THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	*AND*	*Respondents*
Mr Ian Soanes		**Stobart Capital Limited (1)** **Andrew Tinkler (2)**

Dates of Preliminary Hearing: 16 November 2018

Employment Judge: Mr N Deol

Appearances

For the Claimant: **Mr M Palmer (Counsel)**
For the Respondent: **Ms A McColgan (Counsel)**

JUDGMENT

1. The Respondent's application for a strike out of the Claimant's whistleblowing claims fails.

2. The Respondent's application for a deposit order in relation to the whistleblowing claims also fails.

3. The claim will proceed to a full merits hearing listed for six days from 19 February 2019.

REASONS

1. The full merits hearing in this case is currently listed for six days from 19 February 2019.

2. In advance of that hearing the Respondent pursues an application to strike out the Claimant's claims for (i) automatic unfair dismissal contrary to Section 103 of

the Employment Rights Act 1996 ("ERA") and (ii) his suffering of detriments contrary to Section 47B ERA and/or to seek a deposit order in respect of some or all of these claims.

3. The grounds for the Respondent's application are set out in its amended Grounds of Resistance at pages 43 to 49 of the bundle prepared for this preliminary hearing (the "Bundle") and in correspondence to the Tribunal dated 15 October 2018 (page 50 of the Bundle).

4. In support of his Claim, the Claimant relies upon the protected disclosures set out in the ET1 Form and identified in the Case Management hearing on 17 September, specifically:

   (i) The written communication of 20 November 2017 (e-mail from the Claimant to Andrew Tinkler). [pages 72-73 Bundle]
   (ii) The communication of 7 February 2018 (sms message from the Claimant to Andrew Tinkler). [Page 82 Bundle]
   (iii) The oral and written communication set out in the further information supplied by the Claimant at pages 39-40 of the Bundle.

5. The thrust of the Respondent's challenge to the Claimant's case is that the alleged protected disclosures do not meet the statutory threshold for protection. It is not this Tribunal's role to determine this issue, simply to consider whether the Respondent's challenge is sufficiently strong to warrant dispensing with this issue as a preliminary matter, or at least requiring a deposit to be paid in relation to part or all of the claim if it is to be allowed to proceed to a main hearing. There was no reliance, at this preliminary stage, on an argument that the alleged disclosure did not meet the public interest threshold.

6. The Claimant's position is that there are significant disputes of fact between the parties which are not suitable for determination or disposal at this preliminary stage. Instead they should be determined at a full hearing, after the exchange of documents and evidence, such that the evidence can be properly evaluated, and the issues properly determined.

7. The relevant legislation **(**Section 103A ERA) protects workers who make 'protected disclosures' from dismissal and/or from being subject to a detriment. In order for a disclosure to be a "protected disclosure" three requirements need to be satisfied (which are set out in Section 43 ERA):

   (1) There needs to be a disclosure within the meaning of the Act.

   (2) That disclosure must be a 'qualifying disclosure', and

   (3) The disclosure must be made by the worker in a manner that accords with the scheme set out in sections 43C to 43H of ERA.

8. It is necessary that the worker making the disclosure has a reasonable belief that the disclosure tends to show one of the statutory categories of 'failure'

(Section 43B(1) of ERA). The categories of failure include that a person has "failed, is failing or is likely to fail to comply with any legal obligation to which he is subject".

9. The thrust of the Claimant's case is that the 2nd Respondent became involved in the structuring of a transaction that caused the Claimant concern, specifically that there was a potential breach of the 2nd Respondent's fiduciary obligations and his legal obligations owed to the 1st Respondent. The Claimant alleges that it is because he raised these issues, he was asked not to attend work and ultimately decided to resign, claiming that he had been constructively unfairly dismissed.

10. The Respondent, through its submissions, acknowledges that some background information, or context, is important. It suggests, however, that the Claimant is overplaying his concerns now to bolster an artificial whistleblowing claim.

11. The Respondent argued that the arrangement between Stobart Group and Stobart Capital (which the Claimant was involved in drawing up) envisaged that the 2nd Respondent would have a hybrid role, which also recognised the potential for conflict and ensured that Stobart Group would make any final decisions. This was the foundation for the Respondent's argument that there was nothing untoward about the 2nd Respondent's proposals and simply no reasonable basis for alleging wrongdoing, if that is what the Claimant had done at all.

12. The Tribunal heard legal submission from the Respondent's representative, the summary of which was agreed by the Claimant's representative.

13. The Respondent acknowledged the caution that a Tribunal must have when considering the strike out of a claim as a preliminary matter, particularly where there are factual matters in dispute.

14. The Tribunal was referred to the case of **ED&F Man Liquid Products Ltd v Patel & ANR** [2003] CP Rep 51 in which the Court of Appeal outlined the danger of conducting a mini trial where there are significant differences between the parties so far as factual issues are concerned. However, the Court of Appeal went on to say that there may be cases where the factual allegations lack substance where they are contradicted by contemporaneous documentation where a different approach may be appropriate.

15. This principle was approved in **Ezisas v North Glamorgan NHS Trust** [2007] ICR 1126, a whistleblowing case. The Court of Appeal held that:

> *"an employment tribunal should be alert to provide protection in the face of an application that little or no reasonable prospect of success, but it must also exercise appropriate caution before making an order that will prevent an employee from proceeding to trial in a case which on the face of the papers involve serious and sensitive issues."*

> *"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than be hearing and evaluating the evidence."*
>
> *"The risk of justice is minimised if the answers to these questions are deferred until all the facts are out. The Tribunal can then base its decision on its findings of fact rather than on assumptions on what the Claimant may be able to establish if given an opportunity to lead evidence."*

16. The Respondent argued that there were no core factual disputes to consider here, the only question being whether, taking the Claimant's argument at its best, he made protected disclosures.

17. The Respondent also referred to the case of **Ashok Ahir v British Airways** [2017] WL 02978862 to support its argument that although the threshold for striking out a claim at a preliminary stage is a high one, it is not one that is unsurmountable.

18. The Respondent argues that the alleged disclosures, put at best, are not capable of being protected disclosures. A disclosure of information will amount to a "disclosure" whether it is made in writing or verbally and any form of recorded information would be likely to be accepted as a form of disclosure.

19. The Respondent relied on the decision of **Cavendish Munro Professional Risks Management Ltd v Gubuld** [2010] IRLR 38 in which the EAT held:

> *"… the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information."*

20. Based on this, the Respondent argued that the must a disclosure of information as such for the Claimant's case to get off the ground. A "disclosure" is more than merely a communication, and "information" is more than merely an allegation or a statement of position. The worker making the disclosure must actually "convey facts". Simply expressing an opinion is unlikely to amount to a disclosure. Likewise, it is not sufficient that the claimant has simply made allegations about the wrongdoer.

21. In the case of **Western Union Payment Services UK Ltd v Mr C Anastasiou** UK EAT/0135/13 the EAT stated that:

> *"We follow and apply the approach adopted by the EAT in Cavendish.. Section 43B ERA requires the disclosure to be one "of information" not merely the making of an allegation or statement of*

> *position. That said, the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact sensitive."*

22. The Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] IRLR 846 provided further guidance:

> *The concept of "information" as used in s 43B(1) is capable of covering statements which might also be characterised as allegations. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between information on the one hand and allegations on the other."*
>
> *"Grammatically, the word "information" has to be read with the qualifying phrase, which tends to show [etc]. 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 subsection (1). Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in light of all the facts of the case." (emphasis added)*

The case makes two other important points:

> *"It is a question which is likely to be closely aligned with the other requirement… namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters…. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."*
>
> *"Whether a particular disclosure satisfies the test in Section 43B(1) should be assessed in the light of the particular context in which it is made."*

23. These concepts are recognised in the authority of **Korashi v Abertawe Bro Morgannwg University Local Health Board.** [2012] IRLR 4

> *"Many whistleblowers are insiders. This means that they are so much more informed about the goings on of the organisation of which they make a complaint that outsiders, and that insight entitles their views to respect. Since the test is "their" reasonable belief, that belief must be subject to what a person in their position would reasonably believe to be wrong doing."*

24. A whistleblower does not have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of

wrongdoing listed in the legislation. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure.

25. The whistleblower's belief must be reasonable and so there must be some information which tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The Respondent also refers to the authority of **Kraus v Penna Plc [2004] IRLR 260** to argue that likely to fail (in that case) with a legal obligation was a higher test that just showing a possibility or risk.

