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# EMPLOYMENT TRIBUNALS

## *Claimant*

## *Respondents*

Mr Sbrana

**AND**

1. Wimmer Financial LLP
2. Wimmer Family Office Ltd
3. Per Wimmer

**Heard at:** London Central

**on:** 23 October, 25 and 26 October 2018  
8 November 2018 Chambers day

**Before:** Employment Judge Burns

**Members:** Mr T Robinson  
Mr J Carroll

## **Representation**

**For the Claimant:** Mr C Khan(Counsel)

**For the Respondent:** Mr C Adjei (Counsel)

## JUDGMENT

The Claims are dismissed

## REASONS

### Introduction

1. The claims are for detriment, (suspension and dismissal) for making a protected disclosure contrary to s.47B of the Employment Rights Act 1996 and automatic unfair dismissal contrary to sections 103A, s.104, 104A, and/or 104D of the same act. The specific issues are set out in an agreed at page 53 of the first bundle of documents.
2. At the beginning of the Hearing on 23/10/2018 we allowed the Claimant's application for an order amending the list of issues, so as to add an additional element to the claims against the Third Respondent under s.47b(1A) so as to include an allegation that he had dismissed the Claimant while acting as a worker of the other Respondent's and accordingly he should be personally liable as confirmed by the case of Timis and Sage v Osipov, EAT 2018 EWCA 2321. The law in this area has been unsettled recently, and the new limb of the claim did not require

any additional evidence. The issues to be determined were still exactly the same. The amendment had the effect of potentially extending personal liability against the Third Respondent and consequently on a vicarious basis against the First and Second Respondents in relation to dismissal under s.47B. There was no evidence that any of these Respondents would have adopted any different stance in the litigation at an earlier stage had this additional limb been added earlier or included in the first place. Applying the principles in Selkent we decided that the amendment should be allowed.

3. We heard evidence from Peter Olesen (a previous intern with the Respondent), then from the Claimant, then from Mr Henry Myers (a previous worker with the Respondents), then from Mr Jonathan Moore-Stanley (a current worker with the Second Respondent), then from Mr Axel Bevort (a previous intern with the Respondents - we took his evidence on a television via skype from Denmark), then from the Third Respondent.
4. The documents were in two bundles running to 710 pages to which we added a few pages during the course of the Hearing.
5. We also received a Claimant's chronology.
6. Because of lack of time, and with the agreement of the party's barristers, and at their specific request, we did not receive oral final submissions from either side but instead arranged for them to serve written submissions before our Chambers day. Each side provided lengthy and detailed written submissions and also each filed written replies to each other's written submissions and provided us with files of written authorities. These documents contained detailed arguments and points all of which it would be disproportionate and unnecessary to mention in these reasons. However, we have considered and discussed all of them before reaching our decision.

#### Findings of Fact

7. We first set the scene with a brief summary of the main events. We then consider discrete issues and in so doing record our findings of fact in relation to those:
8. The First Respondent is an LLP and its main business is broking, investments and financing of mining and the exploitation of other natural resources. The Second Respondent is a limited company and its main business is asset-management for high-net-worth individuals and families. The First and Second Respondents share the same business premises in

London where about ten persons are employed at any one time, including a number of unpaid interns. The Third Respondent is the founder, CEO and effective 100% owner of both the First and Second Respondents.

