EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105570/2016

Held at Glasgow on 16, 17 and 18 October 2017

Employment Judge: P Wallington QC
Member: Mr P O'Donnell
Mr R McPherson

Mrs J Hassan — **Claimant**
Represented by: Mr B Kadirgolam – Solicitor

Community InfoSource — **Respondent**
Represented by: Mrs A Davis – Director

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) The Claimant's claim of automatically unfair dismissal under Section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

(2) The Tribunal has no jurisdiction over the Claimant's claim of unfair dismissal under reference to Section 98 of the Employment Rights Act 1996 by reason that the Claimant lacked sufficient continuous employment at the effective date of termination of her employment.

REASONS

Introduction

1. In this case the Claimant, Mrs Jamila Hassan, claims unfair dismissal against the Respondent, Community InfoSource, a Community Interest Company. In the original claim, which was presented by the Claimant acting in person, she

claimed to have had over 2 years' continuous employment at the date of termination of her employment, 31 July 2016. That point was put in issue by the Respondent's response, which gave the date of commencement of her employment as 14 August 2014. It was accepted on behalf of the Claimant prior to the full merits Hearing that the Respondent's position as to her start date was correct.

2. Subsequently, the Claimant engaged the Glasgow Ethnic Minorities Law Centre to represent her, and the Centre applied successfully for permission to amend her claim to assert that the dismissal was automatically unfair as the reason or principal reason for her dismissal was that she had made a protected disclosure under the Public Interest Disclosure legislation, as contained in Part IVA of the Employment Rights Act 1996 ("ERA 1996"). The Respondent, at that stage of the proceedings represented by solicitors, applied for permission to amend the response to address the additional claim under Section 103A. That application had not been dealt with before the start of the full Hearing of the claim, but it was not opposed by Mr Kadirgolam, who appeared at the Hearing for the Claimant, and the Tribunal gave the Respondent permission to make the amendment.

3. It was clarified at the commencement of the Hearing that the Claimant accepted that the Tribunal would have no jurisdiction over her claim of unfair dismissal based on the ordinary principles of unfairness under Section 98 of ERA 1996. However the Respondent equally accepted that the Tribunal has jurisdiction over the claim under Section 103A, by reason that the requirement for 2 years' continuous employment does not apply, by virtue of Section 108 of the Act, to a dismissal where the reason or principal reason for the dismissal was the making of a protected disclosure.

4. It was also clarified by Mrs Davis, a Director of the Respondent, who represented the Respondent at the Hearing, the solicitors previously acting having withdrawn from the record the week before the Hearing, that it was accepted that the principal reason for the dismissal of the Claimant was the sending of an e-mail to the Esmée Fairbairn Foundation ("EFF") on 22 April 2016, the contents of that e-mail being the matter relied on as the protected

disclosure by the Claimant. Accordingly, the only substantive issue in dispute before the Tribunal has been whether that e-mail constituted one or more protected disclosures within the meaning of the ERA 1996. If it did, the Claimant's dismissal was automatically unfair by virtue of Section 103A. If it did not, the Tribunal has no jurisdiction over the matter because the Claimant lacked sufficient continuous employment.

5. It was confirmed before the commencement of the hearing of evidence that it would not be necessary for the Tribunal to hear evidence about the disciplinary process leading to dismissal, or the Claimant's unsuccessful appeal against dismissal. The evidence led before the Tribunal has in the main been confined to issues bearing on whether the e-mail did constitute a protected disclosure.

6. Additionally, before the commencement of hearing evidence, the Tribunal raised with the Claimant's representative the question of the basis on which it was said that the e-mail was a protected disclosure, having regard to the complexities of the legislation contained in particular in Sections 43B and 43C to 43H of ERA 1996. Mr Kadirgolam confirmed that the Claimant based her case that the disclosure was a qualifying disclosure on the Claimant's reasonable belief that that which she disclosed in the e-mail of 22 April 2016 comprised information which tended to show that the Respondent had not complied with a legal obligation on it, namely an obligation in a funding agreement between the Respondent and EFF to report major changes in the project for the purposes of which the funding was provided by EFF, and that it was the reasonable belief of the Claimant that the disclosure was made in the public interest, thus satisfying Section 43B(1)(b) of ERA 1996.

7. Mr Kadirgolam further confirmed that the Claimant did not rely on Sections 43C, 43D, 43E or 43F of the 1996 Act as applicable, but did rely on Sections 43G and 43H. The basis on which reliance on those sections is placed was further developed in Mr Kadirgolam's closing submissions, and will be referred to again later in this Judgment.

8. The Tribunal heard evidence on oath or under affirmation from the Claimant herself, and on behalf of the Respondent from Mrs Sheila Arthur and Mr

Hassan Darasi, both Directors of the Respondent. The Tribunal was also referred to a bundle of productions jointly agreed between the parties' representatives.

9. We considered both of the Respondent's witnesses to be honest, credible and straightforward; both also impressed us with their evident dedication to the work the Respondent was undertaking, and their sensitive and sympathetic approach to the issues arising in the proceedings.

10. By contrast, we found the Claimant to be an unsatisfactory witness. Her evidence was not consistent. She often appeared to be self-serving or disingenuous, in particular in affecting not to understand questions which she had difficulty in answering. The Claimant is without doubt an intelligent and well-educated woman, and although English is not her first language, she has sufficient fluency in English that we do not accept that it was this factor which affected her ability to understand the questions. Overall, we considered that where there were differences in the evidence between the Claimant and either or both of the Respondent's witnesses, we preferred the evidence tendered on behalf of the Respondent. We add that we were left with the clear impression that the Claimant had a rather high opinion of her abilities, and regarded Mr Darasi, who at the relevant time was her line manager, as her intellectual inferior, a judgment we considered to be wholly unjustifiable.

11. Having made these observations as to the credibility of the evidence we heard, we can turn to our findings in fact.

Findings in Fact

12. The Respondent is a small Community Interest Company. It is a limited company, in the course of obtaining charitable status, which exists for the purpose of promoting support for refugees and other marginalised people. The Respondent has a particular interest in the promotion of human rights, especially within the refugee and asylum seeker communities in Scotland.

13. The Respondent is a small organisation, dependent to a large extent on volunteers. At the time of the Hearing, it employed a total of eight part-time and one full-time paid staff, and also had the services, largely on a part-time basis, of 25 volunteers. The Respondent has six Directors, including Mrs Arthur and Mr Darasi, all of whom in their capacity as Directors work as volunteers without remuneration. The Respondent is entirely dependent on grants and donations received from charitable organisations, foundations and the like, having no independent resources of its own. Until April 2016, the premises from which the Respondent operated were located in a spare room in Mrs Arthur's house, with occasional ad hoc rental of premises for conducting seminars and workshops which for whatever reason could not take place within Mrs Arthur's house.

14. The Claimant is of Sudanese origin, but also holds Norwegian citizenship. She moved to Norway in 2000, before coming to the UK in 2013. She has a First Degree in Economics from a University in Sudan, and a Masters Degree in Developmental Studies from a University in Norway. She has experience of working as a Research Assistant and as an Integration Officer for a local authority, amongst other jobs in Norway. During the period the subject of this case she was registered for a PhD at the Open University.

15. The Claimant first joined the Respondent as a volunteer, working in the field of mental health wellbeing, in 2013. She was at that time also working for a Living Well project in Glasgow, which targets primarily refugees and asylum seekers. She further had a part-time paid job for a charity called Sahelia, from January 2014. She continued to work as a volunteer for the Respondent until the end of 2015, but from 14 August 2014 she was also engaged as a paid employee of the Respondent, initially on a 12 hour week, working on a project funded by the Hennery Smith Foundation to run a series of workshops.

16. A particular interest of the Respondent, which was shared by the Claimant, was the combating of Female Genital Mutilation ('FGM'). The contribution that the Respondent sought to make was to target men from those communities in which FGM is practised, particularly the Sudanese, Eritrean and Somali communities. Funding applications for this work were prepared,

principally by Mrs Arthur, including an application to the EFF, which was successful, but subject to an important condition, in June 2015.

17. The funding, for some £23,000 a year for 3 years, was subject to the condition of matching funding being obtained from another donor. This was eventually secured from the Tudor Trust in December 2015, at which point the EFF confirmed its original award, and money was made available to start the Combating FGM project at the beginning of 2016. The funding provision included a salary and employer overheads for a Project Manager post working 35 hours a week, and also a relatively modest item for other overheads including premises costs. Funding was released for the first year initially, with funding for future years to be conditional on satisfactory progress with the project, with a requirement for a report after 11 months of the project being in operation. Additionally, the letter from EFF notifying the award of the grant (pages 59 to 70) contained the following statement:

> "It is important that you advise me of any major events or changes that might affect the funded work such as a change in senior staff or any post that we support. If there is a problem it is better for us to know as soon as possible so that we can help should any changes in the funding be needed."

18. Two matters occurring prior to the commencement of the FGM project in January 2016 require to be mentioned. The first is that around July 2015 the Claimant's relations with the Directors of the Respondent underwent a significant deterioration. The Claimant was unhappy that she was not allowed to take on the writing of grant and funding applications, and that Mr Darasi was to become her supervisor, replacing Mrs Arthur, who no longer had the time to act as her supervisor because of her numerous other, largely voluntary, commitments. Whilst there were no particular incidents identified in the evidence before us over the period from July 2015 to December 2015, we are satisfied that the Claimant's relationship with, and attitude towards, the Directors of the Respondent during this period were not particularly happy, and that she showed markedly less respect for the Directors than she had previously shown or they were entitled to expect.

19. The second matter occurring at this time is that the Claimant set up a new body, which later obtained charitable status, called Together for Better Life ('Together'). This body was, like the Respondent, a Community Interest Company, intended when funded to work with the refugee and asylum seeker communities in the Glasgow area. Inevitably, it was likely to be in competition with the Respondent for the limited funding available to this sub-sector of the community interest sector. Together obtained charitable status in early 2016, prior to the sending of the e-mail that led to the Claimant's dismissal and is relied on as a protected disclosure.

20. The Claimant subsequently, after her dismissal, became an employee of Together, her salary as such (on a part-time basis) being funded by grants received by Together. We return in our conclusions to the issue raised by the Respondent whether the existence and nature of this body indicates that the Claimant had an ulterior motive, or was seeking personal gain, in the making of what she relies on as a protected disclosure.

21. Once the Respondent knew that the funding package for the Combating FGM project was complete, the Directors, and a steering group comprising mainly the Directors, each considered the appropriate structure to put the project into operation. They concluded that an element of supervision for the Project Manager post was necessary, and, given the limited funds, decided that Mr Darasi would be employed for a day a week (7 hours) in the capacity of Project Supervisor, continuing as the Claimant's Line Manager, whilst the Claimant would be employed for 28 hours a week as the Project Manager, with the remainder of the funding, so far as intended pay for staff, to be used to fund a part-time project worker.

22. We find that the division of the funding in this way was well within the discretion available to the Respondent in deciding how best to implement the project for which funding had been obtained. In addition to the part-time project worker to be recruited for the project, it was decided that Mr Darasi would work for a day a week (7 hours) in that capacity, so that he would be paid for a total of two days a week, at salaries respectively commensurate with the level and responsibilities of the posts.

23. For the Claimant, 28 hours a week represented an increase in the time for which she was to be paid, and the rate of pay (£27,000 p.a. pro-rata) was higher than she had been receiving. She nevertheless did not agree to the structure, considering that she should be allocated the full 35 hours a week of project management work for which funding was provided, and that she should not be supervised by Mr Darasi, and also expressing concerns about the fact that he would be acting in both a superior and subordinate capacity to her in the two part-time jobs to be given to him. She made her objections clear repeatedly, to the Directors more generally and not just to Mr Darasi and Mrs Arthur, but eventually in late January 2016 accepted under protest the contract offered to her, which took effect from 1 January 2016. Mr Darasi's appointment to both the positions commenced at the beginning of February 2016.

24. It is necessary at this point to make findings concerning Mr Darasi's qualifications and suitability for the roles he undertook. Mr Darasi first came to the United Kingdom in 2007 as an asylum seeker. He had before then obtained a degree in Geology from the Al-Fateh University in Libya, and had worked in an administrative capacity in a number of countries, before his circumstances led him to seek asylum in the UK. Since arriving in the UK he had worked in a number of capacities in the voluntary sector, including an extended period as a volunteer at the Maryhill Citizens Advice Bureau, during which he received extensive training, amongst other things in one to one communication. He fully met all of the essential and desirable requirements set out in the person specification attached to the job description for Project Supervisor (pages 100 to 103).

25. In addition to speaking English with a fluency at least as good as that of the Claimant, Mr Darasi is fluent in a number of languages spoken by members of the refugee and asylum seeker communities from the East African region, specifically Amharic, Tigrinya and Arabic, as well as speaking his native Sahel. Finally, Mr Darasi was heavily involved in setting up, and was for a period the Chair, of the Asylum Seekers' Residents' Association, and has also been involved actively in the Scottish Refugee Forum, including in meetings with the Home Office. No reasonable person with knowledge of Mr Darasi's

background, experience and qualifications could doubt his suitability or qualifications for the post of Project Supervisor

26. During the period immediately following the inception of the Combating FGM project, and indeed from the time that the funding for this project was confirmed in December 2015, the Directors of the Respondent were actively involved in seeking new premises for the Respondent's use. Mrs Arthur's spare room was both unsuitable and insufficiently large for the various projects for which the Respondent had by that stage acquired funding, and new premises were needed. The Directors took the view that the premises needed to meet certain conditions, which included accessibility for clients with disabilities, both in the sense of being reasonably conveniently located for public transport and in the sense of physical access in and out of the premises.

27. Mr Darasi and Mrs Arthur were both actively involved in seeking premises, and viewed some ten possible locations before becoming aware of office space available at the Albany Centre, a multi-occupied office block owned by the Scottish Council for Voluntary Service. Wherever possible, the Claimant had been involved by the relevant Directors in the inspection of premises. However, she had accumulated a considerable amount of annual leave, which under the Respondent's conditions of employment had to be taken within the leave year, which ended at the end of March. She was therefore absent for a total of 6 weeks on annual leave from mid February to the end of March 2016. It was during this period that the Respondent became aware of and viewed the premises at the Albany, comprising one large room of some 700 square feet, with step free access, in a building which also contained a café and restaurant, available for use at any time by the occupants of the building, and indeed open to the public.

28. Having viewed the premises the Directors concluded that they were suitable, and unlikely to be bettered, and managed to negotiate a reduction in the rent with SCVS, the landlord. Arrangements for drawing up the lease took a little time but the lease was finally signed off by Mrs Arthur on behalf of the Respondent on 15 April 2016. The lease was for a period of 15 months from

18 April 2016, at a monthly rental of £625, and with provision for three months' notice either side.

29. The Claimant had not seen the premises prior to the signing of the lease. The reasons for this were in part that she had been on annual leave when the premises had been found and the decision had been taken to seek a lease, and in part that the keys to the premises were not available to the Respondent until the lease commenced on 18 April 2016.

30. Mr Darasi arranged to take the Claimant to see the premises the following day, 19 April. When they arrived at the Albany Centre, the Claimant went very briefly into the office, remaining for no more than 10 or 20 seconds, before walking out. She was clearly dissatisfied with what she had seen, and turned to Mr Darasi and told him angrily, in Arabic, "you have sunk the project".

31. Mr Darasi tried in vain to persuade her to spend some time looking at the room to assess how it could be used for the various activities that the Combating FGM project would need to undertake there. She was unwilling to do so, and refused his second proposal to adjourn to the café to discuss the matter. She insisted on going outside to a nearby park, where she repeated that she considered the premises completely unsuitable and that Mr Darasi had sunk the project.

32. The claimant had two concerns about the premises in particular. The first was that the room had no separate area in which confidential one to one meetings with clients of the project could be undertaken. The second was that seminars and workshops which were a feature of the project were held on Saturdays. The building is only fully open from 8am to 6pm Mondays to Fridays, so that to use the premises on a Saturday, the Respondent would either require to arrange for the caretaker to be present, at a cost of £15 an hour, or would need to obtain the keys to the premises, taking responsibility for opening and locking them, and for any misuse of the premises whilst they held the keys. Mrs Arthur confirmed that neither of these has in fact been any problem at all for the Respondent in its occupancy of the premises.

33. In a separate development shortly before this, EFF's Grants Manager, Ms Jo Rideal, had written to Mrs Arthur requesting an update on how the project was progressing, to which Mrs Arthur had responded on 15 April 2016, in an e-mail which was subsequently forwarded to the claimant, summarising the various steps which had been taken to get the project under way. This e-mail identified that Mr Darasi was Project Supervisor supporting Mrs Hassan, and also working with the project in particular helping to access the relevant communities. The e-mail did not refer to the acquisition of premises, no doubt because Mrs Arthur thought that that would not be of any particular interest to EFF.

34. Following these developments, on 22 April 2016 (a Friday, and a day on which the Claimant was not due to work) the Claimant wrote a lengthy e-mail which she sent to Ms Rideal at EFF. As this is the document relied on as containing the protected disclosures in this case, it is worth setting it out in full. The e-mail read as follows:

> *"Dear Jo*
>
> *Thank you for your follow up of the project "Combating FGM by Working with Men". Your communication with Sheila in this regard has been forwarded to me. However I am not satisfied with her response, and hereby I provide my opinion on progress of the project. Generally, I am not happy with progress of the project since we received your fund.*
>
> *First, two funds (from Hennery Smith and Tudor Trust) were received to work with same ethnic group, Sudanese-Eritreans. The project has been working with this group since its start and recruitment for seminars is declining. Therefore using the second funding for other practicing communities would improve likelihood of success of the project. Because, the related project worker (PW) posts should be for two people from different ethnic groups to facilitate access to their communities. Currently, the two employed people are from what we consider as one group (Sudanese/Eritreans).*

Second, one of the CIS Directors (Hassan Darasi 'HD') is employed in two posts in the project for 16 hours. The first is eight hours Project Supervisor (PS) post that financed by the sum of support and supervision hours and eight hours from the project manager (PM) post. The second post is project worker (PW) for eight hours and financed from the 24 hrs project worker posts. The post of project supervisor-worker confuses the PM [that is, the Claimant] *about her responsibility towards the PW part in this post. It is not clear for her whether it is responsibility of the PS, which implies he as PS supervises himself as PW, or it is responsibility of the PM who is supervised by the PS. Furthermore, HD is not qualified for either of the posts and his interest in the project is doubted. Later, I will give example to prove this claim.*

The PW who had volunteered for a year and been trained, attended courses and other related events, and acquired knowledge and experience in facilitating seminars, is offered 16 hrs a week for a year. While the director who refused to volunteer in the project, offered his two posts for three years. Though the PM worked 35 hrs a week since November, she is offered 28 hrs a week starting from January. [In fact the Claimant was engaged on a paid basis for only 24 hrs a week prior to the commencement of this project]. *Instead of reducing her tasks to fit with the number of the offered hours, her tasks were increased by liaison with a supervisor who is not qualified for his position and up to now does not understand the project.*

Third, the project model was expected to be fully implemented after reception of the new funding (from Esmée Fairbairn Foundation and Tudor Trust). However, use of the funds was delayed resulted in delaying of implementation of the project. The supervisor-worker started in February. The PM received her new job description in February. The PW offered the post in February, but he couldn't take it before March. This is because he lost hope to get the post in the project that he expected in November and started a job in other place.

Consequently, the one-to-one support, which is responsibility of the PS-PW is not improved and the system is not developed yet; the follow up is not started but the database development is under process and expected to be started in May; three seminars out of twenty were run and the fourth is planned on 30th April.

At this end, I would provide example to illustrate the above claim that the PS is not working for interest of the project, and do not support the PM. We decided to pool funds for the 'room hire' we received from the various funder and the part of the organisational overhead cost, to rent a premises that could be used as office, room for one-to-one support, as well as seminar room. The three staff members of the project viewed a two-room premises that they considered as suitable to serve the needs of the project; however the directors had some concern about it and has been rejected. While the PM was on annual leave in March the PS was on charge of both posts. During this period the directors, found other place that they considered as suitable. When the PM returned from her leave, she has been updated by the PS who informed her about the new premises (one large room) and confirmed that it is suitable for the seminars. The PM requested to have partition to divide the room into two parts to work as office and seminar room. The PS informed the other directors who started to raise fund for this task. The contract started on 18th of April, and the PM got opportunity to view the new office on the following day. In the same day, the PM has been informed that eight desks will be used in the venue, because all CIS projects would share the venue.

The venue is one room, located in a building that accommodate different organisation. The room is too small to be divided and is not suitable for the seminars. Furthermore, there is no place that provides confidentiality for users of the one-to-one service, and that the follow up phone calls could not be done in it, because it would not only disturb CIS staff who share the room, it would also disturb people in the neighbouring rooms. Furthermore, she has been informed that if it would be used in the weekends (time of the seminars) a charge of £15

per hour is applicable otherwise we should shoulder responsibility of the building which host many organisations. It is good to have all projects of the organisation in one place that provides needs of all projects. This venue provides needs of other projects but not that of FGM project that bears almost entire the cost as informed by the PS. It is noteworthy that the FGM project paid for using premises of other CIS's project for seminars.

When the PM asked the PS why he didn't consider needs of the project, he responded that the decision was taken by the majority of the directors. This indicates that the PS does not differentiate between his role as PS and acting PM and that as CIS director. Furthermore, he could not argue for interest of the project; though I think interest of the project should be prioritised without arguing, considering that the fund is for the FGM project and not other CIS projects.

The planned seminar on next Saturday was expected to be run in the new premises, the PM asked the PS about where it should be run given the situation of the new premises and has been waiting for the SP to discuss it with the landlord as he said. I do not know what the outcome would be, but this might be repeated for every seminar, if it is allowed to be run in the premises!

Other example is related to the expected fund from Robertson Trust. The PM in a meeting with the PS suggested using this fund for Somali community. After discussing this issue with the directors, the PS informed the PM that the directors rejected the suggestion, and agreed to use the fund for the West Africans. Yesterday, (20.4.2016 at 7.23pm), knowing that the PM would not be at the office for the following two working days, the PS texted the PM to inform her that the directors decided to announce for the post the following day. I do not want to anticipate what they would do, but this obvious evidence that they marginalised the PM and that they employed the PS to manage the project through him.

A third example that supports the above claim is that the directors have taken £200 from other FGM fund for CIS expensive. They have not discussed this with the PM or PS.

NB: attached are the job descriptions for the two posts financed by Esmée Fairbairn Foundation.

Jamila Hassan."

35. On receipt of the e-mail, Ms Rideal replied asking the Claimant to forward a copy to Mrs Arthur, which she did, on the evening of Sunday 24 April 2016. When Mrs Arthur saw the e-mail that evening, she contacted the other Directors and it was agreed that the Claimant would be suspended for investigation of potential gross misconduct, namely bringing the Respondent into disrepute.

36. The Claimant was indeed suspended the following morning, on full pay. She remained suspended until she was dismissed on 15 July 2016, the dismissal taking effect on 31 July 2016. The allegation of gross misconduct had in the meantime been the subject of an investigation by an external investigator appointed for the purpose, Ms Hermine Makangu. This had been followed by disciplinary proceedings which were conducted by two Directors of the Respondent, Henriette Kubakouenda and Alison Davis. Following her dismissal the Claimant appealed. Her appeal was heard by another of the Directors, not previously involved in the matter, Mr Pervin Ahmed. The appeal was unsuccessful.

Relevant Law

37. The right not to be unfairly dismissed is the subject of Part X of the Employment Rights Act 1996. Section 108 of the Act provides that the right is subject to the employee concerned having at least two years' continuous employment as at the effective date of termination, but excludes from that condition dismissals which fall within section 103A. That section in turn provides that an employee who has been dismissed is to be regarded for the

purposes of Part X as unfairly dismissed if the reason, or if more than one the principal reason, for the dismissal is that the employee made a protected disclosure. That provision contains two elements; that the employee made a protected disclosure, and that that was the reason or principal reason for her dismissal. In this case, as noted earlier in this judgment, the matter claimed to be a protected disclosure is the email of 22 April 2016 we have set out above; it is not disputed that its sending was the principal reason why the claimant was dismissed, but it is disputed whether it was a protected disclosure.

38. A protected disclosure is defined in section 43A ERA 1996 as a qualifying disclosure (as defined in section 43B) which is made in accordance with any of sections 43C to 43H of the Act. There are thus two stages to the determination of whether the claimant's email was a protected disclosure: whether it was a qualifying disclosure, and if so whether the sending of it to EFF was in accordance with any of sections 43C to 43H. We take these in turn.

39. A qualifying disclosure means any disclosure of information which in the reasonable belief of the person making it is made in the public interest, and tends to show one or more of six listed matters collectively referred to in section 43B(5) as a 'relevant failure'. In this case the relevant failure relied on is 'that a person has failed, is failing or is likely to fail to comply with a legal obligation to which he is subject' (section 43B(1)(b)), the legal obligations asserted being those of the respondent to EFF as a provider of funding.

40. The questions whether the claimant believed that she was disclosing information in the public interest, and whether she believed that the information tended to show a failure by the respondent to comply with its legal obligations, are each questions of fact. Whether that belief, if held, was reasonable is a matter to be determined objectively by the Tribunal. It is not necessary for a claimant to establish that whatever legal obligation is relied on in fact existed: see **Babula v Waltham Forest college [2007] IRLR 346**. However the employee's belief that such an obligation exists, and that the

information disclosed tends to show that it is not being, or is likely not to be, complied with, is a necessary element in a qualifying disclosure.

41. Whether a qualifying disclosure is a protected disclosure depends on the identity of the person or body to whom the disclosure is made. Sections 43C, 43D, 43E and 43F apply respectively to disclosures to the discloser's employer, to a legal adviser, to a Minister of the Crown and to a 'prescribed person'; the latter are identified in regulations, and are broadly persons and bodies with regulatory functions. It was not suggested by Mr Kadirgolam that any of these provisions apply to the claimant's email; in particular EFF is not a 'prescribed person' under the relevant regulations.

