EMPLOYMENT TRIBUNALS

London South Employment Tribunal
14 & 15 September 2023 (video)

Claimant: Clary Lynette Dewing-Bates

Respondents: BAE Systems (Operations) Limited [1]
Mr Steve Kent [2]

Open preliminary hearing

Before: Judge M Aspinall (sitting alone as an Employment Judge)

Appearances: Mrs C Dewing-Bates, in person)
Mrs G Houlden, Counsel for the Respondents

JUDGMENT

1. Allegations that a Change of Circumstances form, failing to follow the UK grievance procedure, and a counselling request delay amounted to whistleblowing detriments are struck out as the Claimant has no reasonable prospect of demonstrating that it was not reasonably practicable to bring such claims in time, that they were part of a continuing act, or that they formed part of a series of similar acts. She has not established an arguable case that they were detriments related to her protected disclosures.

2. Other whistleblowing detriments alleged, or claims brought, against the First Respondent including for constructive or automatically unfair dismissal, will continue.

3. All claims against the Second Respondent (Steve Kent) are struck out and he is discharged as a Respondent.

Reasons

Application to Strike Out Detriment Claims

4. The Respondent made an application to strike out the detriment claims under section 47B of the Employment Rights Act 1996 as having no reasonable prospect of success, because they were brought outside the time limit.

5. In the written application dated 17 August 2023, the Respondent argued the Claimant should have been aware of the alleged detriments by December 2020 at the latest but did not bring the claim until June 2022. As the usual time limit is 3 months, extended to 6 months at most if conduct extends over a period, none of the statutory exceptions applied.

6. At the hearing on 14 September 2023, the Respondent clarified the application was focussed on the detriment claims being out of time, not just the dismissal claims. The application also covered the merits of the claims, beyond simply being out of time.

7. The Respondent submitted the letter of 8 December 2021 informing the Claimant that the disciplinary process would restart was not a detriment because:

   a) The decision to restart the process was communicated on 1 September 2021, so was out of

time.

b) The Claimant had asked for the disciplinary process to restart.

8. Therefore, there was no reasonable prospect of her showing this was a detriment linked to any protected disclosures.

9. If the final alleged detriment was unfounded and out of time, there would be no reasonable prospect of establishing a series of similar acts to bring earlier detriments in time.

Application to Strike Out Claims Against Second Respondent

10. The Respondent argued the claims against Steve Kent should be considered separately and struck out.

11. The only detriment alleged directly against him was the email he sent on 8 December 2020, which was significantly out of time with no reason it could not have been brought sooner.

12. As an individual respondent, the single isolated allegation was clearly out of time so should be struck out.

Respondent's Further Submissions

13. In further written submissions, the Respondent maintained the complaint against Mr Kent was clearly out of time as there was only the single email allegation against him personally.

14. The Respondent submitted that at the highest, Mr Kent was involved in one other meeting on 2 December 2020, but these two matters were still considerably out of time regarding claims against him personally.

The Claimant's Response

15. In her witness statement, the Claimant stated she was unaware she could bring an Employment Tribunal claim alongside the internal grievance process. She believed she had to fully exhaust the grievance procedure before bringing a claim.

16. The Claimant said the grievance process took so long that by the time it concluded, the time limit for bringing her claim had nearly expired. She felt she had been duped into following the grievance procedure rather than going straight to the Tribunal.

17. The Claimant argued she was not well enough due to her sickness absence to bring the claim sooner and struggled to complete the necessary documents without help. She could not afford legal assistance until shortly before submitting the claim.

18. In oral evidence at the hearing on 14 September 2023, the Claimant reiterated feeling duped by the Respondent into pursuing the grievance procedure. She maintained she was told she must follow the full process before bringing a claim.

19. When asked whether her sickness absence prevented bringing a claim earlier, the Claimant said the amount of work involved in the grievance process whilst off sick made it difficult. She had no legal help and could not afford assistance.

20. In response to a question about having union support, the Claimant confirmed she had a union representative for part of the time but he refused to assist her in bringing a tribunal claim.

