EMPLOYMENT TRIBUNALS

Claimant: Mr AY Ali

Respondents:
1. Salix Homes Limited
2. Hayley Reed
3. Michael Page International Recruitment Limited

Heard at: Manchester **On:** 17–20 December 2018

Before: Employment Judge Franey
Ms M T Dowling
Mr P Stowe

REPRESENTATION:

Claimant: In person
1st and 2nd Respondents: Ms L Quigley, Counsel
3rd Respondent: Mr W Wiltshire, Counsel

WRITTEN REASONS

These are the written reasons for the judgment given orally with reasons at the conclusion of the hearing on 20 December 2018, and sent out to the parties in writing on 28 December 2018.

Introduction

1. By a claim form presented on 23 February 2018 the claimant brought a range of complaints arising out of the termination of his engagement as a Customer Service Adviser supplied by the third respondent ("Michael Page") to the first respondent ("Salix"). His assignment had been terminated after only four days in November 2017. He complained that this was because of a protected disclosure he made during those four days, and that the termination amounted to an unlawful detriment on the ground of a protected disclosure.

2. The claimant also pursued complaints of unfair dismissal and breach of contract, but following a preliminary hearing before Employment Judge Porter on 3 August 2018 it was determined that he was not an employee and those complaints

were dismissed. A complaint of unlawful deductions from pay was withdrawn at a preliminary hearing on 2 May 2018 before Employment Judge Feeney, and an application by the claimant to add complaints of direct race discrimination was withdrawn at a hearing before Employment Judge Sharkett on 4 July 2018.

3. The response form on behalf of Salix and Mrs Reed was filed on 29 March 2018. It was accepted that the claimant was a "worker" under section 43K Employment Rights Act 1996 and entitled to bring his detriment complaint. Salix also accepted that it was liable if the second respondent, its employee Mrs Reed, had acted in an unlawful manner in the course of her employment. The response denied that the claimant had made any protected disclosure but asserted that in any event the reason for the termination of his assignment was to do with his conduct. Nine examples of inappropriate behaviour were identified.

4. The response form from Michael Page was filed on 28 March 2018. It asserted that the assignment was terminated by Salix. Any unlawful conduct was denied.

Issues

5. The case management process summarised above meant that the only complaints for the Tribunal to determine were the complaints of detriment due to a protected disclosure. The issues had been identified by Employment Judge Feeney at a preliminary hearing on 2 May 2018, and some of those issues had fallen away during the case management process. The claimant clarified at the start of our hearing that he argued that Miss Collins of Michael Page had been party to the decision to terminate his assignment at Salix, and/or that comments she had made showed that Michael Page no longer wanted him to do any work for it. It was therefore agreed that the issues for the Tribunal to determine were as follows:

(1) Did the claimant make a protected disclosure during a verbal exchange with Mrs Blair witnessed by Mrs Reed and Mrs Green on 30 November 2017, in that there was a disclosure of information which the claimant reasonably believed was made in the public interest and which he reasonably believed tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject?

(2) If so, in deciding on 30 November 2017 to terminate the claimant's assignment with Salix, did Salix and/or Mrs Reed subject the claimant to a detriment on the ground that he had made a protected disclosure?

(3) If so, in deciding on 30 November 2017 to terminate the claimant's relationship with it, and/or being party to the decision to terminate the assignment with Salix, did Michael Page subject the claimant to a detriment on the ground that the claimant had made a protected disclosure?

Witness Evidence

6. We heard from six witnesses in total, each of whom gave oral evidence pursuant to a written witness statement. The claimant was the only witness on his side. His statement incorporated the factual content of his claim form.

7. From Salix four witnesses gave evidence: Hayley Reed (the second respondent) and Sasha Green, who were Customer Service Supervisors; Gayle Blair and Naila Petruseva, both Customer Service Advisers.

8. Michael Page called its Business Manager, Jessica Collins.

Documents

9. The Tribunal was given a bundle of documents which ran to approximately 260 pages. It contained all the documents to which the parties wished to refer. Any reference to page numbers in these reasons is a reference to that bundle.

10. By email of 4 December 2018 the claimant had sought an order striking out the response forms of Salix and Mrs Reed on the basis of irregularities in the bundle. On 11 December 2018 Employment Judge Holmes directed that this be addressed at the start of the hearing. It transpired that there were three matters causing the claimant concern.

11. The first matter was that there were some documents duplicated in the bundle. We explained that the Tribunal had no difficulty ignoring duplicates.

12. The second matter was that some documents in the bundle appeared to be wholly irrelevant. An example was the CVs of other candidates for the role at Salix. We explained to the claimant that we would have no difficulty ignoring irrelevant documents.

13. The third matter raised by the claimant was the inclusion in the bundle of written statements from people who had not been called as witnesses. This referred primarily to typed statements taken in February 2018 by the respondent when it became clear the claimant would be pursuing a complaint. Two of those statements were from individuals not being called as witnesses to our hearing. On behalf of Salix and Mrs Reed, Ms Quigley accepted that these statements were not material which had been before the decision makers in November 2017, and therefore that their relevance was limited. She also acknowledged that the Tribunal might choose to attach no weight to those statements (particularly given that they were unsigned) if factual information in them was contradicted by other evidence. We assured the claimant that we would proceed on that basis.

14. The claimant emphasised that he considered that this approach had been taken deliberately by the solicitors for Salix in order to cause him unnecessary work and distract the Tribunal. That was the basis for his application to strike out the response forms. The Tribunal explained that a fair hearing was possible and it would not be proportionate to strike out the response forms, but that in any event any difficulties arising from his concerns were minor ones which could be easily managed during the hearing. The Tribunal expressed no view on whether his belief this had been done deliberately was well-founded. The claimant was advised of his right to apply at the end of the case for a preparation time order if he thought there had been unreasonable conduct which had resulted in him wasting time on preparing for this hearing.

Relevant Legal Principles

Protected Disclosure

15. A protected disclosure is the subject of Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

> **"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(1): in this Part a "qualifying disclosure" 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) …**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…**

16. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17**:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

17. The approach taken by the EAT in **Kilraine** was endorsed by the Court of Appeal in the same case at **[2018] EWCA Civ 1436** (see paragraphs 27-36).

18. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons.

19. In **Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837** the Court of Appeal approved a suggestion from counsel that the following factors would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

20. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that the alleged disclosures were made to the claimant's "employer" (section 43C read with section 43K(1)).

Detriment

21. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."**

22. It was common ground that the claimant was a worker in this case for both the Salix and Michael Page under the extended definition in section 43K(1). It was also accepted by both of those respondents that under section 47B(1B) they were liable for any actions of their own employees which amounted to a breach of section 47B.

Causation

23. The right to go to a Tribunal appears in section 48 and is subject to section 48(2):

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

22. In **International Petroleum Ltd and ors v Osipov and ors UKEAT/0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"…I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> **(a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
>
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not**

> **do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.**
>
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

23. The case went on appeal on other issues but no doubt was cast on the accuracy of that summary: **Timis and Sage v Osipov (Protect intervening) [2018] EWCA Civ 2321.**

24. Because the nature of a protected disclosure detriment case is akin to a complaint of victimisation under the Equality Act 2010, it is not possible to impute to the mind of the decision maker knowledge held by another person which she does not actually possess. That was confirmed by the EAT in **Malik v Cenkos Securities PLC UKEAT/0100/17** (17 January 2018). The EAT also confirmed in paragraph 89 of that decision that the analysis in Equality Act cases derived from the decision of the Court of Appeal in **CLFIS (UK) Ltd v Reynolds [2015] IRLR 562** applies in this context too.

25. It follows from the approach taken to the causation issue in **NHS Manchester v Fecitt [2012] ICR 372** that the cases under the equality legislation dealing with victimisation where a claimant has committed a protected act by making an allegation of discriminatory treatment are also relevant. Some cases have recognised a distinction between the protected act (or disclosure) itself and the manner in which it is made. They include **Martin v Devonshire Solicitors [2011] ICR 352** and **Woodhouse v West North West Homes (Leeds) Limited [2013] IRLR 773.** These Equality Act cases were considered in a whistleblowing context in **Panayotiou v Kernaghan and another [2014] ICR D23.** The EAT concluded that:

> **"Those authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did…. [despite Woodhouse] there is no additional requirement that the case be exceptional. In the context of protected disclosures, the question is whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, in fact, the reasons why the employer acted as he did."**

Background Facts

26. This section of our reasons sets out the broad chronology of events. It was necessary for the Tribunal to resolve some disputed factual issues, and we will address those matters in our conclusions. There were some matters mentioned in evidence on which we made no findings because they were not material to the issues.

Background

27. Salix is a not-for-profit charitable organisation which provides social housing. It employs a number of Customer Service Advisers whose primary role is to take

calls from tenants and help sort out their problems. It has a team of approximately 30 people in its contact centre. The role profile appeared at pages 84-87.

28. The team are managed in part by targets for answering 95% of calls, and 95% of those calls must be answered within 60 seconds. Advisers are monitored as to how much of their time is spent on the telephone to tenants and how much is time when an adviser is "not ready" to take calls.

29. Salix also had a policy which it is convenient to call the Tenant Commitment Policy ("TCP"). The documents appeared at pages 94-96. The essential principle was that if a tenant was in arrears with rent, the full repair service to the relevant property would be withheld. Only emergency repairs would be carried out. Guidance was given as to what repairs would be considered emergency repairs. The TCP would be signed by the tenant.

30. Salix also had a Whistleblowing Policy (pages 88-93). However, none of its witnesses had considered it during the events giving rise to this case.

The Claimant

31. Having performed a number of different roles dealing with housing and welfare benefits, the claimant saw an agency position with Salix advertised through Michael Page in early November 2017. He had a passion for that kind of work, and was in the process of going through a law degree. He wanted to leave his existing role because of an incident on 2 November 2017 where he was assaulted whilst visiting a tenant (pages 118-125). The attraction of the Salix role was that it was contact centre based with no risk of such incidents.

32. The claimant applied for the job. His CV appeared at pages 133-137. He was interviewed on 17 November by Mrs Green and Mrs Blair, and the same day accepted an offer of employment. It was arranged that he would start on Monday 27 November and work for the rest of that week, save that he had Friday 1 December off due to a funeral of a friend.

27-28 November 2017

33. On Monday 27 November the claimant had an initial induction during which he signed the Health and Safety Policy, then he spent the day sitting with the Customer Service Adviser, Andrew Lysniak. He listened to Mr Lysniak take calls on the telephone and watched how he dealt with them and with the computer system.

34. Tuesday 28 November was spent with Mozmul Hussain. The claimant started to take tenant calls himself that afternoon, observed by Mr Hussain.

29 November 2017

35. The claimant's third day was spent with Naila Petruseva. He observed her and took his own calls. During that day Ms Petruseva had a one-to-one meeting arranged with Mrs Green. The claimant sat with Mr Hussain again while she was in that meeting.

36. During the meeting Ms Petruseva raised some concerns about the claimant, saying that he did not carry out the data protection procedure correctly when calls were received, and that he was questioning procedures such as why callers were not put through to third parties such as local Benefits Offices. She also reported to Mrs Green that the claimant had made a comment about all Salix tenants having mental health issues. She told Mrs Green that this had upset her because she too was a Salix tenant.

37. Having learned of these concerns, Mrs Green spoke to Mrs Reed and they decided to speak to Mr Lysniak and Mr Hussain to elicit their views. They were given further information which reinforced those concerns. The information included a suggestion that the claimant had sought to engage Mr Hussain in a discussion about religion.

