Appeal No. UKEAT/0150/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 8 October 2013
Judgment handed down on 24 January 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

NORBROOK LABORATORIES (GB) LTD — APPELLANT

MR A SHAW — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JACQUES ALGAZY (One of Her Majesty's Counsel) Instructed by: Norbrook Laboratories Ltd 105 Armagh Road Newry BT35 6QQ
For the Respondent	MR A SHAW (The Respondent in Person

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

On the facts of this case the Employment Judge did not err in holding that three emails from the Claimant to the Respondent taken together can amount to a qualifying disclosure within the meaning of **Employment Rights Act 1996** section 43B(1) even though they were not sent to the same individual or department and taken separately each email was not such a disclosure. **Goode v Marks and Spencer plc** UKEAT/0442/09 15 April 2010 para 37 applied. Further, drawing a dangerous state of affairs to an employer's attention is capable of constituting a disclosure of information within the meaning of section 43B(1)(d). The information given in the emails was not too general to constitute disclosure of information within ERA section 43B(1). Appeal from the decision on the preliminary issue of whether the disclosures relied upon by the Claimant are capable of amounting to qualifying disclosure dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Norbrook Laboratories (GB) Limited ('the Respondent') appeals from the judgment of Employment Judge Solomons ('the EJ') on a Pre-Hearing Review sent to the parties on 29 May 2012 ('the judgment') in which he decided that two emails sent by the Claimant's on 30 November and one on 6 December 2010 taken together are capable of amounting to qualifying disclosures within the meaning of the **Employment Rights Act 1996** ('ERA') section 43B(1)(d).

2. This preliminary issue arose in the determination of claims brought by Mr Shaw ('the Claimant') against the Respondent, his former employer, in respect of action said to have been taken against him on grounds of making an alleged protected disclosure within the meaning of ERA section 43B. The claims are of automatic unfair dismissal under ERA section 103A and of being subjected to a detriment under ERA section 47A both on the grounds of making a protected disclosure. There is no qualifying period of employment for a claim of 'automatic' unfair dismissal under ERA section 103A. The Claimant had insufficient qualifying service to claim "ordinary" unfair dismissal. In light of his decision on the preliminary issue that the disclosures relied upon by the Claimant are capable of amounting to qualifying disclosures the EJ held that the claim of unfair dismissal and detriment on the grounds of public interest disclosure could proceed to a full hearing.

3. **Employment Rights Act 1996**

Section 43A:

> **"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."**

Section 43B:

> **"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:-**
>
> **…**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;**
>
> **…**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be damaged."**

Outline relevant facts

4. The Respondent sells and distributes pharmaceuticals, primarily vetinary products. On 4 October 2010 the Claimant commenced employment with the Respondent as their Sales and Business Communications Manager. His duties included managing a team of Territory Managers who operated throughout the United Kingdom. In the course of their duties they drove to customers and potential customers to obtain sales.

5. The winter of 2010 was particularly severe. In the early winter the roads were covered with snow following large snowfalls and main motorways were closed. In setting out the relevant background to the claims made by the Claimant, the EJ recorded evidence given that:

> **"4. …Territory Managers were having difficulty getting to their appointments and they raised the matter with the Claimant, their Manager; they were, of course, concerned that if they were unable to travel to their appointments they would nevertheless be paid their wages."**

6. The Claimant sent three relevant emails to the Respondent. At 10:41 on 30 November 2010 he emailed Alan Cuthbertson, the Respondent's Health and Safety Manager, as follows:

> **"Could you please provide me with some advice on what my Territory Managers should do in terms of driving in the snow. Is there a company policy and has a risk assessment been done."**

The EJ held at paragraph 6:

> **"Leaving the story at that point it seems clear to me that this email could not be described as a disclosure of information, it is quite clearly taken by itself upon its face simply an enquiry about what Territory Managers should do and whether or not there was a company policy or a risk assessment in relation to driving in snowy conditions."**

The Claimant was informed that there was no applicable company policy or risk assessment. Mr Cuthbertson made some suggestions about driving in the snow.

