



EMPLOYMENT TRIBUNALS

Claimant: Mr N Williams

Respondent: Michelle Brown AM

Heard at: Cardiff **On:** 6, 7 and 10 September 2018

Before: Employment Judge Ward
Mr R Mead
Ms C Williams

Representation:
Claimant: Mr C Howells (counsel)
Respondent: Mr S Jenkins (solicitor)

RESERVED JUDGMENT

1. The claim is dismissed.
2. The letter of the 11 December 2016 was not a protected disclosure.

REASONS

The issues

1. The claimant asserts that he made a protected disclosure on 11 December 2016 and that as a consequence he suffered detriment when suspended from work on 20 December 2016 and that his dismissal was automatically unfair. The respondent resisted the claim. The matter came before the Tribunal for a three day hearing.

The applicable law

2. The claimant bears the burden of proving, on a balance of probabilities, that his disclosure qualified for protection under s43B of the Employment Rights Act 1996 (ERA).

3. A qualifying disclosure under S43B(1);

“means any disclosure of information, which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following-

(a) That a criminal offence has been committed, is being committed or is likely to be committed”

4. It is only if the disclosure is protected that a Tribunal will then go on to consider causation in relation to detriment and dismissal.

5. The question as to what amounts to a protected disclosure under section 43B has been helpfully discussed in Cavendish Munro professional Risks management Ltd v Geduld [2010] ICR 325 and Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436.

The evidence

6. The tribunal heard evidence from Mr Williams and for the respondent Ms Franklin, Ms Hardwicke and Ms Brown. The parties provided an agreed bundle of documents of 332 pages.

The relevant facts

7. The claimant was employed as a senior advisor to the respondent on 11 May 2016 following the respondent’s election as an assembly member.

8. Staff employed in this situation are employed for an initial six month probation period before a competitive recruitment exercise is undertaken. Template job descriptions are provided by the Assembly and before recruitment is undertaken, every assembly member is able to change the templates to suit their personal requirements.

9. The assembly member then undertakes the selection process, except in cases involving family members. In these cases the Assembly selects and interviews, with only the appointment decision reserved to the assembly member themselves.

10. The respondent had been advised of the recruitment procedure required after the first six months and sought advice on the content of the job descriptions from the Assembly during November 2018. The claimant was aware of emails between the respondent and the Assembly discussing the post held by the respondents brother (Richard) during this time due to the access that he had to the respondents emails in undertaking his day to day duties.
11. The claimant's own post had to go through this recruitment procedure and he was interviewed for the position on 11 November 2016. He was successfully re appointed by the Respondent who at this point had not raised any concerns about the claimants performance or conduct.
12. The post held by the claimant's brother also had to go through this recruitment exercise. On the 2 December the claimant formed part of the interview panel and recommended to the respondent the appointment of another candidate, not the claimant's brother.
13. On 5 December the respondent asked for the claimants access to her emails to be withdrawn.
14. On 11 December the claimant wrote to the respondent detailing his concerns about the breakdown of their employment relationship. The letter contains the following statement, which the claimant relies upon as a protected disclosure;

“Richard just did not make the grade despite you trying your best to manipulate the (recruitment) process beforehand so that he could be employed.”

Conclusions

15. The Tribunal evaluated the above sentence and addressed the legal issues in turn to decide whether it was a protected disclosure.

Does the disclosure contain information?

16. The Tribunal was cautious to not over rely on the principles established in *Cavendish* and the sometimes artificial distinction between an allegation and information. It was clear that the exercise for the Tribunal is to consider whether the sentence conveys facts.
17. The Tribunal considered the sentence and found that it contained three elements. Firstly that her brother did not make the grade, this is a statement of fact. Secondly the allegation of a manipulation and thirdly the fact that the

aim was to secure employment. The Tribunal concluded that overall the particular sentence relied upon disclosed information.

Was the disclosure made in the public interest?

18. The letter was a statement of the claimants personal position where the employment relationships had broken down. That said the sentence relied upon as the disclosure is a statement of fact about the employment of the Assembly member's brother. This in the tribunal's view was in the public interest given the position an assembly member holds.

Was the disclosure made with a reasonable belief of the claimant?

19. The tribunal considers that the claimant made the statement with reasonable belief because he had seen emails from the respondent to the assembly HR advisor Ms Franklin during November about changes to the job description which her brother would apply for.

Did the information tend to show that a criminal offence has, is or is likely to be committed?

20. The *Kilrane* case confirms that in order for a disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) of S43B.

21. The Tribunal finds that the sentence in the claimants letter does not meet this standard. The word manipulate is used, no reference is made to obtaining a pecuniary advantage or any sufficient specific information that tends to show that a criminal offence has, is or is likely to be committed in the whole of the sentence. As in *Kilrane* where one of the disclosures used the word inappropriate, the Tribunal finds that the word manipulate may cover a multitude of sins, it is too vague, the term denotes something underhand not a criminal act.

22. The disclosure is therefore devoid of factual content sufficient enough to be capable of tending to show one of the matters listed in subsection (1) of S43B. It is on this basis that the Tribunal must conclude that the claimants letter of 11 December 2016 did not constitute a protected disclosure.

Employment Judge
Dated: 9 October 2018

JUDGMENT SENT TO THE PARTIES ON

9 October 2018

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS