



EMPLOYMENT TRIBUNALS

Claimant:
Mr C Riley

v

Respondent:
Belmont Green Finance Limited
t/a Vida Homeloans

Heard at: Reading

On: 8-9 May 2018

Before: Employment Judge Hawksworth
Members: Mrs J Wood and Ms B Osborne

Appearances

For the Claimant: In person

For the Respondent: Mr M Palmer of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. the claimant was a worker for the purposes of section 43K of the Employment Rights Act and the respondent was the claimant's employer for this purpose;
2. the claimant's complaints of protected disclosure detriment contrary to section 47B of the Employment Rights Act are not well founded and are dismissed.

REASONS

Introduction

1. The claimant is a mortgage underwriter. By a claim presented in time on 6 June 2017 (after ACAS early conciliation), he made complaints of public interest disclosure detriment contrary to section 47B of the Employment Rights Act 1996 and complaints under the Agency Workers' Regulations 2010. All the claimant's complaints under the Agency Workers' Regulations 2010 were dismissed on withdrawal by the claimant in the course of a preliminary hearing on 25 August 2017.
2. The hearing of Mr Riley's public interest disclosure detriment claim took place on 8 and 9 May 2018. The parties had prepared an agreed bundle of

405 pages. At the start of the hearing, Mr Riley asked to add two additional documents. The respondent did not object and these were added to the bundle at pages 407-411. Page references in this judgment are to the agreed bundle.

3. The tribunal took some time for pre-reading. The witness evidence started at 12 o'clock. We heard evidence from the following witnesses, all of whom had prepared witness statements:
 - The claimant;
 - Mrs Helen Bramham, Operations Director, Rockstead;
 - Mr Bob Weatherill, Operations Support Manager with Rockstead at the material times;
 - Mr Guy Todd, Senior Underwriter with the respondent;
 - Mr David Botting, Director of Operations with the respondent at the material times.

Issues

4. The claimant's claim is that he has been subjected to a detriment for making a protected disclosure. The issues for determination by the tribunal were set out in the case management summary following the preliminary hearing on 25 August 2017. These are:-
 - 6.1 *The Claimant claims that he was a worker within the meaning of section 43K of the Act. For the avoidance of doubt he does not claim to have been an employee or a worker under section 230 of the Employment Rights Act.*
 - 6.2 *Details of the alleged protected disclosures are set out at paragraph 5.9 of the ET1 claim form.*
 - 6.3 *Details of the alleged detriments are set out at paragraphs 5.10, 5.11 and 5.12 of the ET1 claim form.*
5. Paragraphs 5.9 to 5.12 of the ET1 claim form were at pages 18 and 19 of the bundle.
6. The parties agreed that these are the issues for determination.

Findings of fact

7. We have made the following findings of fact on matters which have assisted us to determine the issues we had to decide.
8. On 28 July 2015, the claimant entered into a consultancy agreement with Rockstead Limited ('Rockstead') (pages 46 to 62). The agreement constituted a contract for the provision of services under which Rockstead assigned the claimant to temporary placements as a temporary underwriter or similar working for Rockstead's clients. The consultancy agreement was not specific to any particular client and the claimant

undertook a number of assignments for different clients of Rockstead prior to being assigned to the respondent (page 353).