42. Section 43G, which is relied on, covers 'disclosure in other cases', according to its marginal note. The conditions for the section to apply are complex. First, the person making the disclosure must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true. Secondly, the disclosure must not be made for purposes of personal gain; thirdly one or more of the conditions set out in section 43G(2) must be satisfied; and fourthly in all the circumstances of the case it must be reasonable for the discloser to make the disclosure; that is a matter to be determined objectively by the Tribunal, not a matter of the discloser's reasonable belief. The seven factors that are required to be to be taken into account in making that determination are set out in section 43G(3).

43. The three 'gateway' conditions in section 43G(2) are that at the time of the disclosure, the discloser reasonably believes that she will be subjected to detriment by her employer if she makes the disclosure to the employer; that where (as in this case) there is no relevant prescribed person to whom the disclosure can be made, the worker reasonably believes that it is likely that evidence related to the relevant failure will be concealed or destroyed if the discloser makes the disclosure to her employer; and that the discloser has already made the same disclosure to her employer, or to a prescribed person.

44. By section 43H a disclosure is protected if the discloser believes that the information disclosed, and any allegation contained therein, are substantially true; the disclosure is not made for purposes of personal gain; the relevant

failure is of an exceptionally serious nature; and in all the circumstances (including the identity of the disclose) it is reasonable for her to make the disclosure. The essential differences in the conditions requiring to be satisfied between sections 43G and 43H are that in the latter case it is not necessary to show that one of the 'gateway' conditions in section 43G(2) applied, but it must be shown that the relevant failure is of an exceptionally serious nature.

45. Finally in relation to the relevant law we have taken into consideration the helpful guidance given by the Court of Appeal in **Chesterton Global Ltd v Nurmohammed [2017] IRLR 837** as to when, if the information disclosed relates to the personal position of the discloser, it may nevertheless be in the public interest to disclose it; we refer to this in our conclusions on the public interest issue below.

Submissions

46. The claimant's case is that she reasonably believed that there was a legal duty on the respondent to report matters to EFF, including the allocation of part of the funds for the Project Manager post to Mr Darasi, the unsuitability of Mr Darasi to be engaged as Project Supervisor, and the unsuitability of the premises leased at Albany House for the Combating FGM project. The basis of her belief that there was a legal obligation on the respondent to report these matters to EFF was her understanding of the letter from EFF awarding funding for the FGM project, in particular the passage we have set out at paragraph 17 above.

47. Mr Kadirgolam submitted that the claimant had real concerns about the success of the project, and that it was Mrs Arthur's email to EFF reporting on progress in getting the FGM project under way which prompted her to send her own email, to inform EFF of what she believed Mrs Arthur had a duty to report but had not reported; it was her belief that Mrs Arthur's report did not reflect the reality of the position of the project. Mr Kadirgolam accepted that the claimant had not discussed or raised, either with Mrs Arthur or Mr Darasi, all of the points she set out in her email to EFF; however he submitted that

she was under instructions not to contact any of the directors (who included Mrs Arthur) except through Mr Darasi. He went on to submit that the claimant considered, in view of Mr Darasi's reaction to her concerns about the new premises, that she had no alternative way to rescue the project other than to contact EFF.

48. As to the public interest issue, Mr Kadirgolam submitted that the claimant believed that she was acting in the public interest because the FGM project was for the benefit of the public, and that a failure of the project would not be in the public interest.

49. In relation to section 43G, Mr Kadirgolam submitted that the claimant's evidence established that she did believe that the allegations contained in the information she disclosed in the email to EFF were substantially true; that the conditions in section 43G(2)(a) and (c) were satisfied; and that it was reasonable in the circumstances for her to make the disclosure. He also submitted that the claimant did not send the email for purposes of personal gain, and that she had previously made a disclosure of substantially the same information to the respondent, specifically when she discussed the position of the directors with him on 19 April 2016. We note however that Mr Kadirgolam did not explain how this amounted to a prior disclosure of other matters in the email to EFF.

50. Finally Mr Kadirgolam submitted that the disclosure fell within section 43H because the collapse of the project would be an exceptionally serious matter for the claimant.

51. Mrs Davis, for the respondent, sought to refute any breach by the respondent of its legal obligations. Neither the arrangements for the staffing of the project nor the acquisition of premises were, she submitted, matters sufficiently major to require to be notified to EFF under the funding conditions. She further argued that the claimant was not in a position to make a judgment on whether the move to new premises would affect the viability of the project, not least because she had been on annual leave for much of the time since the project had started; and there was no evidence that the project was in any trouble. She further submitted that the claimant had not exhausted internal

procedures. She was aware of, but had not attempted to use, the respondent's Grievance Procedure; and she was not afraid of discussing issues with the directors, including Mrs Arthur.

52. Mrs Davis submitted that the disclosure was not made in the public interest. There was no public interest in the precise arrangements for the management of the project or the layout of the premises leased to accommodate it.

53. Mrs Davis further submitted that the claimant was not acting in good faith, as evidenced by her failure to raise the issues first internally. She had also disrespected the directors, and been obstructive and truculent. The claimant was well aware of the damage that her email to EFF would do to the relationship between the respondent and EFF; the email was not sent in the interest of the project but to damage the respondent and for personal gain. The personal gain point arose from the interest she had in securing grant funding for her own organisation, Together, which must on the evidence have been in existence for some time before April 2016. In these circumstances she had a potential for personal gain by casting aspersions on the respondent.