7. The Claimant emailed Mr Cuthbertson again on 30 November 2010 at 12:04 in the following terms:

> **"I was hoping for some formal guidance from the company. The team are under a lot of pressure to keep out on the roads at the moment and it is dangerous. Do I log this as the formal guidance?"**

8. As a result of the Territory Managers asking for clarification about their pay in the event of being snowed in, on 6 December 2010 at 15:44 the Claimant sent an email to a different employee, a member of the Human Resources department. The EJ set out the relevant parts of the email in paragraph 7 of the judgment.

> **"I am only after a simply [sic] policy statement to increase transparency and help build morale and goodwill within the team. As their manager I also have a duty to care for their health and safety. Having spent most of Monday and Friday driving through snow I know how dangerous it can be. In addition the time spent battling through the snow is unproductive; they can gain more sales by phoning customers. If they are not going to be paid then I have to put in contingencies for diverting calls to those team members still on the road. In the absence of any formal guidance I take full responsibility for the directions given to my team."**

The decision of the EJ

9. The EJ considered whether the Claimant had made a disclosure of information which he reasonably believed tended to show that the health and safety of any individual had been, was being, or was likely to be endangered. The EJ gave a self direction that for there to be a qualifying protected disclosure there must be a disclosure of information. On considering

recent authorities including **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, the EJ held at paragraph 3:

> **"It is of paramount importance, therefore, to consider the provisions of section 43B in the light of the EAT judgment that what is required is a disclosure of information rather than an allegation."**

10. The EJ held at paragraph 8 that looking at the email correspondence as a whole a number of statements were being made by the Claimant as well as queries raised by him. In the email of 12:04 on 30 November the Claimant was making the point that the sales team were under a lot of pressure to keep out on the roads and that it was dangerous. The EJ further held:

> **"In the e-mail on 6th December he is again making the point that he has a duty of care for his team's health and safety and that he himself, having spent time out on the roads driving through the snow, knew how dangerous it could be."**

11. The EJ concluded at paragraph 9:

> **"It may be that to some extent the claimant is expressing an opinion, but it is also clear I conclude that in the course of the e-mails of 30 November 12.04 and 6 December at 15:44 he is also informing his employer that the road conditions are so dangerous that the health and safety of his team is being placed at risk. I conclude that even though such facts, as is submitted on behalf of the respondent, may have been obvious in any event to the respondent that does not prevent the claimant in providing that information in the course of those e-mails making a disclosure which is capable of amounting to a qualifying disclosure within Section 43B(1)(d). He is disclosing in my judgment to the respondent information, namely the dangerousness of the road conditions for his team in driving in those conditions. That is clearly capable of being a disclosure of information that the health or safety of any individual, in particular those in his team, has been, is being or is likely to be endangered; he is in essence making the point that the conditions are so bad that the safety of Managers that he controls is being or is likely to be endangered as a result of driving in the snowy conditions. The fact that he is making that contention in the context of other points, and against the background of his team being concerned to know that they will be paid if they are snowed in and unable to travel to appointments, seems to me not to mean that the communications themselves are not a disclosure of information.**
>
> **In those circumstances I conclude the communications taken as a whole, to which I have referred are capable of amounting to a qualifying disclosure within Section 43B(1)(d). The claim of unfair dismissal and detriment on the grounds of public interest disclosure may proceed to a Hearing."**

The submissions of the parties

12. Mr Algazy QC for the Respondent contended that the finding by the EJ that the communications in the emails of 30 November at 12:04 and 6 December 2010 at 15:44 were

capable of amounting to a qualifying disclosure was perverse and/or erroneous. He submitted that applying recent caselaw, statements of opinion and references to obvious states of affairs are not protected disclosures within the meaning of ERA section 43B(1)(d).