9. The Claimant is a global financing investment banker who had previously worked for Goldman Sachs in New York.
10. He started working for the First Respondent on 11 October 2016. He signed an employment contract (65) which provided for him to work in exchange for no salary but for payment of commission and bonus only, which were both stated to be purely discretionary and subject to change at any time and set out in written guidelines attached to the contract (68).
11. The Claimant worked for the First Respondent without receiving any pay or salary, bonus or commission whatsoever except for a payment of £250 for arranging a meeting and reimbursement of expenses in the sum of £3,166.91. This situation continued until October 2017.
12. The Claimant ran short of money and used the office phone to make private calls to San Paulo in Brazil. These costly calls came to the attention of the Third Respondent and he asked all staff whether any had made them. The Claimant dishonestly denied having done so. The Third Respondent guessed that in fact that the Claimant had made the calls, but he did not confront him about them. Nevertheless, he felt a loss of trust in the Claimant.
13. The Claimant became increasingly concerned and agitated about the failure of the First Respondent to pay him and he made various attempts to discuss the matter with the Third Respondent, but on these occasions, he was fobbed-off or the Third Respondent would procrastinate. One such conversation took place on 9 October 2017.
14. Throughout the period of the Claimant's employment the Third Respondent declined to provide full and transparent information to the Claimant about the deals and transactions on which the Claimant had been working. As a result, the Claimant was not able to keep track of, what if any, commission he might be entitled to as a consequence of his work.
15. On some date prior to the 24 October 2017 and probably between the 9 and 24 October, during the absence of the Third Respondent, and without his permission, the Claimant took a key out of a drawer in the Third Respondent's desk in the office and used it to open a previously unlocked cabinet. In this cabinet the Third Respondent had stored financial

information and records of transactions which the Third Respondent had not shared with the Claimant, and in addition confidential material such as personnel files relating to other staff.

16. The cabinet had been accessed from time-to-time by interns and junior staff under the Third Respondent's supervision for purposes such as filing non-disclosure agreements, but the Claimant had not had such access before.
17. Having unlocked the cabinet, the Claimant spent time going through all the financial documents and records and concluded that he was owed a substantial sum of commission which the Third Respondent should have caused the First Respondent to pay him.
18. The Claimant compiled a list setting out the deals and commissions in question and then, with the assistance of a solicitor, compiled a formal grievance which he emailed to the First Respondent on 24 October 2017 (236).
19. The grievance complained that the Claimant has been working for a year without any pay and that this has caused him personal hardship and that he had made several unsuccessful attempts to discuss the matter with the Third Respondent. The grievance then set out the transactions and related commissions which the Claimant contended were due to him.
20. The penultimate paragraph of the grievance reads as follows:- *"I am aware that not only myself but also other employees at Wimmer Financial LLP have not been paid even the national minimum wage. This is of huge concern to me given the regulated environment that you and Wimmer Financial LLP are operating within and the level of compliance that must be adhered to it to in such an environment. It is also my understanding that the company may not (be observing) its commitments in terms of access to pensions for both myself and other employees"*.
21. The grievance concluded by requesting that the matter be investigated urgently and that a written response be provided by no later than 27 October 2017.
22. On receipt of this email on 24 October 2017 the Third Respondent was returning from Europe. He immediately arranged for the Claimant's access to his work email to be suspended.
23. On 25 October 2017 the Claimant came in to the office for a client meeting, and found the Third Respondent who asked the Claimant to

hand over his office keys. By this stage the Claimant had already removed some of his personal property from the office.

24. The Claimant and the Third Respondent had a face-to-face conversation during which the Third Respondent told the Claimant to go home.
25. On 30 October there was another brief conversation on the telephone between the Claimant and the Third Respondent and it was agreed that they would subsequently have a face-to-face meeting on Monday 6 November.
26. In fact, on the 6 November there was a telephone conversation only which resulted in the final termination of the Claimant's employment.
27. The conversations between the Claimant and the Third Respondent on 9 October 2017, 25 October, 30 October and 6 November were all recorded clandestinely by the Claimant and agreed written transcripts of these conversations were provided to us in the trial bundles.
28. It is common cause that the recordings were made by the Claimant clandestinely and we find that the Third Respondent was unaware of the fact that the conversations were being recorded at the time and furthermore that he had not taken any legal advice by then about the matters under discussion. We have considered these transcripts in the context of all the other evidence but in the circumstances find that the transcripts contain a reliable record of the genuine beliefs and motivations of the Third Respondent at the time.

Was the Claimant an employee of self-employed consultant?

