IN THE LONDON SOUTH

EMPLOYMENT TRIBUNAL

CASE NUMBERS: 2318353/2010N

and 2330171/2010/N

BETWEEN:

Ms A A Vaughan

Claimant

-and-

Careers Enterprise LTD and Others

Respondent

PRE-HEARING REVIEW

Written Submissions for Ms A A Vaughan

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1. I am employed by Careers Enterprise Ltd. It is responsible for delivering the Connexions contract in Lewisham. I began working for the Connexions service in March 2004. VT Group PLC took over the Connexions PFI contract in the first week of August 2008. Babcock International Group PLC acquired VT Group PLC on 8th July 2010. It is an international private corporation, running a public service.It is the UK's leading engineering support services organisations with recorded revenue of £1.9bn in 2010. It employs more than 27,000 staff. Babcock delivers critical asset support to many sectors, including transport, energy, defence, telecommunications and education. I work in the Support Services division of the company. The name of the specific division is Babcock Enterprise.

When Babcock acquired VT it also took on the liabilities of the company.

2. On 9th August 2010 I wrote to the Tribunal requesting that a pre-hearing review be held to determine the question, *'Should the ET by-pass the separate legal personality of my employer's subsidiary by postulating a duty owed in tort by the parent company Babcock International Group PLC to me?'*

3. I attended a Case Management Discussion on 12th August 2010 and I was accompanied by two friends, Tanya Davis and Wayne Davis. During the CMD I produced a letter from my employer that had been typed on Babcock headed paper proving that the subsidiary company (my employer) was an agent of the parent company and/or working in partnership with the parent company VT Group PLC (now Babcock International Group PLC). It proves that the Connexions contract that I work on was part of a joint venture between VT Group PLC (and is now part of a joint venture between Babcock International Group PLC and Careers Enterprise Ltd- my employer). This was a protected disclosure within the meaning of section 43A of the Employment Rights Act 1996.

4. I read the letter out loud and my friend Tanya Davis showed it to Judge Salter. Ms Biddlecombe from Paris Smith Solicitors, (acting on behalf of the Respondent), tried to dismiss the letter. She told a lie and informed everyone at the meeting that, 'the letter is mistaken'.

5. Prior to the CMD, the Respondent party had requested that the Tribunal consider an order limiting the number of incidents of discrimination / protected disclosures that I can rely upon and stated during the CMD itself that some of my claims

were out of time and should be struck out on this basis. The Respondent threatened to make an application for costs on the grounds of 'unreasonable behaviour', if I did not agree to limit the amount of claims that I rely on.

6. I requested a pre-hearing review in this case to determine the following questions:

    a) Should the ET by-pass the separate legal personality of my employer's subsidiary by postulating a duty owed in tort by the parent company Babcock International Group PLC to me?

    b) Should the Respondents defence be struck out on the grounds of abuse of process, unreasonable, oppressive and vexatious behaviour and the deliberate concealing of information about the above?

    c) Whether I can continue with all of my claims?

Issues

7. The tribunal will have to decide the following issues:

Joint Liability

8. Should the ET by-pass the separate legal personality of my employer's subsidiary by postulating a duty owed in tort by the parent company Babcock International Group PLC to me? (This also includes the consideration of my

joinder applications for *Babcock International Group PLC* and *Babcock Enterprise/Babcock Education and Skills LTD*).

Striking out the Respondent Party's Defence

9. Should the Respondents defence be struck out on the grounds of abuse of process, unreasonable, oppressive and vexatious behaviour and the deliberate concealing of information about point 1, 2, 3, 4, 20 and 36?

The Scope of my Claims

10. Whether I can continue with all of my claims?

Submissions

Should the ET by-pass the separate legal personality of my employer's subsidiary by postulating a duty owed in tort by the parent company Babcock International Group PLC to me?

11. I believe that there should be joint liability and that *Babcock International Group PLC* and/or *Babcock Enterprise/Babcock Education and Skills LTD* should join Careers Enterprise LTD in proceedings. By reason of various factors, including the control exercised by the company(s), its power(s) to insist on proper workplace standards being maintained, and the appearance that but one enterprise was being conducted by the separate legal entities, the company(s),

conscious of a breach of duty of care and risk of injury, and being in a proximate relationship to me by virtue of the above matters, owed a duty of care to me, because of its relationship with me, (which is the party to the contract of employment). It is clear from the evidence that the intertwined nature of the operations of the *VT Group PLC* and/or *VT Enterprise/VT Education and Skills LTD* (now *Babcock International Group PLC, Babcock Enterprise/Babcock Education and Skills*) and *Careers Enterprise LTD*, (my employer) does not truly merit separate treatment.

12. It has been confirmed by Paris Smith's Ms Biddlecoombe, that Careers Enterprise Ltd accepts that if liability was established it was responsible for the actions of the individual respondents (VT/Babcock employees) to the claims. The House of Lords has held that the test for deciding employer's vicarious liability should focus on whether the act of the employee had a sufficiently close connection to my employment. The Respondent party therefore accepts that there is a significant connection between the tortious acts of the VT/Babcock employees and the circumstances of my employment.

13. In the Order on the Case Management Discussion the Chairman stated in his 'Reasons' that '*Careers Enterprise Ltd accepted that, if liability was established, it was responsible for the payment of compensation and that it was also responsible for the actions of the individual respondents to the claims*'. I believe that this statement supports my assertion that the individual respondents to the claims are in a proximate relationship to me by virtue of a significant connection between the tortious acts of those individuals and the circumstances of my employment. Therefore I am owed a duty of care by the company that employs

those individual respondents (VT Group PLC and/or VT Enterprise/VT Education and Skills LTD, now *Babcock International Group PLC, Babcock Enterprise/Babcock Education and Skills*), because of its relationship with me, which is the party to the contract of employment.

14. Recently doubt has been thrown onto the ability of the principle in *Salomon v Salomon & Co [1897] AC 22* to insulate the company's legal status in the context of group corporate activity given the principle in *Salomon* which was developed on the basis of a one man company. In *Stocznia Gdanska SA v Latvian Shipping Co [2002] EWCA Civ 889* a parent company was held liable for indirectly inducing the breach of a contract between its subsidiary and a third party using unlawful means through failure to comply with an agreement to fund the subsidiary's purchase of goods.

15. I believe that VT (now Babcock) induced and/or knowingly assisted the breach of my contract of employment (the universal implied terms) using unlawful means through impropriety in relation to the use of the company structure. The company induced and/or knowingly assisted the following breaches:
    a) mutual trust and confidence; the failure to support someone who has been a victim of harassment at work, Wigan BC v Davies [1979] ICR 411, EAT
    b) the failure to provide a safe working environment
    c) the failure to deal promptly with grievances; the employer is under duty to afford employees an opportunity to obtain, reasonably and promptly, redress of any grievance that they may have, W A Goold (Pearmark) Ltd v McConnell [1995] IRLR 516, EAT.

16. The liability of the company and the cornerstone of any discussion of whether a parent may be liable for inducing a breach of contract is the decision in *Salomon v Salomon & Co [1897] AC 22* that protects the corporate personality. As to what amounts to actionable inducement appears to be one that is outside the operation of independent corporate governance of the subsidiary. Often the courts ignore the veil of incorporation when the corporate form is being used to evade a legal obligation.

17. I believe that observing the veil of incorporation in this case would defeat the very purpose of justice itself. It is just and equitable for it to be lifted in order to provide a remedy for the wrong which those controlling the company have done. It is justified to disregard a company's personality so as to protect paramount public interest and prevent the corporate form being used as a medium through which to lawfully carry out an activity which would otherwise be a wrongdoing.

18. The corporate form cannot be used for the purposes of fraud, *Re Darby [1911] 1 KB 95,* or as a device to evade contractual or other legal obligation, *Gilford Motor Co v Horne [1933] Ch 935.*

19. Holding companies were in fact carrying on business through the agency of its subsidiary company but only where the activities of the subsidiary company are so closely controlled and directed by the parent company that the latter can be regarded as merely an agent conducting the parent companies business, *Smith Stone and Knight Ltd v Birmingham Corporation [1939] 4 All ER 116.*

