relied on in his First Claim. It does include (at paragraphs 13 and 14) a repetition of the protected disclosures detriments claim from the First Claim under the heading *"Retaliation for Public Disclosure per 43 ERA 1996"*, but it then goes on to set out, under the heading *"Description of the new legal claim – Unfair and Discriminatory Dismissal"* complaints of what are described at paragraph 17 as *"continued discrimination and harassment throughout 2020"* and then at paragraphs 18-19:

> 18] I would like to note that my request for making organizational and procedural changes to create a fair and caring environment were always the same and in line with my original suggestions pertinent to my 17.01.2017 **Protected Disclosure per 47 B(1) ERA1996.** Following the Respondent's categorical refusal to make any such adjustments and their failure to force me to submit to their continuous harassment and accept their terms, the Respondent ended my contract of employment without notice on 13 January 2021 (the last date of employment).
> 19] For consideration of eligibility for Interim Relief application, I request you to also take into account the case of Mrs S Steer v Stormsure Ltd:(UKEAT/0216/20/AT (V)).

41. Although paragraph 18 makes reference back to the alleged protected disclosure relied on in the First Claim, paragraph 18 does not assert that the Claimant was dismissed because of that protected disclosure. The disclosure is referred to as background, but no causal connection is pleaded. The dismissal is said to be unfair and discriminatory, but it is not said to be because of the protected disclosure made four years previously. In this case, construing the claim form both as a standalone document and in the light of background documents, that omission appears to me to be deliberate and properly reflects what the Claimant intended his case to be when pleading the claim. I reach that conclusion based on the following:

    a. The Claimant is not a lawyer, but he has evidently done considerable legal research himself and has been in receipt of legal advice on his claim. Although he refers to other (correct) statutory provisions in relation to his claims, he does not refer to s 103A Employment Rights Act 1996 (ERA 1996) or (as noted) assert that his dismissal was because of the protected disclosure.

    b. In his correspondence with the Respondent prior to dismissal the Claimant did not assert that he was being dismissed because of any protected disclosure (or anything similar), although he did contend that dismissal would be unlawful disability discrimination (see, for example, pp 166, 192, 195, 205 and 207).

    c. In his Second Claim he refers to *Steer v Stormsure* as forming the basis for an interim relief application, as if that case provided the basis for a claim for interim relief in relation to a discriminatory dismissal. He repeated that point in his email to the Tribunal of 23 March 2021. If he considered he was making an application for interim relief based on a protected disclosures claim, there would have been no need for him to refer to *Steer v Stormsure* (or, at least, if it was an additional basis for the application, it would have been expressed differently).

d. His email of 23 March 2021 implicitly acknowledges that he did not in his Second Claim plead that his dismissal was because of a protected disclosure because instead of simply referring to his Second Claim, he refers back to his First Claim and says *"… as noted in my application there is an open legal claim with ET (Case No 2202809/2020), where one of the claim heads is "Retaliation for Protected Disclosure per 47B(1) ERA 1996". I contend that the Respondent's series of discriminations and victimisations up until the point of unfair and discriminatory dismissal on 13 January 2021 stem from that protected disclosure and subsequent chain of events over long period"*. In other words, in response to Employment Judge Brown pointing out the difficulty with his interim relief claim, he decided to claim, and articulated for the first time, that his dismissal 'stemmed' from the protected disclosure pleaded in his First Claim.

42. In the circumstances, I conclude that the Claimant's Second Claim does not include a claim that he was dismissed because he had made protected disclosure(s). Nor does it include any alleged protected disclosures other than that alleged to have been made on 17 January 2017 and referred to in the First Claim.

Issue (3): Whether the Claimant should be permitted to amend his claim to include a claim of automatic unfair dismissal (and additional protected disclosures)

43. In the light of my decision on Issue (2), I therefore consider that the Claimant needs to amend his claim if he wishes to make a claim for automatic unfair dismissal, as he apparently does given that it is on the basis of that claim that he is seeking to claim interim relief at this hearing. Although the Claimant maintained the position that he did not need to make an amendment application, he did make submissions on the issues relevant to an amendment application and since his application for interim relief must fail unless I consider the question of amendment, I considered it to be implicit that he was seeking permission to amend if that were needed and that it was appropriate for me to determine the question of whether he be permitted to amend his claim.

44. Mr Smith referred to *British Gas v Basra* UKEAT/0194/14/DM at [48] *per* HHJ Serota QC where it was held: *"It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the Respondent can make submissions and know the case it is required to meet"*. He submitted that unless that test was satisfied, I should not move on to consider the *Selkent* factors. I am not convinced the hurdle is as absolute as that passage of the judgment suggests, since HHJ Serota QC goes on only to refer to it being only his *"almost invariable practice"* to get advocates to produce a written draft of any amendment for approval and, in any event, I do not consider that such a strict approach is necessarily appropriate in the case of a litigant in person. Nonetheless, the extent to which the witness statement properly sets out the necessary particulars of the protected

disclosures that the Claimant wishes to add to his claim, and a claim of automatic unfair dismissal because of them, is a matter I take into account in considering all the circumstances as *Selkent* [1996] ICR 836 requires.

45. In accordance with *Selkent*, I must also take into account the over-riding objective, the nature of the amendment, any applicable time limits, the implications of the amendment in terms of impact on the trial timetable or costs and I must balance the injustice/hardship of allowing the amendment against the injustice/hardship of refusing it

46. In relation to the nature of the amendment I must consider whether it is the addition of factual details to existing legal claims or addition or substitution of other legal labels for facts already pleaded to or whether it amounts to making an entirely new claim.

47. If a new claim is to be added by way of amendment, then the Tribunal must consider whether the complaint is out of time or, at least, whether there is an arguable case that it is in time (*Galilee v Comr of Police of the Metropolis* [2018] ICR 634 and *Reuters Ltd v Cole* (Appeal No. UKEAT/0258/17/BA at para 31). For this purpose, the EAT in *Galilee* held that the new claim is deemed received at the time at which permission is given to amend (*Galilee* at para 109(a)). Mr Smith submitted that was binding on me, but it seems to me that the *ratio* of *Galilee* is merely that the doctrine of relation back (i.e. relation back to the original claim) does not apply in Tribunals. I do not read *Galilee* as determining the question of whether the relevant time was when the application to amend was made or when it was decided since that was not in issue in *Galilee*. Given the potential unfairness to a claimant if the relevant date is the arbitrary date of when the Tribunal determines the amendment application rather than the date on which the application is made by the claimant, I am prepared to assume for the purposes of this hearing that the relevant time is the date on which the Claimant made the application. His witness statement was served on 21 April 2021, so I will take that as the relevant date.

48. If the proposed amendment is simply relabelling of existing pleaded facts with new legal labels, there is no need to consider the question of timings (*Foxtons Ltd v Ruwiel* UKEAT/0056/08 (18 March 2008) per Elias P at paragraph 13, which was common ground between the parties, post *Galilee*, in *Reuters v Cole* at paras 15 and 27). In *Reuters v Cole* Soole J specifically considered what is necessary to make something a new claim and concluded that a relabelling of already pleaded facts with a new legal label does not make it a new claim, but if additional facts are pleaded with the new legal label such that the 'new' claim involves a different factual enquiry, then it will be a new claim. It will still be relevant to consider how close the facts are to the old claim so as to consider the significance and likely impact of the amendment (para 30). In that case, it was held that a different reason for treatment, and a different causation issue, made it a new claim, not a relabelling: see paras 28-30.

49. The fact that an amendment is a 'mere' relabelling, however, does not mean that an amendment should automatically be allowed. The Selkent principles require that all the circumstances be considered.

50. The underlying merits of the proposed amended claim may be relevant if the Tribunal is in a position to make a fair assessment of those merits, since there is no point in allowing an amendment to add an utterly hopeless case, but normally it should be assumed that the proposed amended claim is arguable: *Woodhouse v Hampshire Hospitals NHS Trust* (UKEAT/0132/12), at para 15.