9. The consultancy agreement between the claimant and Rockstead governed the terms on which the claimant was engaged to do work for Rockstead and its clients (ie the end users in the arrangement). It covered the parties' duties and obligations including availability, fees payable to the claimant and the services the claimant was to provide.
10. The respondent, trading as Vida Homeloans Limited, is a mortgage lender specialising in residential and Buy to Let mortgage products. The respondent is one of Rockstead's clients.
11. In November 2016, Rockstead entered into discussions with the respondent to provide temporary underwriters to the respondent. The purpose of the arrangement was to assist the respondent to deal with a backlog of mortgage applications. The claimant was one of the temporary underwriters assigned by Rockstead to the Respondent.
12. A scope of work document was agreed between Rockstead and the respondent (page 189 to 197). This contained details of the terms on which Rockstead's consultants such as the claimant were engaged to do work for the respondent. Some aspects of the engagement were matters for Rockstead, others were matters for the respondent. For example:
 - 12.1.1. The consultants were to report to a Rockstead team leader whilst providing services to the respondent however the respondent was responsible for induction, training, day to day supervision and management, productivity, quality standards and compliance;
 - 12.1.2. the respondent determined the hours to be worked by the consultant and the location of the assignment.
13. The claimant's temporary assignment with the respondent began on 9 January 2017. Three other Rockstead consultants, Ms Jewell, Mr Cragg and Mr Demetriades, were already working for the respondent.
14. Mr Weatherill, an Operations Support Manager with Rockstead, was the team leader for the consultants and their point of contact (page 210).
15. Mr Todd, a senior underwriter with the respondent assisted the claimant with day to day issues and queries. The claimant said Mr Todd was excellent at assisting him and that he had no qualms in that respect.
16. The claimant's assignment with the respondent was initially due to end on 31 January 2017 but this was extended by the respondent to 28 February 2017 and then 31 March 2017.
17. On 31 January 2017 the claimant had a one to one review meeting with Mr Weatherill. Mr Weatherill made notes of the meeting on a pro-forma document (page 242) which includes questions or subjects for discussion

in one column and responses in the other. The note includes the following subjects (S) and responses (R):

*“S: Anything making you feel frustrated regarding [the respondent]
R: No – [Chris] feels generally happy...
S: Being treated OK R: The office is friendly and even though he is a contractor, they have made him feel welcome.
S: Feeling physically safe R: Yes
S: Culture? R: It’s a nice culture, the office has monthly meetings where targets are shared. They make a fuss by presenting bottles of champagne and other prizes.
S: Whistleblowing R: BW went through Whistleblowing. There is nothing of concern but Chris would feel comfortable in reporting any issues.”*

The claimant’s meeting with Mr Todd

18. A meeting took place between the claimant and Mr Todd on 13 March 2017. The claimant relies on what he said in this meeting as a protected disclosure. No written record of the meeting or disclosure of information was made by the claimant.
19. Although in his ET1 he described this meeting as taking place on Friday 10 March 2017, the claimant accepted in his evidence to the tribunal that his view on this had changed and the meeting probably took place on Monday 13 March 2017. Mr Todd’s evidence was that it took place on 13 March 2017. We find that the meeting was more likely to have taken place on Monday 13 March 2017.
20. The background is that before the meeting the claimant walked past Mr Todd who was talking to Mr Cragg, one of the claimant’s Rockstead colleagues. Mr Todd stopped the claimant and asked him a question about a particular mortgage application. Although the claimant in his ET1 and in his witness statement described this conversation as taking place during the meeting itself, in evidence the claimant confirmed that it was a short exchange which occurred in the open office before the meeting between him and Mr Todd.
21. In response to the question he was asked, the claimant said to Mr Cragg that if he wanted any more information about the application he should speak to the person who had been dealing with it in the credit risk department. The claimant then walked away. Mr Todd thought the claimant’s response to the question was very rude and abrupt. He thought he should speak to the claimant about it. About 30 minutes later Mr Todd approached the claimant and asked him to have a word in a private office.
22. In the meeting with Mr Todd the claimant’s tone was angry and frustrated. The claimant made a number of complaints about the respondent and said to Mr Todd that if he was asked to extend his contract with the respondent, he would not want to.