21. The Claimant accepted she could have technically brought a claim earlier but felt she did not have enough evidence until the outcome of the grievance process. She also confirmed she eventually got limited legal help with drafting the claim itself.

22. On the disciplinary process restarting, the Claimant said she only asked what was happening with it and wanted to know if the Respondent would continue it given her grievance complaints. She denied agreeing for it to recommence.

23. The Claimant was referred to paragraph 5.3 of the Case Management Order made by Employment Judge Wright at an earlier hearing, which stated:

> "*The Claimant agreed that she asked for the disciplinary process to be restarted.*"

24. In response to questioning on this, the Claimant disputed having agreed to the process restarting. She stated that paragraph 5.3 did not accurately reflect her position, which was that she had asked what was happening with the disciplinary process but had not requested for it to recommence.

25. When referred to correspondence indicating she had requested the disciplinary process restart, the Claimant disputed this and said the letters showed the process could not continue until her grievance was finished.

26. On the complaint against Steve Kent, the Claimant said he controlled the investigation as HR manager and his colleague Alison Prior was involved in everything despite complaints about her. The Claimant argued all the alleged detriments related back to HR.

Other Submissions

27. The Claimant reiterated that the HR advisor dealing with her sickness absence knew about the disciplinary process restarting, despite claiming no involvement. She argued this demonstrated the Respondent's dishonesty.

28. The Claimant also highlighted other alleged detriments around the same time as the 8 December 2021 letter, such as being denied counselling and being asked to sign a form she disagreed with. She wanted to ensure I was aware of these.

29. In response, the Respondent noted the Claimant had not previously alleged Mr Kent was behind all the detriments. This seemed a late attempt to draw him into more matters than just the single email.

30. The Respondent maintained the various alleged detriments were separate and distinct, with no real linkage between them.

31. Regarding reasonable practicability, the Respondent reiterated that awaiting an internal process does not in itself justify an extension of time. The Claimant could have brought her claim after the first stage of grievance concluded but did not.

32. The Respondent noted the Claimant had union and legal advice available earlier to investigate bringing a claim, such that her delay in doing so was unreasonable. Ignorance of the law would not make the delay reasonably practicable.

33. The Respondent argued the Claimant's own evidence contradicted the documents indicating she had previously agreed to the disciplinary process restarting when the grievance finished. In any event, the 1 September 2021 letter showed she was aware it would recommence after her sick leave concluded.

34. Regarding the series of acts point, the Respondent reiterated there was no real linkage between the various alleged detriments to amount to a series of similar acts. For a series argument to succeed, there must be at least one detriment found in time, which was not applicable here.

The Law

Rule 37 of Employment Tribunal Rules of Procedure 2013

35. The power to strike out a claim is provided by Rule 37 of the Employment Tribunals Rules of Procedure 2013 which states:

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

(a) that it is scandalous or vexatious or has no reasonable prospect of success...

Time Limits Under Employment Rights Act 1996

Three-month time limit and extensions

36. The statutory time limit provisions for whistleblowing detriment claims are contained in Section 48 of the Employment Rights Act 1996:

    - Complaints must normally be brought within 3 months of the act complained of (section 48(3))

    - This is extended to 6 months at most if the act extends over a period or is part of a series of similar acts, with time running from the last act (section 48(3))

    - The Tribunal has a discretion to extend time further if it was not reasonably practicable to bring the claim in time (section 48(3)(b))

37. On the practicability point, case law has established that awaiting an internal appeal or process does not in itself justify an extension of time (see Bodha v Hampshire Area Health Authority [1982] ICR 200). It was held that the existence of an internal process, in that case an appeal, does not in itself mean it was not reasonably practicable to bring a claim in time. Each case depends on its own facts.

38. When a Claimant knows of the right to bring a claim, he/she is not obliged to seek legal advice on enforcing that right, but Ignorance of the law or time limits does not necessarily make a delay reasonably practicable.

39. Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All ER (D) 303 EAT).

40. In Palmer v Southend-on-Sea BC [1984] ICR 372 CA awaiting an internal appeal was held not to necessarily make it impracticable to lodge an employment tribunal claim in time.

41. Also in Palmer, it was endorsed that all relevant circumstances should be weighed when assessing reasonable impracticability. Illness or deception may be relevant considerations.

"Similar Acts"

42. Section 48(3)(a) ERA 1996 provides that where an act complained of is part of a "series of similar acts", the time limit for bringing a claim runs from the date of the last act in the series.

43. The purpose of this provision is to allow employees to bring claims relating to earlier acts occurring outside the normal 3-month time limit if there is an act within the 3 months that forms part of a series.

44. There must be some connection between the acts inside and outside the 3-month period to amount to a series. The necessary connections are that the acts must be part of a "series" and must be "similar" to one another (Arthur v London Eastern Railway [2007] ICR 193).

45. The Employment Appeal Tribunal in Royal Mail v Jhuti confirmed acts do not all have to be of an identical character to amount to a series of similar acts. There must be some linkage but not necessarily a single policy or rule connecting all the acts.

46. The similarity may lie in the fact the acts are all done on the ground of a protected disclosure. However, a mere common ground is not enough alone to render acts similar. There must also be some factual linkage between the acts.

47. When deciding similarity, the employment tribunal should look at all the surrounding circumstances of the acts, including whether they involved common perpetrators, were organised, or concerted in some way, or shared a common motive.

48. At least one act must be within the time limit and proven to be detriment on grounds of a protected disclosure. Unproven or unactionable acts cannot by themselves enlarge the time limit.

49. In E v X, L and Z UKEAT/0079/20, Ellenbogen J set out guidance at [50]: "…

a) *In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form (Sougrin v Haringey Health Authority [1992] ICR 650, CA).*

b) *It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination is immaterial (Robinson v Royal Surrey County Hospital NHS Foundation Trust UKEAT/0311/14/MC).*

c) *Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant (Sridhar v Kingston Hospital NHS Foundation Trust UKEAT/0066/20/LA).*

d) *It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue (Caterham School Limited v Mrs K Rose UKEAT/0149/19/RN).*

e) *When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case (Lyfar v Brighton and Sussex University Hospitals NHS Trust [2006] EWCA Civ 304).*

f) *An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs (Aziz v FDA [2010] EWCA Civ 304, Sridhar)*

g) *The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor (Aziz)*

h) *In an appropriate case, a strike-out application in respect of some part of a claim can be approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading (Caterham).*

i) *A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason (Robinson).*

j) *If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing (Caterham).*

k) *Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out (Caterham).*

l) *Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing (Caterham).*

m) *If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue (Caterham). …"*

50. Although E v X, L and Z was a case related to discrimination claims, I consider that the interests of justice require that the same rigorous and careful approach should properly be applied to strike out applications in respect of other heads of claim – including, as here, detriments for public interest disclosure (whistleblowing).

51. Overall, the provisions on "similar acts" should be interpreted purposively and practically to give effect to the aim of allowing employees to bring connected events together over time.

52. In summary, when considering whether various acts are "similar" for the purposes of whistleblowing detriment claims under ERA 1996, the employment tribunal has broad discretion to take a holistic view of all the factual circumstances surrounding the treatment complained of. There must be an actionable act within the 3 months (or within a period of extension properly granted by the Tribunal), and a sufficient linkage between the acts to demonstrate similarity, but there is no rigid test or criteria that must be satisfied.

Alleged protected disclosures

53. Based on my review of the evidence, the Claimant alleges she made the following protected disclosures:

a) On 1st June 2020, the Claimant emailed Rachel Hodson reporting unauthorised access to her work PC. She alleges this was a protected disclosure.

b) On 2nd November 2020, the Claimant emailed Mark Applegate about her PC being remotely accessed, as witnessed by colleagues. She alleges this was a protected disclosure.

c) On 11th November 2020, the Claimant emailed Julie Starling following up on her verbal report the day before about unauthorised access to her PC. She alleges this email contained a protected disclosure; I note that this was not pleaded in her original claim – it was first raised in an a letter sent to the Respondent and Tribunal on 23 August 2023; by referring to it here I do not accept it as an amendment.

The alleged detriments and the Tribunals findings

Failure to deal with IT complaints in June 2020

54. The Claimant alleges that on 1st June 2020 she emailed Rachel Hodson to report unauthorised access to her work PC. She argues this complaint was acknowledged but no proper action was taken to investigate it. The Claimant contends this failure to address her complaint was an act of detriment related to her protected disclosure.

55. The Respondent maintains that Rachel Hodson replied to the Claimant on 1st June 2020 stating she would discuss the complaint with the IT Security Manager. The Respondent also says the Claimant's PC was scanned for malware around this time. The Respondent's position is that appropriate action was taken to address the Claimant's initial complaint.

56. At this preliminary stage, I find the Claimant has presented a legally arguable case that her initial IT complaint in June 2020 was not adequately addressed, based on her evidence that no proper investigation occurred. However, this cannot amount to detriment for making a protected disclosure, as the Claimant alleges this June 2020 email was her first protected disclosure. I find this allegation is out of time on its own and was not part of a continuing campaign. At a full hearing, the Claimant will therefore be unable to establish this initial complaint amounted to detriment for whistleblowing or that it forms part of a continuing act or series of similar acts such as to bring it within the statutory time limit. For those reasons, I strike out this allegation entirely.

Continued reporting of unauthorised PC access not acted on

57. The Claimant argues that between June and November 2020 she continued reporting issues with unauthorised access to her PC to her union representative and ethics manager. She alleges these ongoing complaints were raised with the IT Manager but he failed to properly investigate them. The Claimant contends this lack of action was detrimental treatment linked to her protected disclosures.

58. The Respondent maintains that during this period, the IT Manager liaised with the IT Security & Governance Manager about the Claimant's persistent concerns. The Respondent says that as investigations found no issues, the matter was considered closed unless further new incidents were reported.

59. I find the Claimant has presented a legally arguable case that her repeated IT complaints between June and November 2020 were not adequately addressed. However, I do not consider lack of action during this period amounted to detriment because of the Claimant making protected disclosures. There is an arguable pattern of potential inaction developing, but at this stage the link to protected disclosures is, at the very highest, tenuous. As with the last alleged detriment, the claim brought by the Claimant indicates that the complaints which are alleged to be a detriment, were in fact the further protected disclosures that she says she made. I find this claim is out of time on its own based on the evidence before me. I find that at a full hearing, the Claimant has no reasonable prospect of demonstrating how lack of action on her ongoing complaints was detrimental treatment connected to whistleblowing – less so that she could prove it to be part of a continuing act or series of similar acts such as to bring it within the statutory time limit. At this preliminary stage, I refuse to allow this allegation to proceed further; I strike out this allegation entirely.

Asked to complete unnecessary Change of Circumstances form in 2020

60. The Claimant contends that in June 2020, instead of investigating her complaint about unauthorised PC access, Rachel Hodson asked her to complete a Change of Circumstances form which implied the Claimant could be a hacking risk. The Claimant argues this was an act of detriment linked to her protected disclosure.

61. The Respondent maintains the Claimant was asked to complete the form because she had reported interference with her personal devices, not her work PC which was the subject of her complaint. The Respondent contends the form was unrelated to the Claimant's work IT complaint.

62. I find the Claimant has not established a legally arguable case that being asked to complete this form was detrimental treatment connected to her protected disclosures. Based on the evidence, the form related to concerns about the Claimant's personal devices and does not appear linked to

her work IT complaint which she alleges was a protected disclosure. I find that at a full hearing, the Claimant has no reasonable prospect of demonstrating how being asked to complete this form was detrimental treatment connected to whistleblowing – less so that she could prove it to be part of a continuing act or series of similar acts such as to bring it within the statutory time limit. I decline to allow this allegation to proceed further; I strike it out entirely.

Denied access to company doctor in December 2020

63. The Claimant contends that in December 2020 she was denied access to see the company doctor, on the grounds it was a "security issue". She argues this refusal was because of the protected disclosure she made in November 2020 to Occupational Health. The Claimant alleges being denied access to the doctor was an act of detriment.

64. The Respondent maintains the Claimant met with an Occupational Health Advisor in December 2020 who determined seeing the company doctor was not required. The Respondent disputes any refusal was linked to the Claimant's protected disclosure.

65. I find the Claimant has presented a legally arguable case that being denied access to the company doctor in December 2020 was potentially detrimental treatment connected to her protected disclosure. There is a factual dispute over the reasons for the refusal which indicates this claim may have reasonable prospects. I am satisfied, at this preliminary stage, that the Claimant may be able to prove that this alleged detriment was part of a continuing act or part of a series of similar acts. I decline to strike out this allegation at this stage.

Misled over witness statements in December 2020

66. The Claimant contends that at a December 2020 meeting, she was told witness statements existed regarding her complaint but she was then not permitted to see them. She argues she was misled as the witnesses had not provided any statements. The Claimant alleges being misled in this way was an act of detriment linked to her protected disclosure.

67. The Respondent maintains that only informal witness accounts were taken via telephone during the investigation, not formal witness statements. The Respondent denies the Claimant was misled about the existence of any statements.

68. I find the Claimant has established a legally arguable case that she was misled by the Respondent regarding the status and existence of witness evidence. There is a factual dispute here that indicates this allegation may have reasonable prospects of success. I am satisfied, at this preliminary stage, that the Claimant may be able to prove that this alleged detriment was part of a continuing act or part of a series of similar acts. I decline to strike out this claim at this preliminary stage.

Received threatening email in December 2020

69. The Claimant alleges she received a threatening email from Steve Kent (the Second Respondent) on 8th December 2020 discouraging her from pursuing her complaint further. She argues this email was detrimental treatment linked to her protected disclosure.

70. The Respondent contends the email simply reiterated that the IT investigation was closed and would not be revisited. The Respondent denies the email was inappropriate or threatening in nature.

71. I find the Claimant has presented a legally arguable case that the email received from Mr Kent was potentially detrimental treatment connected to her protected disclosure. The nature of the email indicates there are reasonable prospects of this allegation succeeding. I decline to strike out this claim at this stage.

72. I will deal with this allegation in relation to Mr Kent as the individually named Second Respondent shortly.

Subjected to disciplinary investigation in December 2020

73. The Claimant alleges that after complaining about the Second Respondent's email, she faced a

disciplinary investigation herself into claims she had been aggressive and disruptive. She contends this investigation was an act of detriment resulting from her protected disclosure.

74. The Respondent maintains it commenced a disciplinary investigation about the Claimant's behaviour in accordance with company procedures, after she acted aggressively when discussing the Second Respondent's email.

75. I find the Claimant has established a legally arguable case that the disciplinary investigation was potentially detrimental treatment linked to her protected disclosure. The timing indicates reasonable prospects of demonstrating this connection. I am satisfied, at this preliminary stage, that the Claimant may be able to prove that this alleged detriment was part of a continuing act or part of a series of similar acts. I decline to strike out this allegation.

Not allowed own witness statement in December 2020

76. The Claimant contends she was prevented from drafting her own witness statement for the disciplinary investigation, which focused on the unrelated allegations about her alleged aggression. She argues this was detrimental treatment connected to her protected disclosure.

77. The Respondent states it is standard practice for witness statements to be prepared by the investigating manager. It denies refusing the Claimant her own statement was in any way improper or detrimental.

78. I find the Claimant has presented a legally arguable case that not being permitted her own witness statement was potentially detrimental treatment linked to her protected disclosure. There appear to be reasonable prospects of establishing this connection. I am satisfied, at this preliminary stage, that the Claimant may be able to prove that this alleged detriment was part of a continuing act or part of a series of similar acts. I decline to strike out this allegation.

Subjected to persistent bullying and harassment

79. The Claimant contends the various acts outlined in her claim form amounted to persistent bullying, harassment and victimisation connected to her protected disclosures.

80. The Respondent firmly denies each alleged incident constituted bullying, harassment or victimisation. It argues the Claimant was managed appropriately in line with company policies.

81. I find the Claimant has established a legally arguable case that the alleged detriments outlined could potentially amount to persistent bullying and harassment linked to her protected disclosures. There appears a reasonably arguable connection based on the nature and timing of the alleged acts. I am satisfied, at this preliminary stage, that the Claimant may be able to prove that this alleged detriment was part of a continuing act or part of a series of similar acts. I decline to strike out this claim.

Line manager highlighted Claimant's mistakes

82. The Claimant alleges that between September 2020 and February 2021 her line manager scrutinised her work and disproportionately highlighted any mistakes, whereas errors by colleagues were overlooked. She contends this treatment was detrimental and linked to her protected disclosure.

83. The Respondent maintains the Claimant was managed appropriately regarding any performance issues she had. It firmly denies any double standards or that the Claimant was treated differently than colleagues.

84. I find that the Claimant has presented a legally arguable case that her line manager's alleged treatment during this period was potentially detrimental and connected to her protected disclosure. There appears a reasonably arguable case that she was treated differently on performance issues. I am satisfied, at this preliminary stage, that the Claimant may be able to prove that this alleged detriment was part of a continuing act or part of a series of similar acts. I decline to strike out this allegation.

Disciplinary process concluded Claimant had case to answer

85. The Claimant contends that despite HR being aware of her anxiety, the December 2020 disciplinary investigation still concluded she should face disciplinary proceedings. She argues this was detrimental treatment linked to her protected disclosure.

86. The Respondent maintains the disciplinary process was conducted properly in line with company procedures, given the behaviour allegations made against the Claimant warranted further action.

87. I find the Claimant has presented a legally arguable case that concluding she had a disciplinary case to answer could potentially amount to detrimental treatment connected to her protected disclosure, based on the circumstances. I am satisfied, at this preliminary stage, that the Claimant may be able to prove that this alleged detriment was part of a continuing act or part of a series of similar acts. I decline to strike out this allegation.

Disciplinary process advised Steve Kent's email was inappropriate

88. The Claimant alleges the disciplinary investigation was advised the Second Respondent's 8th December 2020 email to her was inappropriate, yet it still concluded she should face disciplinary proceedings. She argues this was an act of detriment linked to her protected disclosure.

89. The Respondent maintains that despite concerns raised about the Second Respondent's email, the disciplinary process properly focused only on the separate allegations about the Claimant's conduct.

90. I find the Claimant has presented a legally arguable case that continuing disciplinary action despite concerns about the Second Respondent's email was potentially detrimental treatment connected to her protected disclosure. There appear to be reasonable prospects of establishing this link. I am satisfied that the Claimant may be able to prove that this alleged detriment was part of a continuing act or part of a series of similar acts. I decline to strike out this allegation at this preliminary stage.

Further counselling request ignored

91. The Claimant contends she requested further counselling support in September 2021 but this was ignored until December 2021. She believes the delay in responding was because obtaining legal advice had been suggested. The Claimant alleges this was an act of detriment.

92. The Respondent denies the request was ignored, but states further counselling was simply not deemed necessary or appropriate at that time.

93. I find the Claimant has not established a legally arguable case that the delay in responding to her counselling request in September 2021 was detrimental treatment linked to her protected disclosure. The delay alone does not indicate a reasonable prospect of establishing this connection. I find that at a full hearing, the Claimant has no reasonable prospect of demonstrating how such delay amounted to detrimental treatment connected to whistleblowing – less so that she could prove it to be part of a continuing act or series of similar acts such as to bring it within the statutory time limit. I decline to allow this allegation to proceed further. I strike out this allegation.