My decision

51. Having regard to the above principles, I take into account the following:-

52. *First,* the proposed amended claim set out in the Claimant's witness statement for this hearing is not sufficiently particularised. In particular, it is not clear precisely when he alleges he made all the protected disclosures, nor are the precise terms of the alleged disclosures identified. The Claimant simply sets out what he says the disclosures were about in very general terms. Although he describes in relation to each what he says was the public interest in the matters in question, he merely asserts that he considered each of the matters amounted to a breach of a legal obligation. He does not identify what legal obligation he had in mind and it is not obvious what the legal obligation might be since the alleged disclosures are said to relate to matters that may be morally wrong or bad practice but which are not self-evidently breaches of legal obligations. The list is as follows: *"wasting company resources for the benefit of extending personal influence in the company"*, *"arbitrary decision making and acting in contempt of other functional departments and offices"*, *"unfair manipulation of employees annual performance scoring process with prejudice to back office and junior employees through informal behind the stages messaging"*, *"non-compliance with globally announced HR policies and procedures on internal job postings"* and *"covering up the discriminatory acts of a senior employee, concealing the fact of being involved in the discriminatory acts and failing to abstain from investigations even when it was revealed; arbitrary, secretive, opaque, manipulative handling of grievance procedures"*.

53. *Secondly,* although the amendment is sought to be made very shortly after the start of proceedings, it is being made outside the three-month time limit in s 111 ERA 1996. The Claimant was dismissed on 13 January 2021. The original three-month time limit therefore expired on 12 April 2021. The Claimant contacted ACAS on 22 March 2021 and the ACAS Early Conciliation certificate was issued on the same date, but that second certificate is to be ignored in calculating the time limit: see *Revenue and Customs Commissioners v Garau* [2017] ICR 1121, *Romero v Nottingham City Council* (UKEAT/0303/17/DM) and *Peacock v Murreyfield Lodge Limited* [2020] ICR D3. It follows that the Claimant's application, which for the reasons set out above I assume in the Claimant's favour was made on 21 April 2021 rather than at this hearing, was made outside the primary three-month time limit. At this stage, I do not need to make a final determination as to whether

the claim is in time, but I consider that the Claimant's prospects of establishing that it was brought in time are very poor. This is because the Claimant did bring a claim within the primary time limit that did not include the claim of automatic unfair dismissal that he now wishes to bring and it would therefore have been reasonably practicable for him to have brought this new claim within time. He was aware of his legal rights and, as I have already found above, I infer that the reason why he did not include this claim originally is because he did not consider that the reason for his dismissal was his protected disclosures. He only sought to bring that claim when he realised that he could not bring a claim for interim relief in relation to a discrimination claim. If he genuinely considered the protected disclosure(s) to be the reason for his dismissal, it was practicable for him to have brought that claim from the outset.

54. *Thirdly,* so far as the scope of the amendments is concerned, the additional protected disclosures would add significantly to the evidence for the final hearing and the complexity of that evidence, given their nature and number. Adding a claim that the dismissal was because of the protected disclosure pleaded in the First Claim would not add significantly to the length or complexity of the hearing, however.

55. *Fourthly*, so far as the merits of the alleged protected disclosures are concerned, I cannot at this stage form a firm view, but based on the Claimant's witness statement and the documents in his bundle to which he referred me, I consider he is likely to have difficulty establishing that he had a reasonable belief that any of the written documents that he relies on tended to show to their recipients that there was a breach of a legal obligation (at least save where 'discrimination' is mentioned). This is because it is not obvious that the matters that the Claimant asserts were legal obligations were indeed legal obligations and because in none of the documents that he showed me in relation to the period between 2016 and 2018 does he make any clear statement that he believed there had been a breach of a legal obligation.

56. *Fithly,* so far as the merits of the automatic unfair dismissal claim is concerned, I consider that this stands no reasonable prospect of success. This is because the legal test on such a claim is not the same as for the detriments claims. It is not enough that the protected disclosures form a material part of the reasons for dismissal: the claim can only succeed if the protected disclosure(s) were the sole or principal reason for dismissal. Further, the burden is on the Claimant to raise a *prima facie* case that the sole or principal reason for his dismissal was that he had made protected disclosures (s 103A(1)). Only then does the burden shift to the Respondent to prove that the protected disclosures were not the sole or principal reason for the dismissal. The Claimant refused to accept this point at the hearing, saying that he had read cases that said the opposite, but the Court of Appeal's decision in *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 is binding on me in this respect.