20. The weaker the operational autonomy and independence my employer, the stronger the case for holding *VT Group PLC and/or VT Enterprise/VT Education and Skills LTD*, (now *Babcock International Group PLC, Babcock Enterprise/Babcock Education and Skills*) vicariously liable for its unlawful acts. What should be critical to the analysis should be the reality of the relationship between the company(s) in question and Careers Enterprise LTD and not the technical legal form that it takes. The relevant factors party to the contract of employment are:

    a) **The Control Test**: VT/Babcock gave/give the orders as to how the work should be done. The greater the amount of control exercised over the details of the work to be done, the more likely the relationship is to be one of employment

    b) **The Integration Test**: My work on the Connexions contract is considered to be integral to the operation of VT's/Babcock's business, the way in which I was/am paid (via VT/Babcock payroll department), VT/Babcock gave me an extra days holiday, the harmonization of policies and procedures and access to VT/Babcock employee services/facilities etc. It was agreed, expressly or impliedly, that in the performance of the service I performed, I would be subject to the VT'S/Babcock control in a sufficient degree to make that other master ('control'); and the other provisions of the **contract** were/are consistent with its being a **contract** of service

    c) **The Control Test**: VT/Babcock fixed the times of work, (which was negotiated with the union)

    d) **The Control Test**: VT/Babcock were/are responsible for my health and safety: When considering the issue of whether or not a person is an employee in the context of health and safety at work, I believe that the

tribunal should take a wide view of what constitutes employment. There is a real public interest in recognising the employer/employee relationship when it exists, because of the responsibilities that the common law and statutes place on the employer.

21. For the purposes of the Employment Rights Act 1996, the 'mutuality of obligation' and 'control' are seen as the 'irreducible minimum' legal requirements for the existence of a contract of employment. In my employment, the contract won't be discernible just from one document, but will require consideration of several documents, oral exchanges and subsequent conduct. I would like the tribunal to also consider whether the extended definition of 'atypical' engagement is applicable in this case, in which I would fall outside the classic definition of an employee. I believe that it is appropriate for the tribunal, when deciding on my employment status and the reality of my relationship with VT/Babcock, to consider whether there's sufficient mutuality of obligations to justify a finding that:
    a) there was/is a contract of employment, and/or;
    b) there was/is sufficient control exercised by the company(s), and/or;
    c) it had power(s) to insist on proper workplace standards being maintained, and/or;
    d) there was the appearance that but one enterprise was being conducted by the separate legal entities, and/or;
    e) the company(s), conscious of a breach of duty of care and risk of injury, and being in a proximate relationship to me by virtue of the above matters, owe a duty of care to me, because of its relationship with me, (which is the party to the contract of employment), therefore making VT/Babcock liable for any remedy.

22. VT/Babcock caused, induced or instructed the individual respondents to carry out their actions. An employer or principal must not instruct, cause or induce their employee or agent to discriminate against, harass or victimise another person, or to attempt to do so. ‘Causing’ or ‘inducing’ someone to do something can include situations where someone is made to do something or persuaded to do it, even if they were not directly instructed to do it. Both:

a) the person who receives the instruction or is caused or induced to discriminate against, harass or victimise, and

b) the person who is on the receiving end of the discrimination, harassment or victimisation

have a claim against the person giving the instructions if they suffer loss or harm as a result of the instructing or causing or inducing of the discrimination, harassment or victimisation. VT/Babcock gave the instructions, as it had complete autonomy over Careers Enterprise LTD.

23. In section 32 (2) of the **Race Relations Act 1976** it states:

“Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act (except as regards offences thereunder) as done by that other person as well as by him.”

In section 58 (2) of the **Disability Discrimination Act 1995** it states:

“Anything done by a person as agent for another person with the authority of that other person shall be treated for the purposes of this Act as also done by that other person.”

In light of this, Babcock should be held liable for the discriminatory acts of Careers Enterprise LTD employees and/or the individual respondents and other

individuals mentioned in my claim.

24. It is just and equitable for the company(s) to join proceedings in order to provide a remedy for the wrong which those controlling Careers Enterprise LTD (my employer) and the individual Respondents and other non-Careers Enterprise LTD employees acting through it have done. This will protect paramount public interest and prevent the corporate form being used as a medium through which to lawfully carry out an activity which would otherwise be a wrongdoing.

25. If the tribunal fails to do this, the company(s) will escape accountability and liability for its unlawful actions and it will be free to continue with its discriminatory practices, acting through its Careers Enterprise LTD and other numerous subsidiaries, knowing that it will be able to hide behind them. Careers Enterprise LTD will be the scapegoat for the unlawful acts more properly attributed to *VT Group PLC, VT Enterprise/VT Education and Skills LTD, Babcock International Group PLC, Babcock Enterprise/Babcock Education and Skills LTD*. These companies (and their employees) were at fault in their own right, as well as being an accessory to my employer's unlawful acts and it also entered into a conspiracy with the subsidiary to commit the unlawful acts. All the individual Respondents in this case were/are employees of *VT Group PLC, VT Enterprise/VT Education and Skills LTD*, *Babcock International Group PLC, Babcock Enterprise/Babcock Education and Skills LTD*) and the majority of discriminatory actions were perpetrated by employees of these companies. Ultimately these companies exercised complete control and they had the power to insist on proper workplace standards being maintained.

26. Another reason for the tribunal to allow these companies to join proceedings would be to ensure jurisdiction over the companies, so as to enable documents to be obtained through discovery.

Should the Respondents defence be struck out on the grounds of abuse of process, unreasonable, oppressive and vexatious behaviour and the deliberate concealing of information about paragraph 1, 2, 3, 4, 20 and 36?

27. The Solicitor Ms Biddlecomb (acting on behalf of the Respondent party) in her letter to the Tribunal dated 17th August 2010, denied the allegations set out in my letters dated 13th and 16th August 2010.

28. In the case of *Odyssey (London) Ltd v OIC Run-Off Ltd [2000] 97 (13) LSG 42*, the court held a company liable due to an individual's perjury in legal proceedings to which to the company was a party to those proceedings.

Relevant Witnesses

29. Tanya Davis and Wayne Davis were relevant witnesses to the above. The tribunal must also note that the Respondent party has not disputed the allegations set out in my letter to the tribunal dated 9th August 2010. It is submitted that this is because there is the clearest evidence that the Respondent party's parent company 'Babcock International Group PLC' owes me a duty of care.

30. I believe that the Respondent party or those acting by or on behalf of the Respondent party, is guilty of trying to conceal evidence about a breach of a legal obligation, impropriety in relation to the use of the company structure to avoid/conceal liability and the control of the company by the wrongdoer and the (mis)use of the company as a devise or a façade to conceal the wrongdoing. I believe that the overwhelming evidence that I have provided support these allegations.

31. The Respondent party is also trying to seek an order from the Tribunal to prevent me from making any further amendments to my claims and that if I wish to bring proceedings regarding further acts of discrimination or victimisation then they should be treated as new claims and stayed pending the determination of Claims 1 and 2. I do not believe that the Respondents request is in line with the 'overriding objective' of the procedural rules to enable the tribunal to deal with cases justly.

32. The tribunal has the power under rule 10 (q) of the procedure rules to permit amendment of a claim or response. I acknowledge that the closer we get to the hearing, the harder it will be to amend my claim. Having said this, a tribunal claim can be amended at any time; I just need the tribunal's permission. (ET Regs 2004 sch 1 rr10 (2) (q) 11 (1). The Respondents are trying to prevent me from even being able to seek permission, which is unreasonable and unjust.

33. 'In deciding whether to allow an amendment, the ET must take account of all the circumstances and balance the hardship and injustice of refusing the amendment against that of allowing it. '(Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT.

Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07). Any further amendments I may make should not be treated as new claims. 'Where the amendment is to add new facts and grounds, the ET must decide if the new claim is in time and, if not, whether the amendment should be allowed. If the claim arises out of the same facts as the original claim but simply adds factual details or attaches a new legal label, the ET should very readily allow the amendment even outside the time limit.' (Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT. Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07). 'It is always a matter for the tribunals' discretion.' (Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT. Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07). Other factors would be why the new claim was not originally included, how late in the day the amendment is now sought; whether the Respondent would be surprised by the new allegation or prejudiced by its late addition and, as already mentioned, the balance of hardship to each party.

Relevant Witnesses

34. Tanya Davis and Wayne Davis were relevant witnesses to the fact that the Respondent party had stated that my claims were out of time at the CMD on 12th August 2010. It is important to note the Respondent party has denied this in their letter to the tribunal dated 17th August 2010. Paris Smith Solicitors (acting on behalf of the Respondent party) has clearly stated an untruth. It is also important for the tribunal to note that the Respondent party has deliberately avoided

directly addressing this issue in its letter.

35. In addition to this, the Respondent party also did not have any input in relation to the drafting of the schedule of claims. I believe that this would have been an opportunity for the Respondent party to indicate its response to each claim and further the overriding objective of the procedural rules to enable the tribunal to deal with cases justly.

36. In their letter to the Tribunal dated 3rd August 2010, they state, '*It is submitted that the Claimant should present any requests for new orders at the CMD on 12 August 2010 and should not be permitted to make any further requests after this time. It is submitted that there should be no need for any further CMDs in relation to these cases'.* I do not believe that the Respondents request is in line with the 'overriding objective' of the procedural rules to enable the tribunal to deal with cases justly: It may become clear after receiving the documents that my employer discloses voluntarily, when witness statements are exchanged or at the hearing, that there are further relevant documents that have still not been disclosed. Should this be the case, it may be necessary for me to apply for an order. Is the Respondent saying that I should be prevented from doing so? I believe that the Respondent party's conduct in relation to this matter is oppressive, vexatious and unreasonable.

37. The Respondents defence is vague and they have merely rebutted my allegations, but failed to establish a positive case as to why I was treated in a particular way and with regards to my allegation of disability discrimination why I was put at a disadvantage by workplace practices/features and why a measure

of ‘positive discrimination’ was not taken to treat me more favourably in order to remove the disadvantage which was attributable to my disability.

38. The tribunal must remind the Respondent party that it should not leave out of the form any ground upon which the claim is being defended. Another prime example of the weak defence is the fact that in relation to my allegation of disability discrimination, the Respondent party has failed to acknowledge the fact that a failure to make a reasonable adjustment can never be justified and an employer cannot justify ‘less favourable treatment’. Any justification argument must be for reasons that are material to the case and substantial.

39. I have made two applications to the tribunal requesting an order for additional information and written answers. The questions I ask are to clarify the text of the ET3 and my employer’s case, so that I am not caught by surprise and know broadly what defence my employer will put forward. I am permitted to ask a series of questions which will clarify any issue likely to arise for determination or for the information which is likely to assist the ET in dealing with the claim. I have done so in my requests and order applications for additional information and written answers.

40. The power to obtain additional information is to enable the parties to prepare adequately for the hearing by being informed in advance of sufficient details about the case they will have to meet. See White v University of Manchester. As follows from Honeyrose Products v. Joslin 1981, the tribunal should ask itself whether both parties are aware of the details of the case that they will have to meet. If it considers that one of the parties is not sufficiently aware, the tribunal

should make an order for additional information. To determine the scope of the order, the tribunal should consider what is required to ensure that the case can be disposed of justly. I have requested additional information and written answers from the Respondent party but Paris Smith, acting on behalf of the Respondent party have refused to provide this information and as such I have made two applications to the tribunal requesting an order for additional information and written answers. This was listed as an item on my CMD agenda, (in line with my requests for orders). However. At the CMD this matter was not addressed at all by the Chairman.

41. The Respondent party has also stated that there should not be agreed facts, admissions, written submissions or skeleton arguments. I also consider this to be unreasonable. This is a very complex case, and as such I believe that it is just and equitable for this to be allowed and that it will further the overriding objective. In my letter to the Tribunal requesting a PHR I also stated that I would like to produce submissions. My memory and concentration and ability to learn and understand are impaired as a result of my mental health condition. I also suffer from severe fatigue. Allowing written submissions will help me to clarify my thoughts about the case and put them into order. This will ensure that my disability does not amount to a handicap to the attainment of justice and would further the overriding objective in dealing with this matter in the most expeditious, efficient and fair way possible and in a way that enables me to fully participate in the tribunal process to the best of my ability and without being put at a disadvantage.

42. The Respondent party (on two separate occasions so far); have failed to copy me into correspondence to the tribunal on the same day that it has sent its correspondence to the tribunal:

    a) The Respondent party's e-mail to me attaching their CMD which they had sent to the Tribunal the day before
    b) The Respondent party's e-mail to me attaching their objection to the PHR which they had sent to the Tribunal the day before

43. Another example of he Respondent party's unreasonable, vexatious and oppressive behaviour is their attempt to deny me my right to call witnesses and submit written statements from them. In their letter to the tribunal dated 11th August 2010, the Respondent party asserted that it would not be necessary for me to submit the evidence of Wayne Davis and Tanya Davis, as this was disproportionate and would not be in accordance with the overriding objective. This challenge was made even in light of the fact that I am alleging that Paris Smith's solicitor (Jane Biddlecomb) had made various statements at the CMD which took place on 12th August 2010, which she is denying. Wayne Davis and Tanya Davis were also present at the CMD and can corroborate my evidence. Therefore written statements and oral evidence were required from Tanya Davis and Wayne Davis for the clarification of the issues and for the just handling of proceedings, which is very much in line with the overriding objective. This was an attempt by the Respondent party is to suppress evidence obstruct the just disposal of the proceedings.

44. Yet another example of the Respondent party's unreasonable, vexatious and oppressive behaviour is the fact that they have indicated in their CMD agenda that they do not believe that medical evidence is required, yet the Respondent party has even stated itself in its DL56 response that '*without medical evidence, CEL can neither confirm nor deny what factors contributed towards your mental impairment*'. One of my complaints is of discrimination on grounds relating to my disability. I have been suffering from severe depression and it has become unusual now to run a DDA 1995 case without the use of medical evidence. This in itself is also an attempt to conceal evidence about a breach of a legal obligation. The respondent party and those acting on behalf of the Respondent party are clearly attempting to obstruct justice and to make sure that the damning evidence never surfaces. As I will be claiming for severe psychiatric damage as a result of the discrimination that I have suffered, (which the Respondent has stated that it is not liable for in its ET3's), it will be necessary for me to submit formal medical reports from my GP and the two Psychologists that assessed me. It will also be necessary for me to submit evidence from my counselor.

45. Woodrup -v- London Borough of Southwark (2003 CA IRLR 111) Indicated that tribunals should normally expect to hear clear expert medical evidence on any case where it relies on the issue of how a disabled person would be affected if treatment were disregarded. 'Expert' evidence can be from a relevant, non-medical expert - e.g. a psychologist in a learning difficulties case: Dunham -v- Ashford Windows (2005 EAT IRLR 6008).

46. Many of the principles relevant to obtaining medical evidence in a disability discrimination case will also be relevant to proving injury to feelings or health in

all the discrimination strands. The EAT has said that compensation in discrimination cases where no upper limit applies cannot be dealt with briefly and informally. Careful preparation will be necessary for a remedies hearing. In cases under the DDA 1995, a medical expert may well be required as to my likely future health, since this would be relevant to an assessment of future loss of earnings. Buxton v Equinox Design Ltd [1999] IRLR 158, EAT. Medical evidence regarding my condition will be essential to allow the tribunal to deal with the case efficiently and fairly. My GP, the two psychologists that assessed me and my counselor have indicated that they are willing to provide reports, as they are best placed to give evidence about my condition. I should be grateful for the tribunal's order that I should be permitted to rely on expert evidence on the question of my disability, and I suggest that it would be helpful to discuss detailed arrangements for this at the CMD that is due to take place after this PHR.

47. In this case, it's quite clear that Respondent party (Careers Enterprise Ltd and others) and/or those acting by or on behalf of the Respondent party (Paris Smith Solicitors), deliberately and persistently disregarded the required procedural steps by lying at a Case Management Discussion, attempting to conceal evidence about a breach of a legal obligation, impropriety in relation to the use of the company structure to avoid/conceal liability and the control of the company by the wrongdoer and the (mis)use of the company as a devise or a façade to conceal the wrongdoing, by attempting to seek orders that were not in line with procedural rules, by failing on more than one occasion to copy me into correspondence to the tribunal 'in good time', by breaching my privacy and by challenging my request for a Pre-Hearing Review in an apparent effort to obstruct justice and to make sure that the damning evidence never surfaces.

48. As stipulated in BLOCKBUSTER ENTERTAINMENT LIMITED v James: power to strike out an issue: 5. This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if a party has been conducting its side of the proceedings unreasonably.

Whether I can continue with all of my claims?

49. I believe that it is just and equitable for the Tribunal to allow me to continue with the claims set out in my schedule and not limit the scope of my claims any further, as this may lead to inadequate justice. 'The EAT has said that that an ET should be careful not to overstep the line between legitimate case management and over-simplifying my case by striking out proper claims to save time. If the EAT does have a good reason to disallow some of the allegations, it must follow the correct procedure'. Hambly v Rathbone Community Industry Ltd (1999) 617 IRLB 10, EAT. I should be allowed to rely upon them and have all the circumstances considered at a full merits. If I am prevented from continuing with the claims set out in my schedule, it will mean that I cannot deal with those matters at the full hearing and I will be unable to obtain related disclosure at the preparatory stage. This will have far-reaching consequences for the final outcome of my case. There is tension between what expedition requires and what fairness requires. In the end, 'Justice should be preferred to expedition'. (Senyonjo v Trident Safeguards Ltd UKEAT/0316/04. See also EAT's comments in Sodexho v Gibbons [2005] IRLR 836, eat. Article 6 (The right to a fair hearing) and article 14 (non-discrimination) of the European Convention on Human Rights should also be taken into account.

50. In the Order on the Case Management Discussion, Judge Salter stated that he intended to look at the merits of my claim. It should be rare in whistleblowing cases or discrimination cases to strike out on the ground of no reasonable prospect of success, as these issues are particularly fact-sensitive and dependant on evidence being heard.

51. In relation to the question of comparators, I am not sure if the Respondent is stating that I need to identify a real comparator. The circumstances of the Claimant and of the comparator must be the same "or not materially different". One of the circumstances is the comparator's "abilities", but since this is prefaced by "including", it follows that more circumstances are relevant than simply the comparator's abilities. High Quality Lifestyles -v- Watts (2006 EAT IRLR 850).

52. I will be telling the tribunal panel who will decide my case that I intend to use both real and hypothetical ones and will highlight the fact that in cases involving multi-discrimination it may not be easy to construct a hypothetical comparator who does not share any of the prohibited characteristics with the claimant. It may become a difficult and somewhat unreal task. This is important since in such cases a fully relevant direct comparator will be very unlikely to be found. So this is likely to be the kind of case in which it is preferable to ask the question why I was treated as I was, rather than to try and construct a character that does not have my particular disability, whose relevant circumstances including their abilities, are the same as, or not materially different from, those of my own. In this way the tribunal panel who will be deciding my case will not have to spend much time to little purpose trying to hypothecate whether I have been treated less

favourably than some other because of the entirety of the multiple grounds on which I rely.

53. As a result of the Respondent party's request for an order limiting the number of incidents of discrimination / protected disclosures that I can rely upon, I was asked by Judge Salter to list the protected acts relied upon in relation to each detriment/incident of discrimination, (a schedule of claims). However, I had already stated in my ET1's that the detriments and incidents of discrimination that I have been subjected to are part of 'continuing acts' over a substantial period and as such, I will be asking the Tribunal panel who will be deciding my case to consider my claims within this context. In my ET1's I have made reference to:

    a) a 'prolonged course of conduct'

    b) 'ten months of persistent bullying, harassment and victimisation'

    c) 'continued bullying, harassment and victimisation by a number of VT staff'

    I also indicated in my four amendment applications that the grounds for amendment were 'continuing acts'. Continuing acts is also highlighted in my schedule of claims. In light of this, I felt that the Respondent party's request for the information in the form it required was unreasonable and oppressive, particularly as both my ET1's are very detailed.

54. I applied for an extension of time to do this (on health grounds) but my application for an extension of time on the CMD order was rejected. I found it extremely difficult to produce a schedule of claims, without the benefit of legal assistance. It has put a great strain on me and exacerbated my medical condition.

55. I believe that it would have been more reasonable for the Respondent party to just request a simple list of all my protected disclosures and a list of incidents of discrimination and detriments. This would have been more appropriate because I have indicated in both my ET1's that I made over 30 protected disclosures and that there have been over 50 detriments/incidents of discrimination in relation to my first claim and over 30 in my second claim. These factors make it impossible for me to specify which detriment/incident of discrimination might relate to each specific protected act, and it is for this reason that I will be asking the tribunal panel who will decide my case to treat the schedule of claims only as a list, that should be considered in the context of continuing acts.

56. I have provided a list of the protected acts relied upon in relation to each detriment/incidents of discrimination in my schedule of claims in order to avoid having my claims struck out as a result of failing to comply with the order on the case management discussion. As I have no legal representation, I did not know if it would be possible or appropriate to challenge the direction.

Conclusion

57. I would like the tribunal to direct the parent company *Babcock International Group PLC* and *Babcock Enterprise/Babcock Education and Skills LTD* to join proceedings. It may not even be necessary to lift the corporate veil, because the overwhelming evidence that has been presented proves the reality of the relationship between *VT Group PLC and/or VT Enterprise/VT Education and Skills LTD*, (now *Babcock International Group PLC, Babcock Enterprise/Babcock Education and Skills LTD*) and my employer. I believe that it also shows that the

corporate structure was/is merely a device, façade and/or sham that concealed/conceals the true facts. I would like the Tribunal to take into account the extent to which the care was taken by the parent company for me as an employee working in the subsidiary company. I would also like the Tribunal to examine the way the company is actually managed in order to find where the centre or centres of management are in fact located to determine liability. I believe that it will also be necessary to examine whether the directors conveyed directly or indirectly to me that they assumed a personal responsibility towards me, which I believed they did. The Respondent party may argue that VT's former Chief Executive did not carry out the tortious act himself or that he did not assume liability for it, but I would argue that he procured and induced others/the company (VT Group PLC and/or VT Enterprise/VT Education and Skills LTD) to commit the tort.

58. It is also necessary for the tribunal to establish which party or parties originally instructed Paris Smith solicitors to defend the case, as this is not clear. In relation to both claims, did VT instruct them to defend *Careers Enterprise Ltd* and *VT* employees and did Babcock continue to instruct them thereafter? Did *Careers Enterprise LTD* instruct them to defend *Careers Enterprise Ltd* and *VT/Babcock* employees, or did *Careers Enterprise LTD* and the individual respondents instruct Paris Smith separately? Which company(s) and/or individuals are instructing them now? This question is important, not only to aid the tribunal to establish liability, but because the Connexions contract (that is allegedly run by *Careers Enterprise LTD*), is publicly funded and it would be inappropriate and perhaps even illegal for *Careers Enterprise LTD* to fund the defence of the individual respondents and other non-*Careers Enterprise LTD* employees,

because they would be using tax payers money to do so.

59. I would like to request that it carefully examines the evidence that I have provided, which I believe proves that *VT Group PLC and/or VT Enterprise/VT Education and Skills LTD* owes me a duty of care. VT Education and Skills LTD acting through my employer with me have to be determined. I believe that it is highly desirable that all parties who are liable for a remedy should be involved, (*Babcock International Group PLC*, and *Babcock Education and Skills LTD*- formerly *VT*). The companies and their employees (the individual Respondents and other non-Careers Enterprise staff that I have named in my ET1's), acted through my employer Careers Enterprise LTD and because of its relationship with me, that is the party to the contract of employment, this then presents an issue as to the legal position of the different companies. It is therefore appropriate for me to claim against all in the alternative. I believe that it is reasonable for me to do so. Moreover, I draw attention to the Tribunal's power under rule 10(2)(k) of the Employment Tribunal Rules of Procedure (Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure Regulations) 2004). The tribunal may order that any person who the chairman or tribunal considers may be liable for the remedy claimed should be made a respondent in the proceedings. The power to add a respondent has always been available as part of the tribunal's general powers to regulate their own procedure: see *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650.

60. The tribunal is asked to allow me to continue with the claims, as set out in my schedule, not limit the scope of my claims any further. Should the tribunal decide to strike out any claims, those claims should still be heard as background.

61. The tribunal is asked to strike out the Respondent party's defence because of procedural abuse, unreasonable and oppressive behaviour and trying to conceal evidence about a breach of a legal obligation, impropriety in relation to the use of the company structure to avoid/conceal liability and the control of the company by the wrongdoer and the (mis)use of the company as a devise or a façade to conceal the wrongdoing, (which I consider to be scandalous and vexatious). I believe that the defence is also misconceived and that it has no reasonable prospect of success. If the tribunal does not agree, I would like to request that it postpones the CMD in order to determine whether an alternative solution would be more appropriate, (to provide remedies, which are):

    a) to order the Respondent party to clarify and provide me with the additional information and written answers about the defence, (the Tribunal should take into account the fact that a party should not be taken by surprise at the last minute by the other side's case).
    b) to deny the Respondent party the orders that they have requested, (as set out in paragraph 27 and 32)
    c) to allow medical and expert evidence in this case
    d) to allow written submissions or skeleton arguments

Ms Ayodele Adele Vaughan

Date: 26th October 2010