23. There is a dispute between the claimant and Mr Todd as to what was said by the claimant in the meeting, in particular as to the complaints made by the claimant. Both agree that during the meeting the claimant made some complaints about working with the respondent. These included:
- 23.1. Occasions on which work had been wrongly allocated to him or to Rockstead consultants which the claimant felt would be better dealt with by other consultants;
 - 23.2. The claimant's phone not working and not being fixed despite him asking IT several times.
24. We find that these complaints were made by the claimant to Mr Todd. We also consider that it is likely that the claimant complained about the respondent's IT systems and processing. He had experienced problems with the system 'freezing', preventing him from processing customer cases, and he had recorded this in emails on a number of occasions, for example at pages 245 and 255.
25. The claimant says he made other complaints. In paragraph 5.9 of his ET1 he says raised other issues:
- 25.1. The number of inexperienced personnel recently taken on who were actively involved in reviewing cases with no supervision. The claimant gave an example of a case where an applicant was incorrectly told that their mortgage term would have to be reduced;
 - 25.2. his unease over certain lending practices and how he believed they were in breach of regulations, in particular his difficulty rationalising lending to applicants with a history of arrears/County Court Judgments (CCJs).
26. In his witness statement, the claimant also said that he remembered saying that much of what he was seeing was at odds with the Treating Customers Fairly principles and that it was plain that ignoring CCJ debts went against every regulation he could think of.
27. Mr Todd's evidence was that at no point during the conversation did the claimant raise any concerns about lending procedures, inexperienced personnel, the CCJ policy or the Treating Customers Fairly principles. In addition, Mr Todd said that the claimant did not say that he believed that the respondent had breached any FCA regulations, code or policy. Mr Todd said that if such allegations had been made he would have remembered and he would have sought advice from his line manager.
28. During the meeting, Mr Todd asked the claimant to send him an example of one of the occasions when work had been wrongly allocated. After the meeting the claimant did so by email (page 293). Mr Todd replied to the claimant by email the same day saying "I tend to agree, leave it with me."
29. Mr Todd made a written summary of the meeting two weeks later in an email to his line manager. This email referred to the claimant making

complaints about not being able to get responses to his emails from Credit Risk, work being wrongly allocated to him and his phone not working.

30. The dispute between the claimant and Mr Todd as to what was said at the meeting on 13 March 2017 was significant. The claimant alleged that the complaints he made at that meeting amounted to protected disclosures because they tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation to which it was subject. While Mr Todd accepted that some complaints were made by the claimant, he did not agree that the claimant made complaints or disclosed any information about the respondent's lending procedures, inexperienced personnel, the CCJ policy or breaches of any FCA principles, regulations, code or policy.
31. We have found that in the meeting with Mr Todd, the claimant did make specific complaints about IT/processing problems, the allocation of work to Rockstead consultants and about his phone not working. On the balance of probabilities, we find that the claimant did not make specific complaints about lending procedures, inexperienced personnel or lending to applicants with a history of CCJs and that the claimant did not say that he believed that there had been breaches of any FCA principles, regulations, code or policy.
32. In reaching this conclusion we took into account Mr Todd's email summary of 27 March 2017 and the fact that Mr Todd's statement is consistent with this.
33. In relation to the claimant's account, we noted first that at a meeting on 31 January 2017 with Mr Weatherill, the claimant said that the respondent had a nice culture and when asked about whistleblowing, he said there was nothing of concern. His account of the meeting itself was not consistent; new elements were introduced in his witness statement when compared with the account he gave of the meeting in his ET1 and the account he gave Mr Weatherill. Further, his evidence about other aspects of the meeting changed, including the date on which it took place, and the timing/location of the exchange with Mr Cragg.
34. We also took into account the evidence of Mr Weatherill as to what he was told by Mr Todd and by the claimant about what was said at the meeting. He discussed this with them both (separately) the following day. We noted the reference in his note on page 303 to having been told by Mr Todd that the claimant had made 'derogatory comments about [the respondent's] processes, practices and handling of regulatory matters'. However, Mr Weatherill's evidence, which we accept, was that Mr Todd did not mention any discussion regarding the respondent's lending practices specifically and that the claimant said his complaints about the respondent were about not meeting service standards(turnaround times) and his broken phone.
35. In addition, we took into account the fact that Mr Todd followed up after the meeting on complaints the claimant made. An email giving more detail about the work allocation complaint was sent by the claimant after the

meeting at Mr Todd's request and was promptly responded to by Mr Todd in a manner that was supportive of the claimant's point of view. Similarly, immediately after the conversation with the claimant, Mr Todd went to the IT department to try to resolve the problems with the claimant's phone.