57. Ms Marks' decision to dismiss the Claimant in this case was taken after the Claimant had been off work for almost 21 months, and had exhausted his contractual sick pay entitlement over 15 months previously. So far as I can tell from reviewing the correspondence in the bundle, and the Claimant's witness statement in these proceedings, the Claimant's position at that point was that he agreed that he was not fit for work, but maintained that the Respondent had caused his disability and was not making the adjustments necessary to accommodate his return to work, although he did not identify in the correspondence what those adjustments might be. The documents in the bundle show that the Respondent had sought during his sickness absence, and with increased focus from 24 November 2020 when the formal capability proceedings commenced, to obtain medical evidence or an occupational health assessment in relation to him. The Claimant refused to co-operate with that process, or to provide any updated medical evidence, unless the Respondent agreed to a set of complicated conditions which he set out in his email of 23 December 2020 (p 192), which Ms Marks considered 'unworkable' as she put it in the dismissal letter (p 197).

58. Against that background, I consider that the Claimant stands no reasonable prospect of showing that the sole or principal reason for his dismissal was anything other than his lack of capability for work (or, possibly, his refusal to co-operate with the capability process). In any event, he stands no reasonable prospect of showing that the sole or principal reason for his dismissal were disclosures that he made several years previously (four years previously in the case of disclosures he alleges he made to Ms Marks who took the decsion to dismiss). This is not just because of the passage of time (although that is significant), or because of the inherent likelihood that the reason for a decision to dismiss an employee who has been absent for 21 months with no clear route for return was indeed capability, but also because of the nature of the disclosures he relies on which do not, as I have already observed, make clear allegations of breaches of legal obligations and therefore are inherently unlikely to have prompted retaliatory conduct. Further, even if the Claimant is right that there was some link back to those disclosures, as he puts it in his own witness statement *"termination of my employment on 13 January was just a matter of decision for the Respondent as the working conditions became completely untenable as early as in April 2019"*. In other words, whatever had happened previously, by 13 January 2021 dismissal was inevitable given the situation by then prevailing.

59. I should add at this point that the Claimant on a number of occasions during the hearing referred to paragraph 46 of the Respondent's grounds of resistance where the Respondent pleads what is known as the *Polkey* point that if there was anything unfair in the procedure it adopted, that would have made no difference to the outcome so that any compensatory award should be reduced to zero. The Claimant suggested that this supported his case that the Respondent was just trying to orchestrate his departure because he had made protected disclosures. It does not mean that, however: that standard pleading by the Respondent simply sets out the well-known *Polkey* principle that if there was unfairness in the procedure followed prior to dismissal (such as a failure to provide fair warning of the potential for dismissal, or failure to

hold an appeal) then that would have made no difference because it was substantively fair to dismiss the Claimant for capability given his long-term ill-health absence.

60. *Finally*, I consider the balance of prejudice. If I refuse the amendment, the Claimant cannot pursue his application for interim relief, but that is not a significant prejudice. This is because, as a result of the way the hearing proceeded, the Claimant had the opportunity at this hearing to address me on the merits of that application in any event, so that I have been able to take those submissions into account in determining this application to amend. Given that on an application for interim relief the Claimant has to satisfy the high test that it is 'likely' his automatic unfair dismissal claim will succeed, i.e. that it stands a pretty good chance of success (see ERA 1996, s 129(1) and the authorities of *Taplin v C Shippam Ltd* [1978] ICR 1068 and *London City Airport Ltd v Chackro* [2013] IRLR 610), it follows from my conclusion that this claim in fact stands no reasonable prospect of success, that he loses nothing by not being able to pursue an application for interim relief. If I refuse the amendment the Claimant will obviously also lose the opportunity of pursuing this claim at a full merits hearing, but again that is not a significant prejudice given the view I have formed of its prospects of success, and also given that the Claimant has other claims that are at present proceeding to a full merits hearing, including a claim that his dismissal was discriminatory which, if it succeeds, provides a gateway to uncapped compensation. Further, since it is apparent from the Claimant's correspondence in the lead-up to his dismissal, as well as the way in which he originally pleaded this case, that the Claimant regards that discrimination claim as his primary claim in any event, there is little prejudice to him in my not permitting this amendment.

61. In contrast, the prejudice to the Respondent if I permit the amendment is significant since it will be put to the trouble and expense of responding to an apparently unmeritorious claim and to responding to a significantly expanded and insufficiently particularised list of alleged protected disclosures.

62. Taking into account all the foregoing factors, I refuse the Claimant permission to amend his Second Claim to include a claim for automatic unfair dismissal for having made protected disclosures. I also refuse him permission to amend his claim to include any additional protected disclosures, as those are formulated in his witness statement for this hearing. However, it does not follow that the Claimant could not make a more concise, properly particularised, application to amend the protected disclosures relied on for his detriments claim under s 47B ERA 1996 at a later date.

Issue (4): the Claimant's interim relief application

63. Since I have refused the Claimant permission to amend his Second Claim to include a claim for automatic unfair dismissal for having made protected disclosures it follows that I have no jurisdiction to consider his application for interim relief. At this hearing the Claimant accepted that the authority of *Steer*

v Stormsure means that he can make no application for interim relief in respect of his claim that his dismissal was discriminatory. Even if I had permitted the Claimant to amend his claim, however, it follows from my reasons for refusing the amendment claim above that I would also have refused an application for interim relief in relation to an automatic unfair dismissal claim.

Issue (5): the Respondent's costs application

The law

64. Rules 76 and 84 provide so far as relevant as follows:

> **76.— When a costs order or a preparation time order may or shall be made**
> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
> (b) any claim or response had no reasonable prospect of success…
>
> **84. Ability to pay**
> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

65. There is no requirement that a costs order reflect the amount that is specifically attributable to the unreasonable conduct (*McPherson v BNP Paribas* [2004] EWCA Civ 569, [2004] ICR 1398). However, the tribunal must identify the conduct, what was unreasonable about it and the effects it had: these are all relevant factors in determining whether costs should be awarded and the amount: *Yerrakalva v Barnsley MBC* [2011] EWCA Civ 1255, [2012] ICR 420.

66. In deciding whether to make an award of a litigant in person is not to be judged by the standards of a legal professional: see *Vaughan v London Borough of Lewisham & Others* [2013] IRLR 713 at paragraph 25.

67. In deciding whether the conduct of litigation is unreasonable, the Tribunal must bear in mind that in any given situation there may be more than one reasonable course to take: the Tribunal must not substitute its view for that of the litigant: *Solomon v University of Hunter and Hammond* (UKEAT/0258/18-19/DA) at para 107.

The parties' submissions

68. The Respondent applied for its costs of responding to the Claimant's interim relief application on the basis set out in Mr Smith's skeleton argument, i.e.: (a) the application had no reasonable prospect of success; and/or (b) the Claimant had acted unreasonably, including by: (i) seeking to 'shift the goalposts' following receipt of the Respondent's email costs warning of 13 April 2021; (ii) seeking materially to expand 'by the back door' the legal and/or factual basis on which the Second Claim was brought in order to found an interim relief application; and (iii) failing to withdraw the Application when invited to do so by the Respondent. In addition, the Respondent added at the hearing that the Claimant had unreasonably conducted the hearing in that he had repeatedly interrupted Mr Smith and repeatedly asserted (without providing any basis for the assertions) that Ms Marks' witness statement consisted of *"lies"* and *"misrepresentations"*. The Respondent provided a Schedule of Costs for the hearing totalling £25,248.27 (not including counsel's costs and fees for attending the hearing), but accepted that any costs order should be capped at the summary assessment level of £20,000.

69. The Claimant resisted the Respondent's costs application on the basis that he did not accept that he had changed his case in response to the Tribunal and/or the Respondent pointing out that *Steer v Stormsure* did not mean that he could bring an application for interim relief in respect of a discriminatory dismissal. He did not accept that he had conducted the hearing unreasonably and he submitted that he would be seeking costs against the Respondent, although it was unclear on what basis. I indicated that if he had a costs application to make against the Respondent, there was insufficient time to deal with it at this hearing and he should make it in writing after the hearing if he wished.

My decision

70. There was insufficient time at the hearing to hear oral evidence from the Claimant as to his means, and in any event I considered that, given the Claimant's difficulties, it would be unfair both on him and the Respondent to ask him to give that evidence 'on the hoof'. I therefore indicated that I would make a decision as part of this reserved judgment on the question of whether the Claimant's conduct had been unreasonable and, if I so concluded, that I would give directions for the provision by the Claimant of information in writing as to his means so as to decide, in the terms of Rule 84, whether to make a costs order and, if so, in what amount.

71. In my judgment, the Claimant has acted unreasonably in relation to this application. For the reasons that I have already set out above in determining Issue (2), namely whether the original Second Claim included a claim for automatic unfair dismissal for making a protected disclosure, I consider that the Claimant did not make, or intend to make, such a claim when he commenced these proceedings. He changed his case only when it was pointed out to him by the Tribunal and the Respondent that *Steer v Stormsure*

did not mean that he could bring an application for interim relief in respect of a discriminatory dismissal. That change of case might have been reasonable if there was any indication that he considered at the time of dismissal that the reason for it was the protected disclosures (but there is no such indication), or if that claim stood a reasonable prospect of success (but it does not). I acknowledge that the Claimant is acting in person, but (as he emphasised to me at the start of the hearing) he is an intelligent person who excelled in his academic studies, he has done a significant amount of legal research and he has been in receipt of legal advice. More importantly, the core of the unreasonable conduct lies not with any question of legal judgment but with what the facts were as they were known to the Claimant. Although he does not accept that this is what he has done, I find that his change of case was not based on the facts as he believed them to be, and was an opportunistic attempt to maintain an application for interim relief that he ought to have abandoned once it was pointed out that he had misunderstood *Steer v Stormsure*. The Claimant's unreasonable conduct has resulted in the Respondent having to prepare, at speed and considerable cost, for an interim relief hearing, in order to defend itself against an application that stood no reasonable prospect of success. Subject to consideration of the Claimant's means, I find that the threshold test in Rule 76(1) for the making of a costs order is satisfied.

72. I emphasise that it does not follow from the above that I will make a costs order. I will take the Claimant's means into account both in determining whether to make a costs order and, if so, in what amount as permitted by Rule 84.

73. I should add, for completeness, that I also considered the Respondent's submissions about the Claimant's conduct of the hearing. By ordinary standards, the Claimant's conduct of the hearing (in terms of his allegations against Ms Marks, his interruptions of me and Mr Smith and his reluctance to accept direction from me) was unreasonable, but I am not prepared to find that it was unreasonable given his claimed disability.

Conclusion

74. In the light of the foregoing, it is ordered as follows:-

ORDERS

(1) The Claimant is refused permission to amend his claim to include a claim for automatic unfair dismissal under s 103A ERA 1996.

(2) The Claimant is refused permission to amend his claim to include any additional protected disclosures, as those are formulated in his witness statement for this hearing. This does not prevent the Claimant making a

more concise, properly particularised, application to amend the protected disclosures relied on for his detriments claim under s 47B ERA 1996 at a later date.

(3) The Claimant's application for interim relief is dismissed.

(4) These proceedings (2200247/2021) are joined with claim number 2202809/2020.

(5) The Claimant must **within 7 days** of the date that this judgment is sent to the parties:
   a. provide a witness statement setting out details of his financial means, including any income, savings or property; or
   b. if he does not wish his means to be taken into account in determining whether to make a costs order and, if so, in what amount, then he must within the same timeframe confirm that to the tribunal; and,
   c. whether or not he provides information as to his financial means, he may set out any further submissions that he wishes to make, in the light of the matters already determined in this judgment, regarding the question of whether a costs order should be made against him and, if so, in what amount.

(6) The Respondent may provide any response that it wishes to the Claimant's submissions **within 7 days** of receipt of the Claimant's submissions/statement.

(7) The costs application will then be finally determined on the papers by Employment Judge Stout.

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Employment Judge Stout

28 April 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

29/04/2021.

FOR THE TRIBUNAL OFFICE