Decision to resume disciplinary process

94. The Claimant alleges the decision to resume disciplinary proceedings against her in December 2021 was detrimental treatment connected to her earlier protected disclosures.

95. The Respondent maintains the Claimant had requested for the disciplinary process to be restarted once her grievance concluded. It argues it was therefore entitled to continue the disciplinary proceedings given the company doctor had deemed the Claimant fit to participate in meetings virtually.

96. I note that the evidence indicates the Claimant did request for the disciplinary process to be resumed after her grievance finished. However, I find the Claimant has still presented a legally arguable case that the decision to restart the disciplinary process could potentially amount to

detrimental treatment linked to her protected disclosure as part of the same continuing act or series of similar acts.

97. While the Claimant may have requested resumption on the face of it, the background context of the disciplinary process being commenced and then paused indicates there remains a reasonably arguable connection between resuming it and the alleged earlier detriments.

98. I decline to strike out this allegation at this preliminary stage. The full circumstances surrounding the decision to resume disciplinary proceedings can be explored at a final hearing, including the Claimant's request for it to restart and her reasons for doing so.

Alleged failure to follow company grievance procedure

99. The Claimant alleges that between December 2020 and December 2021, the Respondent failed to properly follow its own internal grievance procedure when handling her complaint. She argues this resulted in extensive delays and a lack of communication, which she says was an act of detriment related to her protected disclosures.

100. The Respondent maintains that the company's grievance policy was adhered to appropriately given the complex nature of the Claimant's wide-ranging grievance. The Respondent contends it took necessary steps such as appointing an independent investigator and holding grievance meetings in line with the procedure. It denies any failings in the process were detrimental to the Claimant.

101. At this preliminary stage, I do not find the Claimant has established a legally arguable case that there was any failure to follow the applicable grievance procedure that could amount to a detriment related to her protected disclosures. Based on the evidence before me, while there were some delays and breakdowns in communication during the process, this appears attributable to the substantial scope and complexity of the matters raised in the Claimant's grievance complaint. I do not find a reasonable prospect that she could demonstrate at a full hearing that any alleged procedural flaws were detrimental acts connected to her whistleblowing. Further, this complaint about the grievance process appears fundamentally out of time based on when that process occurred. I do not consider the Claimant has reasonable prospects of establishing it was not reasonably practicable to bring this particular claim sooner. For those reasons, I decline to allow this allegation to proceed further.

Decision on the applications

Decision on Claims Against First Respondent

102. I have struck out the allegations regarding the Change of Circumstances form, the following of the UK grievance procedure, and the counselling request delay as the Claimant has not established even a legally arguable case that they were detriments related to her protected disclosures.

103. Applying the legislation in s.48 ERA 1996, I have struck out the initial IT complaint in June 2020 and the ongoing IT complaints up to November 2020. The June complaint cannot be a detriment as the Claimant says it was her first protected disclosure. For the ongoing complaints, I am not satisfied there is a reasonably arguable link to any protected disclosures made. Both are out of time based on the Claimant's own evidence. I do not consider the Claimant has reasonable prospects of showing it was not reasonably practicable to bring these claims in time, applying the principles from case law like Porter v Bandridge [1978].

104. However, I find the Claimant has presented a legally arguable case that the remaining alleged detriments could form part of a continuing act or series of similar acts linked to her protected disclosures, based on the current evidence.

105. The case law in Royal Mail v Jhuti confirms acts do not need an identical character to amount to a series, just some linkage between them. Here, the timing and nature of the acts indicates a reasonably arguable connection to the Claimant's whistleblowing complaints.

106. I accept the First Respondent may present further evidence at a full hearing to show the alleged

detriments were in fact isolated incidents. But at this preliminary strike out stage, I am satisfied the Claimant has cleared the low threshold to show a legally arguable case they were part of a continuing campaign rather than unconnected events.