54. Mrs Davis also submitted that the claimant could not reasonably have believed that the matters canvassed in the EFF email were breaches of an obligation to report major changes in the project, and her position on this was not credible. It was equally not credible that she believed she could not raise matters with the directors if she received no satisfaction from Mr Darasi.

55. In summary., Mrs Davis submitted that the claimant had no case on any of the contested issues arising from the statutory definitions of a protected disclosure.

Conclusions

56. We start with the issue whether the email was a qualifying disclosure. The first issue in relation to this is whether the claimant reasonably believed that the information she was disclosing tended to show a breach by the

respondent of its legal obligations to disclose major changes in the FGM project to EFF.

57. We have found it difficult to decide whether the claimant did, as she claimed in evidence, believe that the matters she raised in her email were matters that the respondent was legally obliged to disclose. However, even if she did hold that belief, we find that it was not reasonable to do so. The requirement to report was not an obligation to report every detail of the day to day operation of the project, as the claimant well knew having seen the grant letter. The splitting of the funding for the project management between two posts was a legitimate way of structuring the project and not something so out of the ordinary that it needed to be reported to the funding bodies. The acquisition of premises was no more than a necessary step in enabling the project to operate.

58. We consider the reaction of the claimant on being shown the new premises to have been wholly unreasonable and unjustified, particularly so as she refused even to inspect the premises properly, or enter into any kind of dialogue with Mr Darasi about the practical arrangements that would enable her to hold seminars and one to one meetings there, and make confidential telephone calls. In the context that the respondent is a small organisation with limited means, and that prior to acquiring the premises at Albany House it had nowhere suitable to be used for the running of the project, being dependent on Mrs Arthur letting it use her spare room, we consider it wholly unreasonable of the claimant to believe (if she did believe) that not reporting the acquisition of the Albany House premises might be a breach of the respondent's legal obligations of reporting major matters to EFF.

59. Additionally, one of the allegations within the EFF email was that Mr Darasi was unqualified to supervise the project. Not only was he eminently well qualified; we are satisfied that the claimant cannot have believed otherwise, and that she made this allegation out of resentment for the fact that she had been given only a 28 hour contract to enable his role to be funded, and spite against Mr Darasi as the perceived beneficiary of this arrangement.

60. We accept, applying the principles established by **Babula**, that it is not a bar to the claimant's case that there was in fact no obligation to report the matters she covered in her email, and therefore no breach of a legal obligation. However that does not assist her on the question whether any belief she may have had was reasonable; as stated above, we find that it was not.

61. The requirements for a disclosure of information to be a qualifying disclosure also include that in the reasonable belief of the discloser, it is made in the public interest. The **Chesterton** case establishes that a disclosure may be in the public interest (or reasonably be so believed) despite being a disclosure of a matter affecting the discloser personally, such as a breach of his or her contract of employment. In that case Underhill LJ described as 'a useful tool' for deciding the point factors summarised by counsel for the claimant, namely the numbers in the group whose interests the disclosure served, the nature of the interest affected and the extent to which it was affected, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer (see paragraphs 34 and 37).

62. In the present case the claimant's disclosure was at least in part (in relation to the splitting of the funds for the project manager post, resulting in her having only a 28 hour contract) a disclosure of a matter affecting her personal interest, to which the approach advocated in **Chesterton** is of assistance. Applying that approach, this was a matter affecting at most only the claimant and Mr Darasi; the extent of the effect was that she was working, and being paid for, only four days a week instead of the five she desired; the only wrongdoing disclosed was the failure to tell EFF that the funds had been split in this way; and the 'wrongdoer' is a small charity. The balance of these factors points very clearly away from the disclosure being made in the public interest.

63. As for the disclosures about Mr Darasi and the choice of office premises, we consider that these are far from sufficiently serious matters for their disclosure to be in the public interest. It implies no disrespect to the importance of the FGM project so to find; for a disclosure to be in the public interest it must go some considerable way beyond merely drawing to the attention of a funding body which has made a modest grant to a charity that the recipient has not

complied with its obligations to report on how the project being funded is progressing, however valuable and in the public interest the project itself may be.

64. The test is not however whether the disclosure was in the public interest but whether the claimant reasonably so believed. We consider that she did not so believe; rather she believed it was in her interest, and was a way to damage the respondent, and Mr Darasi in particular. If there was no belief, there can be no *reasonable* belief. We add for completeness that even if we had found that the disclosure *was* in the public interest it would not avail the claimant, as the requirement of the statute is that it must be so in the reasonable belief of the claimant.

65. Accordingly, the EFF email was not a qualifying disclosure. That alone prevents the email from being a protected disclosure, and therefore the claim of automatically unfair dismissal must fail. As the claimant lacked two years' continuous employment at the effective date of termination of her employment, the Tribunal has no jurisdiction over her claim of 'ordinary' unfair dismissal. The claim is accordingly not well founded and we dismiss it.

66. In fairness to the submissions of the parties on the issue whether the email was a protected disclosure, we can deal briefly with our conclusions on these points; we deal also below with the respondent's submission that the claimant was not acting in good faith, a point which would have been relevant to remedy had the claim succeeded.

67. The conditions laid down by both section 43G and 43H for a qualifying disclosure to be protected include that the discloser believed that the information disclosed, and any allegation within it, were substantially true. One of the allegations made by the claimant was that Mr Darasi was not qualified to act as Project Supervisor. We have already found that the claimant did not believe this to be true, and that it was an allegation made out of spite. It follows from this finding that the claimant cannot satisfy the condition that she believed the allegations she raised to be substantially true. In making this point, we record our understanding that 'any allegation' means 'each allegation', so that a lack of belief that one or more of the allegations made,

points of detail apart, is sufficient to prevent the disclosure from meeting this condition. But in any case the allegation about Mr Darasi was one of the most significant and serious made in the email.

68. The next issue arising, under both section 43G and section 43H, is that the disclosure must not have been made for the purpose of personal gain. We are not persuaded that the claimant's primary intention was personal gain, rather than venting her anger and spite at the respondent, and Mr Darasi in particular. However we do record that the claimant had placed herself into a position where she had a serious conflict of interest, which she had failed to disclose to the respondent, in that she had set up Together, an organisation that would inevitably be in competition for funding opportunities in the sector in which it and the respondent both sought to operate. Obtaining funding for the kind of projects that the respondent runs is clearly difficult, and depends on a limited range of funding agencies and bodies, so that any success in obtaining funds for Together would have a potentially adverse effect on the range of funding opportunities that the respondent could pursue. It was wrong of the claimant not to appreciate this, and not to disclose what she had done to her employer.

69. Section 43G imposes a 'gateway' that one of the three alternative conditions set out in s 43G(2) is satisfied. Mr Kadirgolam relied on the first and third of these: fear of detriment if the matter was disclosed to the discloser's employer, and that the discloser had previously disclosed substantially the same information to the employer. We regard the first of these as wholly untenable. The claimant had no reason at all to fear that if she raised the points she put in the email to EFF with Mr Darasi or Mrs Arthur, she would be subjected to detrimental treatment. Her evidence to the contrary, and in particular that she was not allowed to take matters of concern to the directors, is simply not credible. This was a small organisation, with its directors actively involved in its affairs on a day to day basis, and easily contactable, and nothing that had occurred up to the time she sent the email would have led any reasonable employee to doubt that she could raise issues with the directors. Indeed she had done so, vocally and persistently, at the time she

was offered a 28 hour contract, with no adverse consequences, even if without succeeding in changing the decision.

70. As to the second gateway, we accept that she had raised with Mr Darasi the unsuitability, as she saw it, of the Albany House office, and had earlier raised her objections to the funding for the Project Manager post being used in part to fund Mr Darasi's role as Project Supervisor. We therefore accept that the gateway condition in section 43G(2)(c) is satisfied.

71. However the further requirement, of both sections 43G and 43H, is that the making of the disclosure was reasonable in all the circumstances. We consider that it was plainly not. The claimant made no serious attempt to discuss with Mr Darasi or Mrs Arthur how the Albany House office could function as the base for the FGM project; she simply over-reacted following a brief look at the office, and adopted a fixed position of antagonism to the idea that it would be suitable as her workplace. There was no good reason why she could not have talked through the issues with Mr Darasi and Mrs Arthur; so too she could and should have discussed her concerns about how the project would function with Mr Darasi having dual responsibilities, including as her line manager. Her failure to take these steps first rendered her action in sending the email unreasonable. In addition, she cannot have been unaware of the considerable damage the email would do to the respondent's relations with EFF, and its prospects of securing future funding from this source, a point it was irresponsible of her not to take into account.

72. Accordingly even if we had found that the email was a qualifying disclosure, it would have failed the tests, both under section 43G and under section 43H, of a protected disclosure. In addition, to pass the test under section 43H, the relevant failure must be of an exceptionally serious nature. Mr Kadirgolam so submitted, explaining that the consequences of failure of the project would be exceptionally serious *for the claimant* (our emphasis). That is not the test, but even if it were, it can only be described as hyperbole. The test is whether the relevant failure is of an exceptionally serious nature. It is not in dispute that the FGM project stood to generate considerable public benefit; anything which assists with the eradication of this particularly abhorrent practice is

undoubtedly of public benefit. But the context is an alleged failure to tell one of the two funders of this relatively small-scale project as much as the funding contract (on the claimant's reading of it) required to be notified. The failure was not of the project but of compliance with a condition of funding. That is so far from being an 'exceptionally serious' failure to comply with a legal obligation that we can only express our surprise that the claimant thought it would be of assistance to her case to rely on section 43H.

73. The final point we address for completeness is the respondent's submission that the email was not sent in good faith. Until 2013, good faith was a requirement for a qualifying disclosure to be protected under both section 43G and section 43H. That requirement was removed by Parliament in 2013, but in its place a provision was added to section 123(6A) of the Act giving a Tribunal a discretion to reduce any compensatory award for unfair dismissal by up to 25% where the Tribunal finds that a protected disclosure was not made in good faith. Established authority (see in particular **Street v Derbyshire Unemployed Workers Centre [2004] IRLR 687**) explains that a disclosure made for ulterior motives is not made in good faith. The disclosure in this case was made for ulterior motives, principally, as we have already stated, to spite Mr Darasi; accordingly if necessary we would have found that it was not made in good faith.

74. For all of these reason, the claimant's claim would have failed even if we had accepted that the EFF email was a qualifying disclosure. The claim is accordingly dismissed.

Employment Judge: Peter Wallington
Date of Judgment: 04 December 2017
Entered in the Register: 06 December 2017
and copied to parties: