Case no: 2201542/22

EMPLOYMENT TRIBUNALS

Claimant: **Mr. M. Kamara**

Respondents: **(1) Seal Security UK Ltd**
(2) Bloomberg LLP

London Central

Employment Judge Goodman **25 October 2022**

Representation:
Claimant: David Lamina, Lamina Litigation Services Ltd
First respondent: Amy Jarvis, Peninsula Business Systems Ltd
Second respondent: Andrew Smith, counsel

PRELIMINARY HEARING
RESERVED JUDGMENT

1. The application to add a claim of race harassment against the second respondent is refused.

2. All claims against the second respondent are struck out under order 37 because they have no reasonable prospect of success.

3. The claims of failing to make adjustment for disability, direct discrimination because of disability or because of something arising from disability are struck out under order 37 because they have no reasonable prospect of success.

4. Claims relating to the Health and Safety at Work Act or claims for personal injury in common law are dismissed because the tribunal has no jurisdiction.

5. **Unless by noon on 15 December 2022** the claimant sends the employment tribunal and the respondent further information about the protected disclosure on which he relies, **the claims for dismissal and detriment for making a protected disclosure stand dismissed without further order**. The information required is :
   (a) what the claimant said or wrote that was the disclosure of information;
   (b) if written, the date of the document and to whom it was sent;

(c) if spoken, the name(s) of the person(s) he spoke to, when he said it, where he said it, and in what context;
(d) the facts he relies on to show his reasonable belief that it was a matter of public interest;
(e) by reference to section 43B of the Employment Rights Act, what the information he disclosed tended to show.

REASONS

1. On 16 February 2022 the claimant was dismissed for gross misconduct by Seal Security UK Ltd, his employer. Seal is the first respondent to this claim. He had been found to be asleep during his shift as a security guard at the premises of Bloomberg LLP, the second respondent, where he worked.

Claims and Issues

2. He brought proceedings in the employment tribunal on 29 March 2022. He claimed unfair dismissal, dismissal and detriment because of protected disclosures, discrimination because of race, religion and disability, harassment related to race, victimisation, unlawful deductions from wages, wrongful dismissal (notice pay), breaches of health and safety legislation, personal injury. (He had also claimed indirect discrimination and breaches of privacy rights but these have since been withdrawn). The claim form contains little outline of the facts in which these claims are based.

3. There was a case management hearing on 23 June 2022 where Employment Judge Palca explored the issues in detail with the parties and then prepared a draft list of issues in the claims which covers 11 pages.

4. She made orders that the claimant give further information about the holiday pay claim (order 3.2.1 and 3.2.2), the public interest disclosure (3.2.3.1 to 3.2.7), and disability (4.3.1-4.3.9). The claimant was also to provide details of the protected act in which he relied in the victimisation claim (22(i)), and details of the unfavourable treatment because of something arising from disability (20 (iii)).

5. EmploymentJudge Palca also noted that the claimant argues that the claimant was an employee of the second respondent within the meaning of section 230 of the employment rights act or section 83 of the Equality Act 2010, alternatively their worker under section 230 Employment Rights Act rights act 1996.

6. When listing the less favourable or unfavourable treatment said to constitute discrimination or harassment because of religion and belief or race, she included in square brackets an allegation that “Mr McKenzie of the second respondent” in a meeting on the 6th floor of Bloomberg required the claimant in derogatory terms to attend work in May 2020. The square brackets were because she noted the second respondent’s explicit objection that the addition of Bloomberg’s Mr McKenzie to the existing allegation against Howard Berry of Seal, was not contained in the claim form, nor had it been

particularised, and the claimant was required to make an application to amend to include it in his claim.

Today's Hearing

7. The claimant has been assisted, at both hearings, by his representative David Lamina, who has also conducted correspondence with the employment tribunal between the hearings. Because Mr Lamina is in business providing litigation services, I reminded him that to advise and represent in employment tribunal claims for *claimants* "by way of business" is an offence, unless he is a registered claims manager, charity, trade union representative or solicitor or counsel (and associated professions). He agreed he was not a solicitor or barrister, that his name does not currently appear on the FCA register of claims managers. He was not the claimant's trade union representative, as the claimant was a member of Unite. He assured the tribunal that he appeared solely as a close family friend of the claimant, not by way of business.

8. As the hearing continued I recalled from his presentation and manner that he had appeared before me in other cases. In one of these he had made an application for costs, despite having said he was acting pro bono. This reinforced the importance of reminding him about the regulation of unqualified persons advising claimants by way of business.

9. Employment Judge Palca listed a number of matters which the judge might decide today. These include applications to strike out the claim against Bloomberg because they have no reasonable prospect of success, or under rule 34; applications to strike out claims for health and safety and personal injury made against Seal, and deposit orders in any claims with little reasonable prospects of success.

10. By way case management, she directed that this hearing could also consider the claimant's application for witness orders, information about CCTV footage used in evidence in the discipline proceedings against him, and an application for a "subpoena ad testificandum" to disclose whether the respondents intend to go out of business, plus finalisation of the list of issues, and the date of the full merits hearing.

11. For today's hearing I was provided with a hearing bundle in 4 sections, MK1, MK2, MK3 and Addendum, totalling 1056 pages. There was an index for pages 1-980.

12. There was a witness statement bundle containing statements by:

Michael Kamara, the claimant (43 pages)
Michael Alake, formerly employed by Seal (just over one page)**,** dealing with an alleged data infringement on 8 October 2021
Aaron Canty, Bloomberg's employment relations team manager, dealing with discipline and grievance and whistleblowing for staff employed by Bloomberg (6 pages), stating that the 6 discriminators identified in the case management summary were employed by Seal, and giving information about a letter of 10 August 2021 sent to Bloomberg (although addressed by name to

a Seal manager) which is identified a protected disclosure in the claim.
Dale McKenzie, European security territory manager for Bloomberg, responsible for security arrangements across 34 European cities where the they operate. He explains interaction between Bloomberg staff and Seal's staff in London (4 pages)
John Reynolds, UK director of Seal, gives evidence about the service agreement and relationship between Seal and Bloomberg, and arrangements for employment of Seal staff (12 pages).

The witnesses were present but were not called to give oral evidence.

13. Seal's representative had prepared a skeleton argument which was sent to the other parties yesterday. Bloomberg's counsel had prepared a skeleton argument which was sent to the other parties on 17 October, although the claimant denies receiving it.

14. The claimant also denied seeing the bundle until recently. Bloomberg's solicitor says it was sent by email on 5 September. The claimant says the attachments to that email were too large to be transmitted (although the first respondent's representative said that she had been able to open it). The bundle was said to have been posted as well. In the addendum documents (page 1058) there is a witness statement by a process server to the effect that on 17 October at 6.30pm he hand-delivered the witness statements and hearing bundle to a man at the claimant's address who identified himself as Mr Kamara, though in the hearing Mr Kamara flatly denied that this delivery took place. I made these enquiries about delivery of the bundle because Mr Lamina seemed unfamiliar with the content of the bundle. As the hearing proceeded, the judge and the representatives for the respondents assisted in finding documents for the claimant. I make no finding about the truth of these disputes about delivery of the bundle, but I observed that when the missing documents had originated from Mr Lamina, or were said to have been sent by him to the tribunal office, Mr Lamina was not able to find them on his laptop. (In an effort to assist, in mid-afternoon, Seal's representative emailed the claimant's grievance of November 2021 to the tribunal and claimant, as the claimant could not find it or identify the date). I concluded that a large part of Mr Lamina's difficulty may not have been that the hearing bundle was sent late, but that he had not prepared for this hearing.

Application for Witness Orders

15. In the case management summary prepared for the June 2022 hearing, the claimant applied for witness orders for named individuals, who I understand to be employees of Seal: Michael Judd, Hajira Faheem, Howard Berry, Rudyard Rennock and Steve Roulette (the claimant's trade union representative). He now asks also for an order for Mark Cooper, Bloomberg's head of security, who was asked by Seal for the building's CCTV on relevant dates so that they could investigate the allegations against the claimant. Mr Lamina explained of a 59 page submission that the evidence of Howard Berry and Mark Cooper was necessary to enable the tribunal to find (by refence to sharing of CCTV material) there was a degree of control by Bloomberg of the claimant's activity, such that he was their worker. He also sought postponement of today's hearing so that the orders could be made to compel their attendance

at a postponed hearing.

16. I declined to make the orders or postpone the hearing. I considered there was sufficient documentary evidence in the bundle about Seal's request to Bloomberg for CCTV evidence, and their reply, and in the claimant's pleaded case and witness statement, for me to take his case at its highest, in assessing what his prospects of success were. Further,8f he did think findings must be made today, the claimant had known since June 2022 that this hearing was to decide the applications, but had not made the applications until today. It was not proportionate to the overriding objective to save costs and expense to postpone the hearing just to arrange for Mr Cooper's attendance.

17. The Employment Tribunal President from time to time issues Guidance Notes which are intended to help unrepresented parties understand tribunal procedure. Guidance Note number 3, which is linked to the General Practice Direction On Case Management states:

> *7. An application for a witness order may be made at a hearing or by an application in writing to the Tribunal. In order that the Tribunal can send the witness order to the witness in good time before the hearing, it is important to make any application as early as possible. A witness order might be refused if the attendance of the witness cannot be ensured in time.*
>
> *8. The application will need to give the name and address of the witness; a summary of the evidence it is believed they will give (or a copy of their witness statement, if there is one); and an explanation as to why a witness order is necessary to secure their attendance.*

18. I reproduce this here so that if the claimant decides to renew an application for witness orders for the final hearing, he can make sure to include the information required by paragraph 8. The claimant will however have noted in the case management discussion at the conclusion of this hearing that the first respondent said that they intended to call John Reynolds, Michael Judd, Howard Berry and Hajira Faheem in any event, so orders are not needed for their attendance.

Application to Amend Claim against Second Respondent

19. At the conclusion of the hearing I asked whether there was an outstanding application to amend the claim against Bloomberg to add an allegation that Dale McKenzie had abused the claimant in May 2020 and that this was harassment related to race or to religion. It took over 25 minutes to establish that an application *had* been made, as part of a long document dated 22 July 2022. Paragraph 5 of this document (bundle page 574) says:

> "Sir/Madam an application to amend court summon grounds to apply today to amend the court's attention to including the specific named bearers management from Bloomberg LP in the attempt to perverse justice adhered in the term "control test" to request from the grounds in the application of strikeout but for frivolous and/or vexatious accusation that will warrant strikeout".

This might be an application to amend, or it might be an application to issue a witness order.

20. I commented that this contained no particulars that could amount to a pleading in sufficient detail for Bloomberg to understand what was alleged or the case they had to defend. (If it was an application for a witness order, Mr McKenzie has provided a witness statement and was present at the hearing). Mr Lamina said there was more detail in the further and better particulars, but he was not able to identify which of the several sets of further and better particulars included in the bundle contains this information, and many of them are very long. I therefore made an order that the claimant supply the employment tribunal, copied to the respondent's representatives, by 4 pm on Friday 28th of October, the further and better particulars containing the amendment he wishes the tribunal to allow, and as the further and better particulars may be a very long document, he is asked to quote from the document the passage on which he relies. I would then consider the application in more detail. For the time being, I understand from verbal comments made by Mr Kamara and Mr Lamina that Mr McKenzie used crude language to refer to the claimant wanting time off for the Eid, or (possibly) for a Friday, and that this was in May 2020. In his witness statement the claimant says that in May 2020 Howard Berry of Seal and Dale McKenzie of Bloomberg, approached him on the 6th floor and asked him to discipline an officer, the claimant replied that they had had a word with him and "they refused and they continue abusing me racially and religiously. I was instructed to follow Howard's instructions else I will find myself in the job market looking for job". The racial or religious abuse is not specified.

21. Late in the afternoon of 26 October that Mr Lamina sent the employment tribunal a long email in which I found the following passage:

> **18. Sir/Madam I/We believe that the actions by the named Respondent/s falls within unreasonable recklessness but for the Court is forthwith reminding that a strict liability offence grounds in a direct racial discrimination by the 1st and 2nd Respondent [BLOOMBERG LP Management by derogatory language F word and impediment to go to pray for EID and or Friday knowing that he is Muslim breach to Religious Belief Direct Discrimination outweigh the rationale of having a contract thereto a strict liability offence irrespective of an ordinary bilateral contract and or not.**

22. This might replicate some earlier document (possibly a long submission of 22 July) but it is not dated. There were also 6 attachments, each in themselves a long document, dated variously 7 September 2021, 21 January 2022, 1 March 2022, 23 March 2022, and more recently. The text is not easily structured but even on careful reading I was not able to find any reference to the alleged abuse by Mr McKenzie.

23. Paragraph 18 above refers to the Eid, which might help date the incident alleged, and in the hearing I asked if Mr Lamina or Mr Kamara was prepared to say when the Eid fell in 2020. Neither was prepared to answer. Ms Jervis for Seal then contributed that an online search showed it was not in May but later. My own pos- hearing check shows that Eid al-Fitr (the feast at the end of Ramadan) fell in May 2020, and Eid al-Adha (commemoration of the sacrifice of Isaac) fell late in July 2020. This tends to confirm that there could have been a reference to Eid in May 2020.

24. It is relevant to recall the words of Mr Justice Langstaff in **Chandhok v Tirkey UKEAT/01910/14**, an appeal concerning an amendment of claim, about the importance of pleadings in the Employment Tribunal:

> "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1".

25. The Tribunal has a discretion under Rule 29 to permit amendments to a party's statement of case. The principles the tribunal must have in mind when exercising its discretion were set out in **Selkent Bus Company v Moore (1986) ICR 836.** The discretion is to be exercised in accordance with the overriding objective, and take into account all the circumstances, including:
a. the nature and extent of the amendment,
b. its timing (including any applicable time limits and the implications of the amendment in terms of impact on the trial timetable or costs),
c. its merits (where those are obvious, there being no point in adding an amendment to bring a hopeless claim),and
d.the relative prejudice or hardship to the parties of either granting or refusing it.

26. In considering whether the amendment should be allowed, I comment that it remains the case that as an pleaded allegation, this is bare of particulars, even though there has been an extensive case management hearing, and it is now 4 months since that hearing. The claimant does not say who was involved in the conversation, what was said, or the context. It does not say when it was, although discussion in the hearing suggested that it was in May 2020. I consider that this is not a relabelling of what is already in the claim, but a new allegation. Further, I cannot see from the earlier grievance material that the claimant had complained about it before September 2021 at the earliest. It is a freestanding allegation, as there is no other harassment complaint to do with Bloomberg, or any suggestion of unfavourable or less favourable treatment than until we come to the fine for not wearing a mask in March 2021, which resulted in Seal making a deduction from pay, and that is *not* alleged as discrimination because of race or religion. There is a complaint about Bloomberg allowing access to CCTV late in 2021, but that is not alleged as discrimination because of race religion either. It is more than 2 years old. It requires oral evidence, as nothing was put in writing about it at the time. The delay weakens the strength of the evidence on either side, and impairs the respondent's investigation and defence of the claim. Mr McKenzie, informed by Bloomberg's legal representatives that the claimant made the allegation about an incident in May 2020 at the preliminary hearing in June 2022, states in his witness statement that he had no recollection of meeting with the claimant and Mr Berry in May 2020 or at any other time, and never witnessed Mr Berry speak to the claimant in derogatory terms, and never spoke to the claimant in derogatory terms himself. The claimant's *own* witness evidence does not say what the abuse was.

27. I conclude that the amendment is not allowed. The claim is late. There is no explanation why it is late. There is clear prejudice to the second respondent in trying to understand and defend it, both because it is bare of particulars and because it is old and undocumented. The claimant has made numerous other claims which are to be heard by the employment tribunal, including an allegation that the first respondent's Mr Berry was involved in this harassment, so the claimant has not lost all chance of redress. The balance of prejudice in this favours the second respondent.

Applications to Strike out

28. Both respondents have made applications to strike out parts of the claim, and I set out the relevant law that applies to these applications.

29. Order 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

> 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. Striking out claims at a preliminary stage, before evidence has been heard, is a draconian measure, only to be taken in an obvious case. In any case where there is a "crucial core of disputed facts", those should be decided after hearing the evidence, and not at some kind of "impromptu trial" based on pleadings and written statements, save where there is, for example, incontrovertible contradictory evidence in a document. In whistleblowing (public interest disclosure) and Equality Act cases, which are important in a democratic society, over and above the interest of the individual claimant, and particularly fact sensitive, tribunals should be especially careful – **Anyanwu v South Bank University and another UKHL (2001)1; Tayside Public Transport Company Ltd v Reilly (2012) IRLR 755; Ezsias v North Glamorgan NHS Trust (2007) IRLR 603**. Nevertheless, it is open to an employment tribunal to assess the claimant's case, based on his pleadings and any statements as if he had proved it after a hearing of evidence, so taking it at its highest, and then decide whether, if he proves these facts, that establishes his claim. As to what the claim is, tribunals were reminded in **Cox v Adecco (2021) ICR 1307** that the claimant should be invited to particularise unclear elements, and that the hearing judge considering strike out should take account of all written material as well as what is said in a hearing, especially who an unrepresented claimant, before striking out.

31. Having done this, if the tribunal decides whether there is no reasonable prospect of success, it must also exercise discretion to strike out as a second stage in the process – **Balls v Downham Market High School and College (2011) IRLR 217.**

First Respondent's Application to Strike out Claims Based on Health and Safety at Work Enforcement and Personal Injury

32. I asked Mr Lamina to address me on the legal basis for the employment

tribunal having jurisdiction to consider these claims. Having heard him, I directed that the employment tribunal had no jurisdiction to enforce the Health and Safety at Work Act or the regulations (such as RIDDOR) made thereunder, which is reserved the Health and Safety Executive and the criminal courts. Nor is the tribunal able to find that the respondent acted in breach of duty of care causing personal injury. That is a common law jurisdiction where claims are brought in the County Court.

33. For clarity, the tribunal does have jurisdiction under the Employment Rights Act 1996 to consider whether the claimant was subjected to detriment or dismissal because he made a protected disclosure about health and safety at work, if that was the nature of his protected disclosure.

34. In addition, if the tribunal finds that there was discrimination, harassment or victimisation under the Equality Act 2010, it may then consider whether that treatment caused personal injury as part of its assessment of appropriate remedy.

35. On the assertion that the claimant's wages were misappropriated by Bloomberg because he had complained about the health and safety issue (in relation to a fine for not wearing a mask in March 2021), the wages deduction is already before the tribunal as a claim under section 13 of the Employment Rights Act, made against Seal as his employer. There is no freestanding claim for breach of health and safety at work, or for personal injury, that can be decided by the employment tribunal.

Disability Discrimination Claims

36. The first respondent, Seal, applied under rule 37 to strike out all claims based on disability or related to disability on grounds that they have no reasonable prospect of success.

37. It is useful at this point to give a short summary of the facts understood by the tribunal from reading the pleadings. The claimant had a contract of employment with Seal from 2018. Seal had a security services agreement with Bloomberg and supplied security officers to work at their premises in London. On 16 August 2021 the claimant was suspended from work on an allegation of sleeping on duty. The allegations related to one episode on 31 July 2021, another on 2 August, and another on 12 August 2021. On 15 December 2021 he was invited to a disciplinary meeting, and on 16 February 2022 he was dismissed for sleeping at work, leading, it was said, to a breakdown in Seal's confidence in his ability to discharge his duties as a security officer. His appeal against dismissal was rejected on 25 February 2022. He had not worked since 16 August 2021.

38. It is a feature of Mr Lamina's complicated, disordered written material, with odd syntax and frequent use of legal phrases in such inappropriate ways that it is clear he does not understand their meaning, that is hard to know whether some feature of the case has been stated in writing or not. While mindful of the guidance in **Chandhok**, I have tried to give Mr Lamina every opportunity to tell the tribunal where the claimant's case has been put in writing, or even to explain it orally, but even then he would answer a question with a speech

on another point, or maintained that it was not reasonable to expect the claimant to remember detail because he had been too ill, or to assert that there had been compliance without saying where it could be found, or attacked one or both respondents for being "disingenuous" in making the applications to strike out at all.

39. It is not easy to discern from the pleadings and further particulars that have been supplied what the disability is. But it is clear from a letter from the claimant's GP that he is recorded as attending surgery on 24 August 2021 with stress and depression, and again on the 18 February 2022. There is a letter from Xyla Therapies, a clinic providing cognitive behaviour therapy, that he had completed such a course by June 2022. The claimant has supplied a disability witness statement, as ordered by Judge Palca (page 705-711). After some preliminaries about how well he was doing until Howard Berry became manager in 2020, he says (paragraph 10) "my problems started on 16 August 2021", when he was suspended. It was the worry about suspension that led him to see his GP on 24 August 2021 when he was diagnosed with stress disorder, including insomnia, anxiety headaches, nausea, rapid heart beats and stomach disorder. There is no mention of other health conditions that might cause an impairment. There is no description of how the stress disorder impacted his ability to carry out day-to-day activities.

40. Taking this evidence at its highest, stress and anxiety as mental impairment began in August 2021 after the claimant was suspended from work. He does not assert a prior impairment. A claim for reasonable adjustments for disability has no reasonable prospects of success. As he was suspended from work on a disciplinary charge, there was no adjustment to be made that would enable him to work. The provision criterion or practice identified in the list of issues was the requirement to work a full day, to be adjusted by reducing his hours, or allocating him office duties away from frontline work. These could not be relevant after his suspension on 16 August. Further, if there are claims under section 13 (detriment or dismissal because of disability) or under section 15 (detriment or dismissal because of something arising from disability), it is clear that he was suspended and dismissed because of conduct that preceded the onset of the disability. He did not assert in the disciplinary hearing or otherwise that stress or anxiety had anything to do with being found sleeping, in fact he denied he had been asleep, asserting only that he been meditating after prayers. For any period when he *was* at work, when reasonable adjustments or other detriment could be claimed, he was not disabled, because it preceded the date when he says his troubles began.

41. A finding that he was not disabled within the meaning of the Act does not preclude him from including the stress and anxiety state and its consequences as factors relevant to remedy, should he succeed in another claim under the Equality Act. But it is right that his claims of disability discrimination should be struck out because, even assuming there was no challenge to his evidence about the mental impairment, he would still not be able to prove there was a failure to make reasonable adjustments for disability, or detriment or dismissal because of disability, or because of something arising (said to be an inability to work normal hours) from disability. He was not disciplined or dismissed because he did not or could not work normal hours. He was suspended from work and later dismissed because of

something which happened before his disability began.

First Respondent's Applications for Deposit Orders – Relevant Law

42. Rule 39 of the Employment Tribunal Rules of Procedure 2013 concerns deposit orders. It states:

> Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

43. The amount of the deposit is set having regard to the party's ability to pay, and must not be so high as to bar access to justice. The real deterrent effect of a deposit order is the risk of paying costs, because if at final hearing the claimant loses because of substantially the same weakness in his case as identified in the deposit order he is likely to have to pay the other party's costs.

44. Making a deposit order requires the tribunal to take the decision in two stages, firstly, to assess the prospects of success, secondly, to exercise its discretion on whether a deposit order is appropriate - see **Hasan v Tesco Stores Ltd UKEAT/ 0098/16** (which concerns strike out).

45. Applications for deposit orders are decided on the basis of the pleaded case and available documents, without taking oral evidence. The tribunal should consider the prospects of establishing the case on the basis of what is pleaded, and may also take into account the party's prospects of establishing the facts pleaded – **van Rensburg v Royal Borough of Kingston on Thames UKEAT/0095/07.**

46. A deposit order can have a chilling effect in what is largely a no-costs jurisdiction, and should not be done lightly, or bar access to justice in practice. The guidance to tribunals in **Hemdan v Ishmail (2017) IRLR 228** is:

> "the purpose of the deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit".

Ability to Pay

47. Rule 37 requires that "the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit".

48. In correspondence preceding this hearing the claimant was advised by the respondents of the need to provide evidence of his ability to pay, but he has not done so, and when this was raised in the hearing, he did not volunteer information. Mr Lamina suggested that he was claiming, or was about to claim, jobseekers allowance. The claimant refers in his witness statement to having a family; it is not known if his wife is working. Mr Lamina said that the family (by implication the wider family) could borrow to finance deposits, but no more. Thus the claimant's financial resources are obscure. I do not know from the witness statement or documents if his recovery by June 2022 following treatment was sufficient to enable him to look for work, or if he has found work, or if he has savings, or pays rent or mortgage, or what dependents he has to support. I do not know why the claimant and Mr Lamina have been so reticent about his ability to pay, and I hope it is not because thereby they hope it will be assumed that he has nothing. Some claimants in the past have been found to be untruthful about the extent of their means when costs or deposit orders are being considered, or when documentary evidence is required, and to have substantially more means than they have suggested before. This is not to say that the claimant is a man of means, only that an employment tribunal has reason to be cautious, even sceptical, in the absence of evidence.

49. Where I have decided to make deposit orders, I have done my best to find a figure which the claimant could pay, given the sketchy indication of his means, but bearing in mind, as the claimant must, that if he decides to pay the deposits, the real penalty is not the deposit itself, but the risk that if he loses his claim for substantially the same reasons as set out in these reasons, he is likely to be ordered to pay very substantial costs to the respondent for having conducted his claim unreasonably.

Protected public interest disclosure claims

50. The nature of the claim recorded by Employment Judge Palca in the case management hearing was that the claimant relied on "complaints about the working conditions of Bloomberg made by him and other officers in writing to David Mitch of the second respondent, and orally at a meeting with John Reynolds of the first of respondent, between April and August 2021". David Mitch (or Meech) was one of Bloomberg's security operations managers who had daily interactions with the Seal managers, John Reynolds and Michael Judd. David Meech, according to Mr McKenzie, occasionally sat in on Seal's daily briefings to staff, which were delivered by the claimant. She made an order for further information about the disclosures.

51. I tried to identify the written material. The respondents believe it is a letter written on 10 August 2021 by Seal Security staff, without identifying themselves by name, complaining about various matters relating to health and safety, and about holiday bookings. Mr Lamina however denied that this was the protected disclosure referred to. The case management directions make it clear that the claimant was expected to provide further details of the nature of the protected disclosure on which he relies. I have not been able to find such particulars in the various documents supplied by Mr Lamina to the employment tribunal since that hearing. I have read carefully the claimant's 43 page witness statement, and in that, in paragraph 49 he complains about the

shift pattern, and in paragraph 50 about holiday booking arrangements. He does not say when or where. He does not mention the 10 August collective grievance to Seal, or that he was involved in it. Complaints about holiday bookings and shift pattern are on the face of it complaints about his *own* working arrangements. It is hard to see how they are a complaint about a matter of public interest, though that might be easier to understand if it was known what he said. In paragraph 15(e) he refers to protected disclosures without specifying what they are, and in paragraph 15(q) he refers to whistleblowing: "the protected disclosures my race and treatment as compared to my white comparators", which suggests a protected act in a victimisation claim. The letter of 10 August 2021 does not complain about any difference in race. The first mention of that I could find is in the grievance he sent to the first respondent in September 2021, which is identified as a protected act for the victimisation claim.

52. I concluded on the particulars supplied, even as clarified to a very limited extent in the hearing, that the claimant has little prospect of establishing that he made any disclosures on a matter of public interest which are protected by the Employment Rights Act. He has not said which documents they were and he has not said what he was complaining about in the meeting with Mr Meech. There were moments in the hearing when I wondered whether Mr Lamina understood that a protected disclosure was not the same thing as disclosure of documents, or that a protected disclosure was not same thing as a protected characteristic, nor the same thing as a protected act. Even taking that into account, it remains the case that the claimant has not identified what he was complaining about that was a matter of public interest, as distinct from a complaint about his own working arrangements. Even if he supplies more precise information about the disclosures, there seems little reasonable prospect of establishing that they were made in the reasonable belief that they were in the public interest. I have not been asked to strike out this claim, perhaps because of the general guidance about fact sensitive claims, but on the claim as pleaded there is little reasonable prospect of success.

53. It remains essential that the claimant identify the disclosures for which he claims protection. The claimant has already been asked to supply further information, but given his representative's difficulty expressing himself other than in generalities, and the possibility that he has mixed up protected acts and protected disclosures or protected characteristics, I have allowed a final chance to give essential information for the public interest claims. If the claimant does pay a deposit, then I add an unless order for further information about the nature of the disclosures, otherwise the respondents are prejudiced in knowing what evidence to adduce, and the tribunal will have great difficulty in making findings.

54. When it comes to the detriment and dismissal, it is *possible* that the claimant could show that he was treated more harshly for his conduct than other people because he had made disclosures on matters of public interest, but without knowing what his complaints were, little more can be said.

Race Discrimination and Race Harassment

55. On the claims of race harassment and race discrimination, the first respondent argues that a deposit should be imposed as a condition of proceeding with its claims because the claimant nowhere identifies why a tribunal should accept that race was the reason for his treatment. The claimant only asserts that he was treated unfairly and white colleagues treated differently.

56. Employment tribunals are able to make inferences from facts in this difficult area, and while it is quite clear, having regard to **Madarassey v Nomura International**, that a bare difference in protected characteristic coupled with unfair treatment, is insufficient, and that there must be "something more", the claimant has provided enough detail of comparators who he says were treated differently (for example over holiday booking), without apparent explanation, for this to be a claim that needs to be examined on the evidence. It is implied, but not stated by the claimant, that because he was excluded from social activity, he may have been the only black person on site. Dismissal of a security officer for sleeping at work is not obviously unfair, but the claimant does assert that white people have offended in a similar way without being dismissed. I heed the remarks in **ABN Amro v Hogben UKEAT/0266/09** to the effect that weak cases should be struck out, not allowing claimants to wait like Mr Micawber in the hope that something will turn up, but that was a weaker case – in a claim of age discrimination the claimant had learned that his intended comparators were so close in age as to mean no discernible effect in decision making; Mr Kamara has better chances of establishing a difference in protected characteristic, and a tribunal could draw an inference from facts, requiring explanation. Bearing in mind the chilling effect of ordering the deposit, while this is a weak case, I consider it is a better exercise of the discretion not to order payment of the deposit in the race discrimination and race harassment claims against the first respondent.

Religion and belief claim

57. The less favourable treatment is set out in paragraph 19 (viii)(a) –(d). Items a and b appear to be complaints about events in May 2020, because there is no explicit mention in the claimant's witness statement of any event or refusal of time off for religious observance at other times. Item c., about not being invited for drinks, is not mentioned in the witness statement, and is not dated. I conclude that the first 3 matters complained of are likely to be well outside the time limit. The final allegation concerns the dismissal and is in time. It is about not heeding the claimant's explanation that he was praying and meditating, rather than asleep. It cannot be said that this item links with the previous items. The relevant law is that the claimant must bring his claim within three months of the act complained of. The act can be "conduct extending over a period", high watermark of such cases being **Hendricks v Metropolitan Police Commissioner.** If out of time, the employment tribunal can exercise to discretion to allow claims to proceed because it is just and equitable, which means taking account of: the delays, why there was delay, and how the delay affects the strength of the evidence, before weighing the balance prejudiced between the parties, and with no presumption that discretion will be exercised in the claimant's favour . I conclude that the earlier items, a.- c., are likely to be found out of time, and that there is no reason to

allow them to proceed out of time, given the lapse of time, the lack of complaint, and the difficulty of the respondent providing evidence. They involve different people. As I understand it, Mr Holt Mr Reynolds and Mr Berry did not play a part in the investigation, let alone the decision to dismiss. The decision about dismissal was made by independent people appointed by Peninsula Business Systems. It makes it most unlikely the first three allegations are part of a course of conduct. The claimant would then have to obtain discretion to allow the earlier claims to proceed. Allowing the claimant to proceed with items a. to c. as well as d. complicates a case which is otherwise largely concerned with suspension and dismissal, with events which are well out of time and occurred much earlier, and which on the face of it have little connection with the decision to dismiss. I conclude that these are good reasons for exercising discretion to order a deposit to be paid in respect of everything pleaded as religion and belief discrimination except item 19 (viii)(d), dismissing the claimant.

Victimisation

58. The claimant referred to victimisation and Employment Judge Palca asked for details of the protected act to be supplied.

59. On page 4 of a 59 page submission made on 22 July 2022 the claimant's representative says:

> "I/we believe that the application or to attempt to mislead the court in the application falls short inappropriate disingenuous on the balance of possible grounds claimant claims outweigh the rationale within on strike out retrospectively infringement contrary to a direct discrimination section 13 (1) Equality Act 2010 treat the claimant less favourably on grounds of his race by unfairly dismissal, victimisation contrary to section 27 Equality Act 2010 being black and no an ex-service quite nuts to set aside grounds in sending letters to all other comparators white in assisting them how to follow trivial error that all staff members are liable to have committed".

60. It is not easy to make sense of this, but it does include a reference to section 27 of the Equality Act. It does not say what the protected act *was*. Of course it is possible that Mr Lamina and the claimant have, as many lay people do, confused victimisation, in the colloquial sense of picking on someone, with the legal meaning of treating someone unfairly because they have complained about discrimination because of a protected characteristic. In question and answer I attempted to find out what the protected act might have been. Mr Lamina responded that it was (1) his race (2) he blew the whistle on not having breaks during working time, and (3) "grievances". Mr Lamina was not able to identify what these grievances were, but Ms Jarvis was able to supply that the claimant had sent a written grievance (which is not in the bundle or mentioned by the claimant in his witness statement) on 11 October 2021. This is a month after the claimant had a face-to-face meeting with the disciplinary investigator appointed by Peninsula. Having been able to read the content of this grievance, much of it is concerned with invasion of privacy by using CCTV to monitor him at work, the unfairness of having to return from holiday in Sierra Leone when he had booked it sometime earlier, compared to white people, and a work breaks issue. There is an extensive section in which he alleges that the unfair treatment of holiday booking is because of race. I

conclude that this is probably the document Mr Lamina had in mind. Clearly it is capable of being a protected act.

61. It was treated to a separate grievance hearing, heard by Magda Bowskill, of Peninsula, and a grievance appeal, decided by Christopher Cox of Peninsula, both other than the person, also from Peninsula, Nazma Khanom, who recommended dismissal. The involvement of different people makes it unlikely that complaints about these matters played much part in the decision to accept the evidence of the CCTV that the claimant was asleep on three occasions on shift, and to reject the claimant's own explanations that he was not asleep but meditating, or was entitled to a break, as on 2 August he was asleep for 33 minutes, longer than his 20 minute break. There was adequate evidence for a reasonable conclusion that he had been asleep. It may involve lengthy consideration of the grievance hearing and appeal (which I have read, as they are in the bundle before me) and these are so wide-ranging that they are likely to complicate and prolong the case, when the claimant has little reasonable prospect of success in establishing that the matters raised in his grievance had anything to do with the decision to dismiss for sleeping at work. It is of course *possible* (though without more, speculative) that the claimant could show that he would not have been dismissed for the conduct found but for the outstanding grievance, but given that he also complains that a Bloomberg manager was saying, soon after his suspension, well before his grievance, that he would not be returning to work, that might suggest that dismissal was already taken to be the penalty for that conduct. Taking all these factors overall, and in particular the length and complication of including grievance procedures on other matters when different personnel were involved, I conclude that it is right to ask the claimant pay a deposit for proceeding with the victimisation claim.

Second respondent's application to dismiss the claims against Bloomberg

62. Bloomberg argues that it was wrongly included in these proceedings at all, and that all claims against it should be struck out on the basis that they have no reasonable prospect of success. The claimant accepts he was employed by Seal. The claimant advanced an argument at the case management hearing that he was jointly employed by Seal and Bloomberg. He relied on the presence of a Bloomberg representative at his recruitment or promotion interviews or both, and also on Bloomberg's day-to-day supervision of his hours and activities at work. In the alternative, if he was not Bloomberg's employee, he was their worker.

63. The claimant's representative maintains this argument today, but did not in this hearing elaborate on the law beyomg refence to the control test being an important feature of establishing whether an individual is another's wrker, rather than self employed.

64. The respondent argues that there is no reasonable prospect of the claimant establishing that Bloomberg was his employer, or that he was Bloomberg's worker. It is argued that arrangements by which a security services company employs a security guard, who is then assigned to work at premises where his employer has a contract to provide security services, is a normal and common

feature of the supply of ancillary services. The claimant agrees that he had a contract of employment with Seal, that Seal paid him, Seal's managers supervised him, Seal heard his grievances, dismissed him, and sent a P 45. They also investigated his grievances, which were addressed to Seal, not Bloomberg. The anonymous grievance of 10 August, were the claimant involved with that, was in fact addressed to a named Seal manager, even though it was emailed to Bloomberg. The documents all confirm this.

65. The claimant's representative's argument is that Bloomberg was *also* his employer, whether within the Employment Rights Act sense of working under a contract of employment, or in the extended definition under the Equality Act, which includes "a contract personally to do work", a worker, where one of the tests the distinguishing worker for a self-employed person is the degree of integration into the workforce in matters such as supervision and control. He relies on **Clark v Harney Westwood & Riegels & others UKEAT/00018/20/BA**, to the effect that the contract of employment is only a starting point. Factually, he points to the wearing of a Bloomberg suit, rather than the Seal uniform, and to the control exercised by Bloomberg managers over his working hours and activities.

66. In **Clark** the Employment Appeal Tribunal President observed that the written contract was "clear and unequivocal evidence as to intention". The respondent argues that the claimant's contract with Seal is also unequivocal evidence of intention to employ him as a security officer to work where he was assigned. I observe that **Uber v Aslam** concluded that the contract of employment was one feature in the overall picture when assessing whether someone was a worker, but that does not mean the contract can be ignored. The claimant nowhere suggests that the contract with Seal was a sham.

67. On the joint employment point, I was referred by the respondent to **Patel v Specsavers Optical Group Limited (2019) UKEAT/0286/18,** with its observation that there there was a "well-established principle of employment law that in general terms one employee cannot simultaneously have two employers". In that case, the practical issue was whether there was an early conciliation certificate against the relevant respondent, the claimant was engaged in a joint venture with one company, whose subsidiary employed him, and of which he was a director. **Patel** discussed the reasoning in **Cairns v Visteon UK Ltd (2007) ICR 616**, where the facts are more similar to the present case. The discussion in **Cairns** included that cases about dual employment in the area of tort liability are concerned to ensure that there is liability in tort, and this is different in contract. There may be cases where a worker has a contract for services with an employment agency and the company to which she is signed, but no contract of employment, and in that case it may be necessary to imply a contract of employment to give her the protection of the Employment Rights Act. Further, where an employee of one company assigned to another seeks the protection of the Equality Act, the provisions of the Act about aiding, instructing (and so on) breaches of the Act provide protection, such that it is not necessary for an employee of one respondent also to be the worker of another. The second respondent argues that it is in no way necessary to imply a contract between the claimant and Bloomberg, let alone the claimant plus Seal plus Bloomberg, to give effect to the working arrangement for the claimant to be protected by either statute, nor

has the claimant suggested that Bloomberg instructed or aided a discriminatory act, or attempted to do so. Instead the claimant by his representative vehemently asserts that he was Bloomberg's worker because they controlled his hours and the way he was to carry out his duties. At several points in the argument Mr Lamina asserted, with reference to William Wilberforce's campaign to abolish the slave trade, but without reference to the Modern Slavery Act, that the claimant was Bloomberg's *slave*, but there is no contract, whether of service or for services, between slave and master; it would in any event be contrary to public policy to give effect to it. I conclude that here is no need to imply a contract fo personal service between the claimant and Bloomberg. If he required protection that he does not have from his employer, the protection should come from sections 111-112, not section 83.

68. Quite apart from whether it is necessary to imply the claimant was Bloomberg's worker as well as Seal's employee. whether someone is a worker as distinct from self-employed is a matter of fact and law. Having regard to the documentary evidence, the claimant's pleaded case, and his witness statement, I conclude that even taking this evidence at its highest, it is fanciful to suppose that an argument that Bloomberg was a joint employer, or the claimant was their worker, has a reasonable prospect of success. On the claimant's own evidence, Seal managers (Mr Berry) were on site. On control of activities, there is no evidence that Bloomberg did any more than observe meetings to find out what happened on handover, and then not routinely. On the uniform issue, it is common, notably in franchise operations, for an employee of one company to wear clothing of the brand of another. Wearing a suit supplied by Bloomberg, rather than the uniform supplied by Seal, when working on Bloomberg premises, does not, by itself indicate such close integration in the Bloomberg operation that he must be their worker. Taken in the context of so much documentary evidence of the contractual arrangements, as well as evidence of how the employment was conducted in practice, with the claimant being managed by, and addressing grievances to, Seal managers, as well as handling of his grievances, and discipline and dismissal by Seal managers or appointees, the suit is a small detail in an overall picture which supports the claimant being the employee of Seal (as he agrees) and not someone so closely integrated into the Bloomberg operation and controlled by them that he must be their worker, let alone their employee. Taking the claimant's case at its highest, there is no reasonable prospect of establishing that the claimant was Bloomberg's worker.

69. If Bloomberg is not the *employer* then the claims for unfair dismissal, whether because of conduct or because of the protected disclosure, and the claim of breach of contract in failing to pay notice, must fail as a matter of law. If the claimant was not Bloomberg's worker, as defined in section 230 pf the Employment Rights Act, the claims of detriment for making a protected disclosure, and breach of the Working Time Directive in work breaks, and the claim for unlawful deductions from wages must fail. In that group of claims, he can bring them against Seal as his employer.

70. As for the Equality Act claims, the claims of race harassment, race discrimination, religion and belief discrimination, any claim of disability discrimination or failure to make adjustments, or victimisation, all concern

individuals who are employed by Seal - other than Mr McKenzie, in which the application to amend has not been allowed. There is no evidence that Bloomberg staff could have known of the claimant's disability, which began in August 2021, after suspension. Thus claims of reasonable adjustments and discrimination because of something arising from disability, even if the claimant was Bloomberg's worker, have little reasonable prospect of success. The protected act relied on for victimisation is a grievance addressed to Seal, and the unfavourable treatment after October 2021 came from Seal not Bloomberg.

71. To conclude, all the claims against Bloomberg, the second respondent, are struck out because they have no reasonable prospect of success.

72. I have made a case management order for information about the protected disclosure because as will be clear from the reasons for ordering a deposit on protected disclosure, the claim cannot be defended or decided without more information about what it is exactly that the claimant relies on. Future case management will be conducted after the expiry of the orders the payment of deposit, when the length of a final hearing will be clearer.

Sarah Goodman
Employment Judge

Dated *1 November 2022*

JUDGMENT SENT TO THE PARTIES ON

.02/11/2022

FOR THE TRIBUNAL OFFICE

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