107. Regarding the decision to resume disciplinary proceedings in December 2021, I note the Claimant requested this. However, applying the principles from cases like Arthur v London Eastern Railway [2007], I find the Claimant has still demonstrated an arguable case this forms part of a continuing act or series of similar acts when viewed in context of the disciplinary process being commenced and paused previously.

108. I decline to strike out any of the remaining allegations against the First Respondent. The merits of these claims should be determined at a full hearing where all evidence can be considered; they will be for the Claimant to prove. My decision today does not reflect any view on the merits of the claims at this preliminary stage.

Decision on Claims Against Second Respondent

109. The only detriment alleged against the Second Respondent is the December 2020 email. I accept at face value this appeared inappropriate. However, applying the principles from E v X, L and Z UKEAT/0079/20, a single email does not draw an individual respondent into a broader alleged campaign without further evidence implicating them personally.

110. I do not accept the Claimant's late attempt to paint the Second Respondent as the "puppet master" behind everything that happened. There is no objective evidence supporting this.

111. While the Second Respondent holds a senior position in the First Respondent company, he is not automatically liable for all actions of his staff without specific evidence. That would be an unreasonable, and potentially chilling, extension to the principle of vicarious liability.

112. The case law establishes that acts must have a relevant similarity and connection to amount to a continuing act or series of similar acts. Here, in relation to the Second Respondent, I do not find any arguable connection between the single email and later issues involving other individuals.

113. The email was sent over 12 months before this claim. I do not consider the Claimant has reasonable prospects of establishing it was not reasonably practicable to bring a claim against the Second Respondent in time. The legal principles on reasonable practicability in cases like Dedman v British Building and Engineering Appliances [1974] indicate otherwise.

114. The Second Respondent's alleged role is limited to this single email. I do not find that draws him into the broader allegations against the First Respondent so as to escape the time limit. I therefore strike out all claims against the Second Respondent in their entirety.

115. The Second Respondent is hereby discharged as a party in these proceedings.

Issues around it being reasonably practicable to bring claims in time

116. I have considered whether the Claimant has demonstrated it was not reasonably practicable for her to bring any arguably out of time claims within the statutory time limit.

117. The burden of proof is on the Claimant to establish reasonable impracticability, as made clear in case law like Porter v Bandridge Ltd [1978].

118. The Claimant argues she believed she must exhaust the internal grievance process before bringing a Tribunal claim. However, authorities like Bodha v Hampshire Area Health Authority [1982] establish that awaiting an internal process does not itself justify missing the Tribunal time limit.

119. The Claimant also mentions her sickness absence made bringing the claim more difficult. But based on her extensive participation in the grievance, I do not consider illness prevented basic enquiries about her Tribunal rights.

120. While the Claimant lacked legal help initially, she had support from a union representative and

was ultimately able to draft her claim. The lack of legal advice does not necessarily make missing the time limit reasonably practicable based on authorities like Dedman [1974].

121. However, at this preliminary stage and on the current evidence, I do not consider it possible to make a definitive determination regarding reasonable practicability. As indicated in Palmer v Southend-on-Sea BC [1984], this will depend on a full evidential assessment of all relevant circumstances.

122. Therefore, in claims I have found to be arguable; I leave the question of whether it was reasonably practicable for the Claimant to bring those claims in time to be determined at the full merits hearing.

123. At the full hearing, the Claimant will have the opportunity to discharge her burden of proof and establish, on the balance of probabilities, that it was not reasonably practicable for her to bring any out of time claims within the statutory time limit.

Conclusion

124. In summary, I allow certain allegations to proceed to a full hearing against the First Respondent company but strike out all claims against the Second Respondent regarding his isolated email.

125. My decision simply applies the relevant legal principles on striking out claims to the current evidence. It does not reflect any view on the merits of the allegations.

126. The allegations which I have found to legally arguable will now proceed to a full hearing to determine their merits based on all the evidence, in accordance with the usual Tribunal process.

Judge M Aspinall
Friday, 15th September 2023

Sent to the Parties on:
Tuesday 19th September 2023

FOR THE TRIBUNAL OFFICE