29. The advertised post was for somebody "*full-time with a work permit*" (3660). The form submitted to the Financial Conduct Authority registered the Claimant as an employee (341) and this was approved by the First Respondent with a declaration of truth (3570). The Third Respondent had a duty to check that information before submitting it. The Third Respondent never regarded the description of the Claimant as "*an employee*" as inaccurate until the course of these proceedings. The employment contract starts with the following. "*We are pleased to offer you employment*" (65) and goes on to use the word "*employee*" seventeen times throughout.
30. The contract contained all the usual terms which are hallmarks of any employment contract such as working hours, annual leave entitlement, company sick pay, notice period, probation, post-termination restrictions and importantly it provided that the First Respondent had exclusive

ownership over the Claimant's labour thus, "*all finance and consultancy related work falls within the scope of your work within Wimmer Financial unless explicitly pre-approved in writing*" (66)

31. The realities of the working relationship were consistent with the Claimant having been an employee, as he worked long regular hours, there was a management structure, there was team work, he had a job-title and he was integrated in to the corporate identity with personal business cards and an email address. He was supervised by the Third Respondent and he also managed or at least assisted more junior employees.
32. We do not accept the Respondent's submission that there was lack of mutuality of obligation. The First Respondent even on its own case had a contingent legal obligation to pay commission and bonus to the Claimant in exchange for his labour. The Claimant had a degree of flexibility as to his work pattern but flexible working is a feature of modern working practices and senior employees such as the Claimant often enjoy a degree of autonomy. However the Claimant having signed the employment contract was obliged to work for the First Respondent as an employee and did so.
33. Both the contemporaneous documents and the realities of the working relationship confirm that the Claimant was an employee of the First Respondent.

Was the Claimant employed by the Second Respondent also?

34. The advert for the Claimant's role was to work for the First Respondent only and refers to the First Respondent (3660). The Claimant's skills and experience were in investment banking not in asset management for high-net-worth individuals which was what the Second Respondent does. The offer letter expressly stated that the offer was employment with the First Respondent and refers to the First Respondent from the footer and refers at the end to the Claimant joining the First Respondent.
35. We accept the evidence of Mr Moore-Stanley that he did not work with the Claimant on work for the Second Respondent or discuss the specialist work that the Second Respondent does with the Claimant.
36. When the Claimant wrote his grievance he stated at the beginning that he had joined the First Respondent and made no mention of being an employee of the Second Respondent.
37. We accepted that there was some small degree of cross-over between the two businesses and that, to a very limited extent, the Claimant did work on

projects for both the First Respondent and the Second Respondent and attended an external event on behalf of the Second Respondent and had a separate business card for the Second Respondent. However these matters do not establish that he was employed by the Second Respondent but rather that he was working to that limited extent for the benefit of the Second Respondent as an employee of the First Respondent.

38. We find that the Claimant was an employee of the First Respondent only.

Was the grievance a protected disclosure under section 47B ERA 1996?

39. We find that there was a disclosure of information, namely that that the Claimant had not been paid and that he and others had not been paid even the national minimum wage and nor had the Respondent honored its legal obligations in terms of pension.

40. The number of people affected by the matters raised by the Claimant is likely to be significant, as the First Respondent has been trading for over ten years, and we heard evidence that at any one time about ten persons work in the business of the First Respondent and that there is a rapid turn-over of staff. There is little evidence that any of these staff have been paid and if this practice continues it is likely to affect people in the future. The Claimant had a genuine concern that the business practices of the First and Third Respondents were likely to affect significant numbers of other people in addition to himself.

41. The nature of the interest affected (withholding even basic employee rights and failing to pay even the national minimum wage) was a fundamental matter bearing directly upon the wellbeing and livelihood of the Claimant and others.

42. The wrong-doing was perceived by the Claimant as deliberate resulting from business decisions made by the First Respondent and the Third Respondent the latter being the Chief Executive Officer who also had the major FCA control function.

43. For these reasons we find that there was a reasonable belief on the part of the Claimant that his disclosure was in the public interest.

44. The Claimant he had researched the position, had spoken to ACAS and HMRC, and he also knew for a fact that he had personally received nil salary despite working for nearly a year. The Respondents had also avoided paying another person called Fredrick (by then a non-intern for several months) and also another employee Jacob, (by then also a non-intern) had been unable to secure a commitment from the Respondent to

pay him a minimum wage. The Claimant also believed reasonably that the so-called unpaid interns were entitled to be paid the minimum wage but were not receiving it. The Claimant therefore also had a reasonable belief about the relevant failures.

45. Finally, the disclosure was protected because it fell under s.43C being a disclosure made to the First Respondent which was the Claimant's employer.

Was the Claimant suspended on 25 October 2017?

46. The Third Respondent suspended the Claimant's email account on or about 24 October. On 25 October the Third Respondent asked for and obtained the Claimant's office key, and then instructed the Claimant to go home, telling him he was "relieved of his duties". We reject the suggestion that the Claimant had already resigned by this point. The Third Respondent at this juncture still believed that the Claimant had duties to perform in respect to which he had to be relieved.

47. Furthermore, on 30 October the Third Respondent contacted his external compliance agent and caused the Claimant's name to be removed from the FCA register.

48. The Claimant was plainly suspended by the Third Respondent on behalf of the First respondent.

Was the Claimant dismissed or did he resign?

49. It is clear from the transcript of the conversation recorded by the Claimant on 6 November 2017 that it was the Third Respondent's decision to terminate the contract between the First Respondent and the Claimant. For example the Third Respondents stated (271) "*it is probably better with focus on the energies of getting on to the next stage and focus on you know the next employer as it were and next opportunity and get in to some sort of next employment form and that sort of things so it is probably best to do that*" ... and (272) "*I will be happy to offer you two options and in that regard and you can tell me now which one you want, either you officially resign if you want to do that and you can send me an email if you want to do that or alternatively for the reasons I just explained then we will do it formally as being let go, up to you which options you like*".

50. This makes it perfectly clear that the Claimant was given an ultimatum of either resigning or being formally dismissed, he went on to choose the latter and asked the Third Respondent to provide him with a formal



confirmation in writing to this effect which the latter agreed to do but then subsequently reneged on.

51. We find that the Claimant was dismissed orally and did not resign.

What was the reason for the suspension?

52. It is for the employer to show the ground on which any act was done and it is not for the employee to prove anything.

53. A lower threshold applies when assessing the causal link between the protected disclosure and the detriment and it is enough that the disclosure simply had more than a trivial influence on the detriment. Where an employer acts for a mixture or combination of reasons then it is enough that the protected disclosure is simply one of them, it need not be the sole or even the dominant one.

54. The transcript of the discussion on 25 October 2017 records the Third Respondent's motivation and thoughts.

55. The discussion starts and continues for many pages about the Claimant's pay (or rather the lack of pay) and the fact that he wanted transparency about the proper rewards due to him for his participation in various deals in which he has been working. The conversation was conducted in a cordial and quite amiable fashion and referred in some specific detail to particular clients and transactions.

56. That section of the conversation ends on page 253 of the bundle where the Third Respondent at the 35:32 is recorded as saying the following "*No fair enough, fair enough I mean I think those are all fair points particularly on Eti (this is a reference to a client that they had just been discussing), and that sought of thing. I am very open for that, very open for that, that's not an issue. Now the other issue we have which was caused by yourself is in that email you sent me, there was a very detailed breakdown of everything. Where did you get that information from?*" The Claimant then replies "*that information was a reconciliation of everything discussed*"

57. There then followed an exchange between the Claimant and the Third Respondent in which the Claimant failed to disclose the fact that he had obtained the information by unlocking and searching through the previously locked office cabinet. Instead he suggested that he had obtained it '*from the companies directly themselves*'.

58. The conversation continues at 36:47 with the Third Respondent speaking as follows. "*There are deals in there you never worked on so it is*

*completely irrelevant to you because you did not work on it and there are deals that are relevant in which case you can ask me which would be the natural thing, so for me of all of these things you brought forward I have no problems with all your concerns or issues, and I will be more than happy to do deals with visibility and all that stuff, for me those are solvable issues if you come to me and said that, for me the biggest issue is ethical because I have somebody who has gone behind my back, effectively. For me that it a big ethical issue you know, Goldman's thinks about ethics I have the same attitude and so for me of all of those things you highlighted, I can find solutions, I can sit down, we can have a beer and we can work it out whatever and all that sort of thing. The biggest issue I end up with now given what you said to me is that and I am not happy with that and that's ethics I am very short on ethics I mean on mistakes ....., so that is the biggest issue I have today".*

59. Later on, on the same page (254) the Claimant attempted to introduce into the discussion for the first time a reference to statutory rights, saying at 39:26 *"I still think it's the fact that information has not given, the fact that for example it is illegal to do that, you carve out statutory rights from the employment contract and all that stuff, that is also ethical, that is also you know tough. You know".*
60. To this attempt by the Claimant to introduce the statutory rights (relevant as the protected disclosure material) the Third Respondent replies as follows at 39:45 *"I mean that it what it is. I have no opinion on that. It has got nothing to do with what we were talking about I am talking about an ethical issue here and that to me is the biggest issue ..."*
61. On page 257 as the conversation draws towards a conclusion the Third Respondent says the following *"well I think from now like I have said all these things their solutions and issues my biggest issue is I need to get through further thought of the ethical issue. I mean that is the biggest issue that I have a big problem with so for now give me a day or two work from home, well be at home whatever you do feel free to apply and whatever, do things but this is why I was so sad yesterday because obviously we worked very well together everything is fun this that and the other...Im just very short fused on ethics and seeing that behind my back I just get "argh" you know, that is the biggest issue. The other things I am the first one to pay out, I am the first one to give visibility and the first one to sit down but that's the issue, I listen I really do, so buddy it was really sad for me to receive that email because I knew what was behind it. That's my issue now.*

62. Finally at page 259 the Third Respondent says the following, *“But anyway let me give it some thought in the next 24 hours I will get back to you for now I have cut off everything as you have seen because of that email because of what was in that email the way it was obtained. But no other reason”*.
63. It is clear from the foregoing that the sole reason which caused the Third Respondent to decide to suspend the Claimant was not the fact that the Claimant had raised issues about not being paid and his desire for transparency or indeed his complaints about the minimum wage or pensions but rather the facts the fact that the Claimant had, without the Third Respondent’s consent and effectively *“behind his back”* accessed a locked cabinet and searched through it, reading material which the Third Respondent regarded as confidential and not for the eyes of the Claimant, which matters the Claimant had not confessed to when given the opportunity to do so during the course of the discussion, but rather sought to explain away disingenuously. It was these matters which the Third Respondent referred to as *“the ethical issue”*.
64. The transcript extracts include several instances in which the Third Respondent stated expressly that all the financial and other matters, other than the “ethical issue,” can be dealt with and are not really an issue for him but can be discussed, but that it is the ethical issue which has caused him to take the steps that he has against the Claimant.
65. For these reasons we have come to the conclusion that the reason for the suspension was not the making of the protected disclosure in any material respect but rather was the manner in which the Claimant had obtained the information which formed the subject matter of part of the grievance letter.

What was the reason for the Claimant’s dismissal?

66. In the first part of the discussion of the “dismissal conversation” on 6 November 2017 (271) the Third Respondent told the Claimant that he needed to move on to further employment and could either resign or be formally dismissed, (as discussed above). The conversation then moved on, (272) to the Third Respondent’s explanation of his sole reason for the dismissal decision as follows. At 3:26 *“That’s no problem I am sorry that ..... its just its difficult when the trust has been breached,’ ...Its just a funny thing trust and once it has been breached its not that easy just to sort of patch up it takes a long time to build up but it also takes a very short time to break down”*.
67. This is the only reason expressed in this discussion for the decision to dismiss.

68. For this reason and for the reasons mentioned above in relation to the related suspension, we find that the reason for dismissal was also simply 'the ethical issues' and not the protected disclosure or the matters which result in automatically unfair dismissal.

Conclusion

69. it follows that the Claimant's claims for detriment contrary to s.47B and for automatically unfair dismissal under the ERA 1996 fall to be dismissed.

70. For the sake of completeness we take the opportunity of recording that had we found for the Claimant we would have awarded a remedy based on our findings that the Claimant was not particularly upset by his suspension and dismissal, and that, had he not been dismissed, he would have resigned anyway by no later than the end of 2017, in order to attend pre-arranged full time studies in Paris and Singapore starting in January 2018.

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Employment Judge Burns

Dated: 9/11/2018

Judgment and Reasons sent to the parties on:

19 November 2018

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For the Tribunal Office