36. Against that background, it seems very likely that if other serious issues had been raised as alleged by the claimant, Mr Todd would have asked the claimant for more details about them, followed them up or tried to deal with them in some way, as he did the complaints about work allocation and the phone, but there is no evidence of this.
37. Equally, it is clear that the claimant was comfortable following up after the meeting by sending an email with details of his complaint about work allocation to Mr Todd. If he had made other complaints as well, we might have expected him to have mentioned them in the email, or to have emailed Mr Todd separately about them. However, there was no such follow up in writing by the claimant.
38. For these reasons, we conclude on the balance of probabilities that the claimant did not make specific complaints about lending procedures, inexperienced personnel or lending to applicants with a history of CCJs and did not say that he believed that there had been breaches of any FCA principles, regulations, code or policy.

After the meeting

39. Immediately after the meeting with the claimant, Mr Todd went to the IT department to try to resolve the problems with the claimant's phone. He spoke to the respondent's IT support analyst who told him she was aware of the problem with the claimant's phone and she had been trying to get it fixed. She said the claimant had snapped at her. It was not behaviour she would expect from a colleague and she was taken aback by it. She was relieved when Mr Todd said he would speak to the claimant as she did not want to speak to him again (page 325).
40. The following day, 14 March 2017, Mr Todd was told by Ms Jewell, another Rockstead consultant, that the claimant had been rude to one of the respondent's mortgage loan originators (MLO). The MLO told Mr Todd that there is a way to speak to people and the claimant didn't do this well. She described the way the claimant had spoken to her most recently as 'particularly terrible' (page 324).

Termination of the claimant's assignment

41. Later on the morning of 14 March 2017 Mr Todd reported to his line manager Mr Botting that the claimant had been derogatory about the respondent and had been rude to Mr Cragg and two other members of staff. Mr Botting felt the claimant's behaviour towards other staff was not acceptable. He asked Mr Todd to speak to Mr Weatherill at Rockstead and request that the claimant be removed from the project immediately, 17 days before it was due to end.

42. Mr Todd phoned Mr Weatherill. He told him that he and Mr Botting were unhappy with the claimant's behaviour and that they had decided that the claimant should be removed from the project immediately.
43. Mr Weatherill attended the respondent's offices on the same day at around lunchtime and had a short meeting with Mr Todd. Mr Todd told Mr Weatherill that the reason the respondent decided to terminate the claimant's assignment was because the claimant had been generally negative and dismissive about the respondent and Mr Todd and Mr Botting were unhappy with the way in which the claimant had dealt with staff. Mr Todd said that he did not want the claimant to continue working on the respondent's underwriting project.
44. Mr Weatherill asked to speak to the claimant in a meeting room near the front door of the office. He told him that the respondent wanted to terminate his assignment immediately and explained what he had been told by Mr Todd. The claimant was upset, frustrated and defensive. He accepted that there had been a terse exchange with a member of support staff but felt it was justified. Mr Weatherill also said that Mr Todd was unhappy with the claimant's attitude during the meeting the previous day.
45. Mr Weatherill had arranged for the claimant's belongings to be brought to the meeting room to avoid the embarrassment of the claimant having to return to his desk to collect them in front of his colleagues before he left.
46. We find that the reason the respondent decided to terminate the claimant's assignment was because of the claimant's attitude and manner in the meeting with Mr Todd on 13 March 2017 at which he had been generally negative and dismissive about the respondent, including saying he would not want to extend his assignment with them, and because Mr Todd and Mr Botting were unhappy with the way in which the claimant had dealt with staff (Mr Cragg and two others).
47. If the respondent had decided to dismiss the claimant because of protected disclosures made during the meeting on 13 March 2017, it seems unlikely that Mr Todd would have followed up after the meeting on the work allocation and IT issues raised by the claimant.
48. After the meeting Mr Weatherill told the claimant that Rockstead would be happy to use him again. He telephoned the claimant the following day and left a message. On 17 March 2017 he texted the claimant with details of a job he might be interested in. The claimant did not reply.
49. Mr Weatherill and Rockstead's Director of Operations Ms Bramham had a meeting with the claimant on 23 March 2017 after the claimant sent an email to Mr Weatherill on 20 March 2017. During the meeting the claimant did not mention whistleblowing. He said that he thought the respondent was not meeting its service standards. Mr Weatherill felt the claimant's demeanour at the meeting on 23 March 2017 was confrontational and rude.

The Law

50. Employees and workers have the right not to be subjected to a detriment by their employer on the ground that they have made a protected disclosure (section 47B of the Employment Rights Act 1996, known as the ERA).
51. The claimant relies on the extended definition of 'worker' which applies for this purpose. Section 43K(1) provides that for the purposes of Part IVA of the ERA, a worker includes an individual who is not a worker as defined by section 230(3) but who
- “(a) works or worked for a person in circumstances in which –*
(i) he is or was introduced or supplied to do that work by a third person, and
(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked or by the third person or by both of them.”
52. Section 43K(2) provides that 'employer' includes the person who substantially determines or determined the terms on which the worker is engaged.
53. An important purpose of section 43K is to extend to agency workers' protection in respect of protected disclosures made while working at the 'end user'. Where both the supplier of the individual worker and the person for whom the individual works substantially determine the terms (anticipated as one possibility under section 43K(1)(a)(ii)), then both are the 'employer' under section 43K(2). It is not necessary to identify which of the supplier or end user determines or determined 'the majority of the terms' or the 'the most significant terms'; both are the 'employer' for the purposes of Part IVA (McTigue v University Hospital Bristol NHS Foundation Trust UKEAT/0354/15).
54. Under section 43B(1) ERA a "qualifying disclosure" includes any disclosure of information which, in the reasonable belief of the claimant, is made in the public interest and tends to show:
- “(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject”*
55. In Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 the Court of Appeal considered the question of what must be provided to constitute a qualifying disclosure, including the circumstances in which allegations may constitute disclosure of 'information'. Lord Justice Sales emphasised that the section 43B(1) should not be glossed to introduce a rigid dichotomy between 'information' on the one hand and 'allegations' on the other. The court agreed that it could be said that paragraph 24 of the EAT's judgment in Cavendish Munro Professional Risks Management v

Geduld [2010] IRLR 38, (in respect of ‘allegations’ and ‘information’) was expressed in a way which had given rise to confusion. The word ‘information’ in section 43B(1) has to be read with the qualifying phrase ‘which tends to show’, and, in order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B(1)(a)-(f). Whether an identified statement or disclosure meets that standard is a matter for evaluative judgment by a tribunal in the light of all of the facts of the case.

56. The ERA also sets out the ways in which a disclosure may be made in order to gain protection, and these include at section 43C disclosures which are made to the worker’s employer.
57. Where a worker has made a protected disclosure, section 47B gives the right not to be subjected to any detriment by any act or deliberate failure to act by the employer on the ground that the worker has made a protected disclosure.
58. Section 48(2) provides a shifting burden of proof in public interest detriment claims. It is for the claimant to show that there was a protected disclosure and that the respondent subjected the claimant to a detriment. Once these elements have been proved, the burden will shift to the respondent to prove that the claimant was not subjected to the detriment on the ground that they had made the protected disclosure.

Conclusions

59. We considered the issues for determination in the light of our findings of fact and the legal principles set out above.

Extended definition of worker

60. We first have to consider whether the claimant was a worker within the meaning of section 43K of the Act. (He did not claim to have been an employee or a worker under section 230 of the Employment Rights Act.)
61. We have concluded that the claimant fell within section 43K(1)(a)(i) as he worked for a person (the respondent) in circumstances in which he was introduced or supplied to do that work by a third person (Rockstead).
62. As to section 43K(1)(a)(ii), the terms on which the claimant was engaged to do the work for the respondent were in practice not determined by the claimant. They were determined by Rockstead together with the respondent. They were set out in the consultancy agreement between the claimant and Rockstead but also in the scope of work jointly agreed by and entered into by Rockstead and the respondent. The respondent determined a number of the terms of the claimant’s work such as hours of work and location.

63. We consider that both Rockstead and the respondent were jointly responsible for the determination of the claimant's terms and that the part played by both of them in determining his terms was sufficient to amount to substantial determination.
64. We conclude therefore that the claimant was a worker within section 43K(1)(a) and that his employer for the purposes of section 43K(2) was both Rockstead and the respondent.

Protected disclosures

65. We next have to consider whether the claimant made any protected disclosures as set out at paragraph 5.9 of his ET1 claim form.
66. The claimant said that he made protected disclosures at the meeting with Mr Todd on 13 March 2017. We have found that the respondent was the claimant's employer for this purpose, and so disclosures to Mr Todd would be sufficient for the purpose of section 43C to attract protection.
67. However, we also need to consider whether the claimant made a qualifying disclosure within the meaning of section 43B. The claimant said he disclosed information which was in the public interest and which tended to show that the respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject. He referred to Financial Conduct Authority principles for business and responsible lending rules.
68. For the reasons set out above and on the balance of probabilities, we have found that the claimant did not make specific complaints to Mr Todd about lending procedures, inexperienced personnel or lending to applicants with a history of CCJs and did not say that he believed that there had been breaches of any FCA principles, regulations, code or policy.
69. We have found that the claimant did make complaints to Mr Todd but that these concerned working practices and procedures more generally, such as problems with the system freezing, occasions on which work had been wrongly allocated to him or to Rockstead consultants and the fact that the claimant's phone was not working and had not being fixed.
70. The information which we have found that the claimant disclosed to Mr Todd did not tend to show that the respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject. The complaints made by the claimant were complaints about problems he had experienced when working for the respondent arising from IT and systems issues and work allocation. These did not amount to qualifying or protected disclosures. In reaching this conclusion we have had in mind that it is for the claimant to prove on the balance of probabilities that he made a protected disclosure. We do not consider that he has done so.
71. In the light of our finding that the claimant did not make any qualifying or protected disclosure, his complaints of protected disclosure detriment fail.

However, for completeness, we have considered whether he was subjected to any detriments by the respondent and the grounds for any detriment to which he was subjected.

Detriments

72. The detriments complained of by the claimant were:
- 72.1. the manner of his removal from the office on 14 March 2017; and
 - 72.2. the early termination of his assignment.
73. We considered the manner of the claimant's removal first. The decision to remove the claimant from his role immediately (part way through the day) was the respondent's decision. The claimant was upset by it. We consider that this amounts to a detriment.
74. The other elements of the manner in which the claimant was removed from his role, for example speaking to the claimant in a room near the entrance of the building and having his property brought to him there, were decisions taken by Mr Weatherill of Rockstead, rather the respondent.
75. We consider that the termination of the claimant's assignment 17 days earlier than planned caused the claimant distress and upset and amounts to a detriment.

The grounds for the detriments

76. We have concluded that the decisions to terminate the claimant's assignment earlier than planned and to remove him from the office immediately amounted to detriments.
77. We found that these decisions were taken by Mr Todd and Mr Botting not because of any information provided by the claimant in the meeting on 13 March 2017 but because of the claimant's manner in the meeting which was generally negative and dismissive about the respondent and because Mr Todd and Mr Botting were unhappy with the way in which the claimant had dealt with staff (Mr Cragg and two others).
78. Therefore, if we had found that the claimant had made any protected disclosures on 13 March 2017, we would not have concluded that he was subjected to any detriments by the respondent on the ground of those disclosures.

79. For these reasons, the claimant's complaints of protected disclosure detriment fail and are dismissed.

Employment Judge Hawksworth

Date: 18 July 2018.....

Sent to the parties on: 18 July 2018.....

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For the Tribunals Office