13. It was submitted on behalf of the Respondent that for the disclosure to fall within a protected category it must be of an underlying wrongdoing or failure. None have been identified in any of the alleged disclosures. Expressing a concern or an opinion does not constitute a qualifying disclosure. Mr Algazy QC contended that in this case the "information" which was the basis of the decision of the EJ constituted a communication of the Claimant's state of mind. He relied upon the judgment of the Employment Appeal Tribunal ('EAT') in **Goode v Marks and Spencer plc** UKEAT/0442/09 in support of a submission that the Claimant's state of mind about weather conditions was not the foundation for a reasonable belief that there was any relevant failure as regards the health and safety of any specific member of the team. Mr Algazy QC drew a parallel with the communications from the employee in **Goode** in which the EAT referred at paragraph 36 to the conclusion of the ET that they were at the highest:

> **"…only 'information' in the sense of being a statement of his state of mind…"**

Whilst information in an earlier communication can be "embedded" in one made later, a term used by the EAT in **Goode**, even if the emails of 30 November 2010 were "embedded" in that of 6 December they did not contain a communication of information of failure to comply with a legal obligation. They did not contain "information" but only a statement of the employee's state of mind. In this regard Mr Algazy QC adopted the submission of counsel for the Respondent in **Cavendish Munro v Geduld** [2010] IRLR 38 at paragraph 15:

> **"Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information."**

14. Mr Algazy QC contended that the facts of this case are also analogous to those considered by the EAT in **Everett Financial Management Limited v Murrell** EAT/552-3/02 and 952/02. The EAT considered whether a request in a petition by employees for an assurance that their employer and they were not engaged in any activity which was or could be construed as unlawful was a disclosure of information. The EAT held at paragraph 48 that the petition in isolation did not disclose any information falling within ERA section 43B. As in the case of **Goode**, the ET had concluded that all that the Claimant wished to do was to discuss the issues which he raised. The EAT in **Everett** decided at paragraph 48 that the ET was entitled to come to this conclusion.

15. Further, Mr Algazy QC contended that for ERA section 43B(1)(d) to be engaged, there must be more than a generalised disclosure. For example when a member of the Respondent's Human Resources department asked the Claimant to identify which of the team members were affected by the risk posed by the bad road conditions, the Claimant responded "It will vary depending on the day, time and location". The Respondent assessed risk on a case by case and day by day basis. Accordingly they needed to know the particular circumstances which were the subject of the alleged disclosure. There are 16 territories throughout the UK. It cannot be said that there was anything more than a vague generalised and non-specific concern expressed by the Claimant about driving conditions without identifying any relevant failure or malpractice. Further it was said that the communication from the Claimant was made in the context of an overarching concern expressed by the sales personnel about pay as opposed to health and safety.

16. Thirdly Mr Algazy QC contended that there was nothing in the language of ERA section 43B which directly supports the suggestions that a "qualifying disclosure" can consist of

several separate disclosures over different days and communicated to different individuals. This also contributed to the vagueness of the complaint. However, counsel agreed that an earlier communication can be relied upon to "contextualise" a later disclosure.

17. Mr Algazy QC submitted that the EJ erred in identifying three protected disclosures when the Claimant had only identified in his ET1 that of 6 December as a protected disclosure, called "Disclosure 2" in his witness statement. Mr Algazy QC fairly pointed out that in his witness statement, the Claimant refers to the email of 10:41 on 30 November 2010 as a protected qualifying disclosure. However, counsel contended that, as in discrimination cases, an ET can only make findings that a disclosure is a protected disclosure if it has been pleaded as such. Accordingly the EJ could only make such a determination in relation to the email of 10:41 on 30 November 2010 and possibly that of 6 December 2010.

18. The Claimant submitted that he made two qualifying disclosures. The first disclosure was in the two emails of 30 November 2010. He contended that the information in those emails was of failure to comply with health and safety requirements. In his skeleton argument he has identified alleged breaches of **Health and Safety at Work Act 1974** ('HSWA') section 2(2)(c), 3(1)(a), 8(1)(a), 8(2)(a) and 10(1)(a)-(c) and the **Management of Health and Safety at Work Regulations 1999** SI 1999 No. 3242 by the Respondent's Health and Safety Manager. He spelt out "other malpractices" as follows:

> **"a) It shall be the duty of every employer to ensure, as far as is reasonably practicable, the health, safety and welfare at work of all his employees – Section 2(2)c – HSWA. The H&S Manager was in the primary position to do this but he selected (sic) to ignore the request for help from another senior manager of the organisation.**
>
> **b) Every employer shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work – 3(1)(a) SI 1999 No. 3242 MHSWR. The H&S Manager explicitly states that no such assessment was done for the Territory Managers and provided no indication that it would be done.**
>
> **c) Every employer shall establish and where necessary give effect to appropriate procedures to be followed in the event of serious and imminent danger to persons at work in his undertaking – 8(1)a SI 1999 No. 3242 MHSWR. We have already established that the changes in weather had caused this yet the H&S Manager was unwilling to resolve the problem.**

d) So far as is practicable, require any persons at work who are exposed to serious and imminent danger to be informed of the nature of the hazard and of the steps taken or to be taken to protect them from it – 8(2)a SI 1999 No. 3242 MHSWR. The H&S Manager was unwilling to resolve the problem.

e) Every employer shall provide his employees with comprehensible and relevant information on (10(1)a,b,c – SI 1999 No. 3242 MHSWR):

a. the risks to their health and safety identified by the assessment;

b. the preventative and protective measures;

c. the procedures referred to in regulation 8(1)(a)

Again the H&S Manager was unwilling to resolve the problem."

19. As for the alleged disclosure made in the email of 6 December 2010, the Claimant contended that it was also of information about failure to comply with the HSWA sections 2(2)(c), 8(1)(a) and 10(1)(a)-(c).

20. The Claimant contended that the content of his emails was not a matter of opinion. He was informing the Respondent that the conditions in which the Territory Managers were expected to drive were dangerous. He submitted that the information he gave was sufficiently precise to amount to protected disclosures. The information given referred to Territory Managers. The territory covered the whole of the UK. The nature of the weather was such that it would vary by location and by time of day. Different individuals were being affected at different times. However the information given by him was of conditions which affected the entire sales team.

21. The Claimant submitted that he had made two protected disclosures, one on 30 November at 10:41 and one on 6 December 2010 at 15:44. The EJ had not erred in considering the two emails of 30 November and that of 6 December as a whole as they contained the same subject matter. In any event, each of the two disclosures referred to as such in his statement satisfy the requirements for categorisation as protected disclosures within the meaning of ERA section 43B(1)(d).

Discussion and conclusion

22. The following principles relevant to this appeal are to be derived from the authorities on communications which are protected disclosures within the meaning of ERA section 43B(1)(d), the provision of section 43B(1) which was the basis of the decision of the EJ in this case. The disclosure must be of information not an allegation (**Cavendish Munro** paragraph 24), nor an expression of opinion or a state of mind (**Goode** paragraph 36). The information must be of facts which in the reasonable belief of the worker making the disclosure tends to show that the health and safety of any individual has been, is being or is likely to be endangered. An earlier communication can be read together with a later one as "embedded" in it rendering the later communication a protected disclosure even if taken on their own they would not fall within section 43B(1)(d) (**Goode** paragraph 37). Accordingly two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact. In **Everett**, the EAT held at paragraphs 46 and 47 that because the ET made no finding of fact on what was said at a meeting before a petition which was said to be a protected disclosure was signed, it was not possible for them to decide whether the petition read with what was said at that meeting was a protected disclosure.

23. It has been well established, at least since the judgment of the Court of Appeal in **Chapman v Simon** [1994] IRLR 124, that an ET should only determine claims which are made before it. It is clear from such cases as **The London Borough of Hackney and Mr Sindu v Ms S Distant** UKEAT/0487/08/MAA that such claims may include particulars given by a Claimant in addition to those in the ET1. In this case the Claimant made a witness statement in which he referred to his email of 10:41 on 30 November 2010 as a protected disclosure and that of 6 December 2010, referred to in his ET1 as such a disclosure, as "my 2nd (protected)

disclosure". The ET1 also referred to his emails of 30 November 2010 although he did not refer to them as "protected disclosures".

24. It was clear from the Claimant's ET1 that he was relying on his two emails of 30 November 2010 one to the Respondent's Health and Safety Representative and one to a member of the Human Resources Department, as supporting his claim although he described that of 6 December 2010 as a qualifying disclosure. This became even clearer from his witness statement in which he described his email of 10:54 on 30 November 2010 as a (protected) qualifying disclosure and summarised the content of his email of 12:04 of that day. In my judgment in that context, the EJ did not err in considering whether the email of 6 December 2010 read together with the two emails of 30 November were capable of constituting a protected disclosure. By the time of the hearing before the ET it was clear from his ET1 and his statement that the Claimant, who was a litigant in person, was relying on at least the 10:41 email of 30 November 2010 as well as the email of 6 December 2010 as constituting a protected disclosure. In any event a prior communication may be taken into account as "embedded" in the one alleged to amount to such a disclosure. On the facts of this case in my judgment the EJ did not err in considering the three communications together in deciding whether the Claimant made a disclosure which amounted to a protected disclosure. Labelling the two emails of 30 November 2010 as protected disclosures in the ET1 would not have materially altered the claim made which was clear from that document alone and was amplified in his statement.

25. In my judgment the EJ did not err in concluding that in the emails taken together the Claimant was communicating information. The Claimant was drawing attention to the danger posed to Territory Managers of driving in snowy conditions. On the facts the EJ did not err in

regarding the emails as communicating information and not just as an expression of an opinion or making an allegation.

26. Further, the information about the danger of the driving conditions in the emails did not cease to be such because the Claimant did not specify the particular Territories or individual Territory Managers affected. There is no suggestion in the judgment or in the detailed ET3 Response by the Respondent that they were unclear what information was being provided. In their response to the emails of 30 November they stated:

> **"17. In effect, Mr Cuthbertson [the Health and Safety Manager] was indicating it was a matter for the individuals concerned to assess the weather conditions themselves to determine whether or not they should drive. If they did so decide, he had given them a number of helpful precautions to take."**

It is unsurprising that no more specific information was given. The information was that the Territory Managers were being exposed to danger by driving in snowy conditions. Those conditions would no doubt change from time to time and from area to area.

27. In my judgment on the facts of this case the EJ did not err in considering the email correspondence as a whole notwithstanding that the email of 6 December 2010 was sent to a different individual in a different department from those sent on 30 November 2010. It is clear from the extract of the 6 December 2010 email quoted at paragraph 7 of the judgment of the EJ that the Claimant was referring to earlier communications. On these facts the EJ did not err in considering the emails together notwithstanding that they were sent to different individuals. The recipient of the 6 December email cannot have been in doubt that there had been earlier communications from the Claimant about the danger of driving conditions to Territory Managers. If the recipient could reasonably have been unaware that these had been made there may have been some force in Mr Algazy QC's submission. However that was not so on the facts of this case.

28. The "qualifying disclosure" relied upon in this case was found to fall within ERA section 43(1)(d): that the health and safety of an individual has been, is being, or is likely to be endangered. This is different from the provision under consideration in **Goode**, ERA section 43(1). To fall within ERA section 43(1)(b) the disclosure must be of actual or likely failure to comply with a legal obligation. Whilst endangering health and safety may involve such a failure the fact that there is a different statutory provision in the ERA for endangering health and safety shows that it is not restricted to breaches of a legal obligation. In my judgment on the material before him, the EJ did not err in concluding that the Claimant's emails of 30 November and 6 December 2010 taken together are capable of amounting to qualifying disclosures within ERA section 43B(1)(d).

Disposal

29. The appeal is dismissed.