> *"In construing the words "likely" in other legislation in the employment sphere the Courts have equated it with probable on a number of occasions."*

26. The reasonableness of the belief will depend in each case on the volume and quality of information available to the worker at the time the decision to disclose is made. This was made clear by the EAT in **Darnton v University of Surrey [2003] IRLR 133, EAT** in which it was confirmed that the proper test to be applied is whether or not the employee had a reasonable belief at the time of making the relevant allegations, although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

27. It follows that the individual characteristics of the worker need to be taken into account and the relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief. This was affirmed by the EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4**. The EAT also confirmed that in certain cases the subjective nature of the test may increase the level of reasonableness required by the legislation; there may be things that might be reasonable for a lay person to have believed (however mistakenly) that certainly would not be reasonable for a trained professional to have believed.

28. The EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4** also confirmed that in cases where there is a plethora of disclosures, the requirement is that there was a reasonable belief in relation to each; it is not enough that the claimant can be shown to have believed in the general gist of his complaints. An unsubstantiated expression of opinion where for instance it is evident that the factual basis of an allegation is false is unlikely to amount to a reasonable belief.

29. The question of whether a worker has a reasonable belief must therefore be decided on the facts as understood by the worker at the time the disclosure was made, and not on the facts as subsequently found by the Tribunal. Employment

tribunals must therefore guard against use of hindsight to assess reasonableness.

30. The Claimant's representative carefully reminded the Tribunal in detailed written submission, of its powers under **Rule 37(1) of the Employment Tribunal Rules of Procedure 2013**. The thrust of the Claimant's submissions was simple, that the power to strike out claims should be used sparingly, and cases should not, as a general principle, be struck out where the central facts are in dispute.

31. It also well established that a disclosure takes place even where an individual is provided with information of which they are already aware.

Conclusions

32. The first alleged disclosure sets the concerns raised by the Claimant about the proposed business structure and the involvement of the 2nd Respondent in promoting it. That e-mail is found at pages 72 and 73 of the Bundle and illustrates that Claimant's concerns about the proposed deal.

33. The Tribunal was also taken to the disclosures (and supporting documentation) now set out in the Further Information provided by the Claimant on 28 September 2018, which was set out at page 39 of the bundle.

34. The Respondent's position was that these communications were far from protected disclosures. At best they were the Claimant's own views as to how a deal may or may not be structured.

35. In his Further Particulars, the Claimant refers to a conversation that took place between himself and Warwick Brady in which he explained his concerns that the proposal gave rise to related party, conflict of interest and breach of duty issues.

36. This was followed by the allegation at paragraph 4 of the Further Particulars in which the Claimant claims that he expressed the same concerns in conversations during the remainder of November 2017 and into early December 2017.

37. This led to a text message dated 7 February 2018 in which the Claimant stated:

> *"OK, Just to explain my concerns from a slightly different perspective. We are a regulated business, as we need to be to do the work we want to do. You and I are regulated persons and we have an obligation amongst others to manage conflicts. The obvious conflict we have is with your various connections to Stobart Group. You have a right to look after your shareholding but through the management agreement with Group we own a contractual duty of care and we have regulatory obligations to Group as a client. Right now I see Stobart Capital's position as untenable given your issues and I am concerned about our regulatory exposure, so we need to discuss that today."*

38. The Respondent relies on two documents to suggest that the Claimant's concerns were/are less significant than the Claimant suggests, these being an e-mail from Warwick Brady – CEO group dated 27 January 2018, sent after the Claimant alleges that he raised his concerns about an alleged conflict and another the same day confirming that the 2nd Respondent could co-invest in ventures that "fit with group strategy".

39. The Respondent also relies on attestation to the FCA (page 74 of the Bundle) signed by the Claimant on 08 January 2018, suggesting that he was not aware of any conflicts. This attestation postdates the alleged disclosures in November but pre-dates the alleged disclosure in February 2018. This, the Respondent suggests, contradicts the Claimant's arguments that he had concerns about the 2nd Respondent's proposal.

40. The Respondent also relies on evidence given by the Claimant in parallel litigation between Stobart Group Limited and Mr Tinkler (the 2nd Respondent in these proceedings). The Claimant is a witness in these High Court proceedings and although having given evidence that he was concerned about an inappropriate transaction, he accepted in evidence before that Court that he had not put forward his concerns about a breach of regulatory obligations at the time.

41. The Respondent also says that the proposal put forward by the 2nd Respondent, which the Claimant clearly had issue with, was always subject to the approval of the Value Committee, a fact that the Claimant was alive to. It would also need to be approved by the Group Board before it was allowed to continue.

42. Addressing the Respondent's application for a strike out/deposit order in relation to some, or all of the Claimant's whistleblowing claims:

    (i) It is difficult to conclude that the Claimant has no or little reasonable prospect of success in relation to the communication of 7 February 2018 (sms message from the Claimant to Andrew Tinkler). [Page 82 bundle]. The Claimant sets out some detail of his concerns and flags that there are contractual and regulatory obligations in play. The question of whether this particular allegation meets the statutory threshold must be determined in context, considering the Claimant's insight and the surrounding circumstances. This can only be done through considering the evidence.

    (ii) It is equally difficult to how the alleged disclosures set out at pages 39/40 of the Bundle in which the Claimant says that he set out his concerns regarding the new group structure can be properly assessed without considering any evidence. The alleged disclosures are made in discussions and the content of, and reaction to, those discussions will be highly probative of the issue of whether there has been a protected disclosure.

    (iii) I have some sympathy for the Respondent's arguments as regards the communication of 20 November 2017. This communication does seem to

simply contain the Claimant's views, with no information that shows, or tends to show, any impropriety. The challenge for this Tribunal, is that this communication needs to be considered in context of the conversations that took place between 12-19 November and around 20th November, which may then provide some background to the more generalised written concerns expressed by the Claimant in his e-mail of 20 November 2018. This background evidence is perhaps even more important in cases based on an argument of constructive, rather than actual, unfair dismissal. Ultimately these are issues that can only be properly assessed through evidence, particularly the evidence of the Claimant, not a simple reading of e-mails in isolation at a preliminary stage.

(iv) In reaching my conclusion I have relied heavily on the guidance of the Court of Appeal in the **Kilraine v London Borough of Wandsworth** case in particular that the concept of "information" as used in s 43B(1) ERA is capable of covering statements which might also be characterised as allegations and whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in light of all the facts of the case, taking into account the issue of "reasonable belief" and "context". Without any evidence I feel ill equipped to take a view on these matters, supporting the Claimant's argument that this case is indeed too fact sensitive for a strikeout/deposit order at this preliminary stage. In coming to this conclusion, I am comforted by the guidance in the **Western Union case** that a disclosure of information can sometimes be found from a statement of position and that this assessment will always be fact sensitive.

(v) The fact that the Claimant was aware that the proposed deal structured by Mr Tinkler had to go through further checks and the approval of the Value Committee does not detract from the possibility that he was raising genuine and legitimate concerns about that deal. The Claimant's knowledge may go to the issue of whether he had a "reasonable belief" of the alleged wrongdoing but that should be properly tested through evidence.

(vi) The Claimant's evidence in parallel High Court litigation will no doubt feature in these proceedings when the Claimant is cross examined, but at this stage I agree with the Claimant's submissions that it is premature to rely upon a few entries in the transcript of a case that has yet to conclude and in which the 2nd Respondent to these proceedings has yet to give evidence, particularly without reference to the pleadings and issues in that case.

(vii) The context and the reasons for the Claimant's attestation to the FCA will also need to be assessed in evidence, and may undermine the Claimant's arguments, certainly in relation to any alleged disclosures before the 8 February 2018. The Claimant may face a significant hurdle to show that he did any more than comment on the structure of a business deal before this date. He would be well advised to take advice on whether these comments meet the required statutory threshold for a

protected disclosure. That said, the proper recourse for the Respondent if any of these arguments are pursued unreasonably is through costs, rather than pursuing a premature, but otherwise reasonable, strike out application.

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EMPLOYMENT JUDGE DEOL

SIGNED ON 2 January 2019

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REASONS SENT TO THE PARTIES ON
4 January 2019

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FOR SECRETARY OF THE TRIBUNALS