38. They decided that for his fourth day the claimant would be placed with a more experienced Customer Service Adviser, Mrs Blair. Mrs Blair was another Customer Service Adviser but she was training to be a supervisor and was more experienced than the three people who the claimant had worked with on the previous days. She was also a different type of personality who could give a different view on him.

Thursday 30 November 2017 - Termination

39. The claimant sat with Mrs Blair on Thursday 30 November. It was his case that he made a protected disclosure about the TCP in a conversation with her that morning in which Miss Green and Mrs Reed also participated. We will return to that issue in our conclusions.

40. In the course of the day Mrs Blair gave feedback to Mrs Green about the claimant. They consulted their manager Mr Ashworth. Mrs Reed and Miss Green decided that the assignment would be terminated. The claimant was not told of this before he left at about 4.30pm. As he left Miss Green indicated he would be back in on Monday. In fact the decision that he would not be coming back had already been taken.

41. Miss Collins spoke to Mrs Reed that afternoon. In the discussions she suggested that an unsuccessful candidate from when the claimant was recruited, “Miriam”, might be suitable. Miss Green had interviewed Miriam as well as the claimant, and she confirmed that Miriam would be appointable. Miriam started in that role the following Monday.

42. The claimant was notified of the decision by telephone by Miss Collins shortly before 6.00pm. They had a telephone conversation lasting 19 minutes. The news came as a great shock to the claimant. He understood Miss Collins to be saying that he had been told of the concerns in a meeting with Mrs Reed and had reacted in an inappropriate way. This was not the case: there had not been any meeting with Mrs Reed.

Claimant’s email 1 December 2017

43. At shortly after midnight on Friday 1 December (the day of his friend’s funeral) the claimant sent an email to Miss Collins at pages 189-190. He accused Salix of

having made up an outrageous reason to terminate his employment. He said that having given up his previous job:

> **"Suddenly a week later I'm asked not to return because as far as I understand I have too much experience and knowledge. If that wasn't bad enough they defame my character with an outright lie by claiming that I was spoken to about a statement(s) that I made and that I didn't respond to them appropriately…"**

44. His email went on to make reference to a possible Employment Tribunal claim, and then the TCP:

> **"I don't wish to labour my point but if you could clarify what has happened and where we go from here I'd be most grateful as I feel like I have been terminated for being too competent.**
>
> **As I understand it among the issues for not being asked to return was I too 'customer focussed' but mainly mentioned to a colleague while being trained 'why we would check if a commitment to pay rent arrears was broken before we carried out a repair' as a box appears on the system to click 'yes' or 'no'. I was advised 'that it is Salix policy in some cases to refuse to carry out repairs – except in emergencies if there are rent arrears'. I replied that in my opinion – and through direct experience – that refusing to carry out any repairs, emergency or not, because a tenant is in arrears could be considered a breach of the Housing Act 1985, Landlord and Tenant Act 1985, Human Rights Act 1998 and possibly the Equality Act 2010, and that this somehow upset someone. If I've got this wrong please let me know?".**

45. The claimant acknowledged in oral evidence that when he spoke to Miss Collins on the telephone she had not mentioned the TCP. His evidence was that Miss Collins had told him that he had queried policies and he thought it must have been his exchanges about the TCP summarised in that email. He recalled Miss Collins having said of Salix that:

> **"They have their own lawyers and policy makers and didn't appreciate your comments."**

46. That detail did not appear in the claimant's witness statement or claim form and we will return to it in our conclusions.

<u>After Termination</u>

47. Miss Collins forwarded the email on to Mrs Reed (page 192). The claimant emailed Salix on 8 December making clear he thought his assignment had been ended because of a protected disclosure (pages 194-195) and he chased Miss Collins for a response the same day (pages 203-204).

48. On 11 December Mrs Reed prepared a summary of what had happened (page 200) and emailed it to a colleague. The summary suggested that the claimant had been more interested in the legal aspects of Salix rather than his role of answering calls, was not really taking on board the training and was spending any free time discussing various legal aspects. Her note said:

> **"As a contact centre does not require this level of legal knowledge, this had brought about debates regarding the rights and wrongs of Salix, which had made existing staff feel uncomfortable. Abdi frequently stated that things were wrong and that Salix were leaving themselves open to legal action. The team repeatedly reiterated that they have**

> **policies and procedures that they are required to comply with and as such that is what they and he should do."**

49. The note went on to say that after speaking with four team members the feedback was that the claimant's understanding of the law generally was in conflict with Salix policies, and it was difficult to move him forward with the training due to the lengthy discussion surrounding law. It had also been reported that he made comments that it seemed like Salix only gave tenancies to people with mental health issues. Feedback from the team leader the following day (Mrs Blair) was very much the same. The note concluded as follows:

> **"Abdi was not dismissed for his interest in law, or indeed any challenges he made, but more that the time and focus he was placing on this was preventing him from moving forward with the role which we required him to undertake – answering calls quickly and applying our policies and procedures which we had in place. It appeared that this was in conflict to Abdi's beliefs and despite being advised that these were our policies which we work to, he continue to question this. As this was a temporary role, but for a six month period, we need to ensure that we had the right person for the role, which was also a good fit for the team. By the end of the first week we would expect an individual to be able to handle calls individually and trust that they are following procedures – due to the misdirected focus Abdi was unable to demonstrate this. Unfortunately on this occasion Abdi was not considered suitable to continue."**

50. There were further email exchanges during December 2017.

51. In January 2018 Sian Grant of Salix interviewed Mrs Blair, Mrs Reed, Ms Petruseva and Mrs Green. The notes appeared at pages 235-240. There were further interviews of six witnesses on 1 and 2 February 2018 carried out by Ms Mitchell of HR. The statements appeared at pages 247-258. None of that material was shown to the claimant until this case was under way.

52. The claimant was not provided with any further assignments by Michael Page. He alleged that when he discussed this with Miss Collins on 30 November she said to him that he should take some time out and go away somewhere. We will return to that matter in our conclusions.

Submissions

53. At the conclusion of the oral evidence each representative made a submission to the Tribunal.

Michael Page Submission

54. Mr Wiltshire had helpfully prepared a written submission which the Tribunal read before hearing from him orally. In essence his submission was that there was no evidence Miss Collins knew anything of the alleged protected disclosure, but even if she did the complaint against his client should be dismissed because Miss Collins had not taken part in the decision to end the assignment with Salix. That was a decision which Salix made without her involvement. She was not in a position to challenge it.

55. Further, there had been no deliberate exclusion of the claimant from any further work for Michael Page, but given that the terms of engagement provided no

guarantee of further work it was doubtful whether that could be regarded as a detriment in any event.

Submission for Salix and Mrs Reed

56. Ms Quigley had also prepared a helpful written submission which we read before oral submissions. After reviewing the legal framework Ms Quigley submitted that the claimant had failed to prove facts which could amount to a protected disclosure. She analysed those passages in the claim form where he provided his factual evidence about what he said to Mrs Blair on 30 November 2017.

57. In any event, even if a protected disclosure had been made, it was made to Mrs Blair. Miss Green and Mrs Reed had not been party to that discussion. Indeed, there was no evidence that Mrs Reed knew of the disclosure at all. A broad awareness that the claimant was "questioning policies" would not be sufficient. It was clear that Miss Green had been informed of the issue about tenant repairs as it appeared in her witness statement, but that was a candid admission on her part which fell short of accepting that she knew that any protected disclosure had been made. The reference to "policies" was a reference to other matters such as data protection: the TCP was not perceived as a "policy" within the respondent.

58. As to causation, Ms Quigley argued that the decision taken by Miss Green and Mrs Reed was based on a range of factors and input from four different people. There were themes of concern which had nothing to do with any protected disclosure. These included comments said to have been made by the claimant, and him questioning the outbound calls policy and data protection issues. Effectively these had caused the claimant to be seen as someone who thought he knew better than others in a way which was to the annoyance of other staff. That was a perfectly good explanation for the decision to terminate the contract of an agency worker after only four days, and the protected disclosure had had no material influence on that decision. We were invited to dismiss all claims against the first and second respondents.

Claimant's Submission

59. The claimant had understandably not prepared a written submission but he supplied the Tribunal with a copy of an email from the solicitor acting for Salix which confirmed that the note prepared by Mrs Reed on 11 December 2017 had inadvertently been omitted from the response to his subject access request.

60. The claimant went on to give his personal perspective of how the hearing had been and his grave concerns about the accusation of racism in relation to comments about a foreign accent, and the suggestion that he had engaged in a religious discussion with Mr Hussain. He described those as attempts to distract the Tribunal from what had really happened in this case. He reminded us that Miss Green and Mrs Reed said they had never heard of the whistle-blowing policy, and he suggested that if there really had been those other concerns (including the alleged comments) he would not have been allowed back on a third or fourth day. The reality was that he had raised issues with a passion to prove a point, explained it to Mrs Blair and had been treated detrimentally because of that. His email of 1 December 2017 accurately recorded what he had been told by Miss Collins on the telephone. He described that as a "surreal experience".

61. With the help of the Tribunal the claimant then went through the ingredients of his protected disclosure and identified the legal obligations on which he relied. They were sections 11 and 13 of the Landlord and Tenant Act 1985, sections 96 and 99A of the Housing Act 1985, and section 4 of the Defective Premises Act 1972. He also suggested that the TCP amounted to direct discrimination because it would disproportionately affect tenants with mental health issues who were more likely to fall into arrears of rent. He urged us to find that Miss Green and Mrs Reed had been aware of his disclosure to Mrs Blair because they had heard it, and he suggested the timing of emails on the afternoon of 30 November was suspicious. He believed that Miss Collins had influenced the decision to terminate his assignment, and that she too was aware of his protected disclosure.

Reply by Salix and Mrs Reed

62. As this was the first time that the claimant had been specific about the legal obligations he said had been breached, we allowed Ms Quigley a right of reply on that point. Ms Quigley submitted that the Landlord and Tenant Act 1985 would not be breached because emergency repairs would be done, and therefore any belief the claimant had on that basis was unreasonable. The Defective Premises Act was concerned with taking reasonable care for the health and safety of tenants or for preventing damage to property, and again the TCP expressly recognised that repairs needed for health and safety would be done. The Housing Act provisions took the matter no further. There was no direct discrimination against disabled people. She therefore submitted that any belief that the information disclosed tended to show a breach of a legal obligation was not a reasonable belief given the claimant's experience of social housing and the fact he was undertaking a law degree.

Discussion and Conclusions

Protected Disclosure - Facts

63. The first matter we addressed was whether the claimant made a protected disclosure on 30 November 2017. This required a finding of fact about what he said to Mrs Blair. It was a verbal discussion and there was no written record of it kept at the time. Nevertheless, according to Miss Green (witness statement paragraph 18), Mrs Blair told her that same day that the claimant had raised the repairs element of the TCP.

64. Mrs Blair confirmed that the TCP and/or repairs had been discussed in her statements from January 2018 (page 235) and February 2018 (page 250). In her witness statement (paragraph 7) she confirmed that the claimant discussed the tenant repairs issue and that Salix could be liable.

65. The first written record was the claimant's email sent shortly after midnight on 1 December (page 189) where he gave his account of that conversation. He explained that he had asked why it was necessary to check whether the tenant had entered into the TCP and was in arrears before repairs were authorised; he was told that the policy of Salix was to do emergency repairs only if there were rent arrears, and he said that in his opinion and experience that could be a breach of the law. That email was not intended as a formal record of the conversation but was his response to being told his assignment was over. It was sent, understandably, in a somewhat emotional state.

66. The claimant's first formal attempt to record what he said to Mrs Blair on that occasion appeared in the claim form (page 18) between paragraphs 38 and 43, where he explained that he had asked her to clarify the position in relation to the TCP. He had relayed his experience at other providers of social housing and said that they had found it impossible to implement similar policies. He expressed the view that contact centre staff were not in a position to decide what was an emergency and what was not, and he showed Mrs Blair the relevant legislation on her computer screen.

67. Putting those matters together we found as a fact that there was a discussion about the TCP as well as a discussion of the licence or tenancy agreement generally. We concluded the claimant had not seen the TCP documents at pages 94-96 in our bundle, but the pop-up box on the screen had been seen by him during a call about a repair issue. We were satisfied the claimant conveyed his view that the policy was potentially unlawful, and that his account at paragraphs 38-43 of the claim was essentially accurate. We were satisfied on the balance of probabilities he did relay his experience with other social housing providers, being experienced in the field but new to Salix. Mrs Blair was not paying attention to the detail of what the claimant said, although she clearly appreciated he was saying the TCP might be unlawful, and we were satisfied that she told Miss Green that he had raised that issue.

Protected Disclosure - Law

68. Having made that finding of fact we had to apply the law as set out primarily in section 43B(1) of the Employment Rights Act 1996.

69. The first question was whether the claimant had disclosed information or not. We noted that section 43L(3) provides that it does not matter if the information is already known to the recipient. We concluded that the claimant had disclosed the following factual information to Mrs Blair on 30 November 2017:

(1) that Salix had a tenant commitment policy of withholding non-emergency repairs if there were rent arrears;

(2) that other social housing providers had found similar policies impossible to implement; and

(3) that legislation exists placing obligations on landlords to carry out repairs.

70. The second question was whether the claimant had a reasonable belief that the disclosure was in the public interest. Understandably this was not challenged by the respondent. Applying the range of factors set out in the **Chesterton** case we were satisfied the claimant had a reasonable belief his disclosure was in the public interest. It affected tenants and future tenants of Salix. We were not told the precise numbers but they must be significant given that the contact centre has approximately 30 staff. This was not a case where the matter was of interest only to the claimant personally. Further, the claimant was dealing with a social housing provider, not a private landlord, and the wrongdoing in question was breach of a statutory obligation rather than any private legal obligation.

71. The third question was whether the claimant had a reasonable belief that the information he disclosed tended to show a breach of a legal obligation. He clearly did have that belief. Was it reasonable?

72. We took into account the fact the claimant was not a qualified lawyer but experienced in social housing and undergoing a law degree. He was also a person able to quote and interpret statutory provisions.

73. His belief the information tended to show it was likely there would be a breach of sections 96 and section 99A of the Housing Act 1985 was unreasonable. The former section simply enables subsidiary legislation, and the second is concerned with improvements carried out by tenants. Neither of those could be relevant. Nor was any belief there was direct disability discrimination reasonable. Disabled and non-disabled tenants were equally subject to the TCP.[1]

74. Section 4 of the Defective Premises Act 1972 creates an obligation on a landlord to take reasonable care to prevent personal injury or damage to property through the state of the premises. The claimant had not seen the TCP documentation and was not aware that health and safety repairs were specifically identified in that document as repairs which would be carried out. We concluded it was reasonable for him to believe that a breach of that section was likely if a customer service adviser in the contact centre made a wrong decision about what repairs to authorise, and it was likely that would happen at least once in the future.

75. Section 11 of the Landlord and Tenant Act 1985 also imposes obligations upon landlords to keep properties in repair, including obligations in relation to utilities, heating and hot water. Again, we were satisfied the claimant reasonably took the view that the respondent was likely to breach section 11 if repairs within the scope of that section were refused due to rent arrears.

76. We were therefore satisfied the claimant had shown that he had a reasonable belief the information tended to show that a person (Salix) was likely to breach a legal obligation in the form of its statutory obligations in relation to tenant repairs.

77. It was not in dispute that the disclosure was made to his employer under section 43C. Mrs Blair was a senior customer service adviser who was training to be a supervisor; she was an employed member of staff not an agency worker, and she had interviewed the claimant.

78. The Tribunal unanimously concluded, therefore, that the claimant had made a protected disclosure to Gail Blair about the tenant repair issue on 30 November 2017.

Detriment - Salix and Mrs Reed

79. We turned to the detriment complaints against the first and second respondents.

[1] There might have been a better case for indirect discrimination but the claimant never asserted he held that belief.

80. There was a factual issue about whether Miss Green and Mrs Reed knew of the protected disclosure. That was important because it is clear from the case law, especially **Malik v Cenkos Securities**, that in a detriment complaint the decision maker must personally be aware of the disclosure if it is to influence her mental processes.

81. The first question was whether Miss Green and Mrs Reed were party to the claimant's discussion with Mrs Blair in the course of which he made his protected disclosure. We accepted their evidence that they were not listening to what was being said. Miss Green and Mrs Reed were aware the claimant and Mrs Blair were talking; he was shadowing her and those discussions were part of that process, and Mrs Reed saw a Government website open on Mrs Blair's screen, but we rejected the claimant's contention that they were aware of what was being discussed. That was a supposition on his part for which there was no direct evidence. It was not his case that either of them actively participated in the discussion. We found that the disclosure was made only to Mrs Blair, not to Miss Green or Mrs Reed.

82. However, Mrs Blair did speak to Miss Green later on 30 November, and we considered the evidence before us about what was relayed. When interviewed in January 2018 Miss Green said (page 239) that the tenant repairs issue had been raised by Mrs Blair. She confirmed that in paragraph 18 of her witness statement. Mrs Blair said in her witness statement (paragraph 10) that she told Miss Green that the claimant had "ripped the license agreement apart" and that he preferred the tenants' views to the views of Salix, but she did not mention specifically having told Miss Green about the tenant repair issue. However, we accepted Miss Green's evidence on this point and found as a fact that Mrs Blair did tell Miss Green the claimant had raised the tenant repairs issue.

83. The next factual question for us was what Miss Green relayed to Mrs Reed in their subsequent discussion in the early afternoon of 30 November. It is important to note that the two of them had had a more detailed discussion the previous day about the claimant which had resulted in the interviews of Mr Lysniak and Mr Hussain. Mrs Reed prepared the document at page 200 on 11 December 2017. This was the first time she recorded the sequence of events. She noted there that she and Miss Green had observed the claimant spending time on the law pages in the tenancy agreement, preventing him moving forward, but she made no mention there of the tenant repair issue. Similarly, when interviewed in January (page 236) Mrs Reed did not say that had been conveyed to her. Miss Green in her interview (page 239) concentrated on what Mrs Blair had told her, and she also did not say that the tenant repair issue had been mentioned by her to Mrs Reed. The same was true of the February statements at pages 251 and 257 respectively. Miss Green said she had relayed Mrs Blair's feedback to Mrs Reed but did not go any further; nor did either of them in their witness statements or their oral evidence suggest that the tenant repair issue had been specifically mentioned. Indeed, Mrs Reed's evidence was that Miss Green told her on 30 November that things were "pretty much the same", which suggested there had been a short general conversation rather than any discussion of specific concerns.

84. We concluded that Mrs Reed's evidence was accurate. We found as a fact that there was a brief discussion about the claimant's behaviour during which Miss Green confirmed (on the basis of Mrs Blair's feedback) that things were pretty much

the same. The concerns about the claimant discussed on Wednesday afternoon had not been assuaged by the input from Mrs Blair on Thursday lunchtime. We found as a fact that Miss Green did not tell Mrs Reed about the tenant repair issue which Mrs Blair had relayed to her earlier.

85. Without knowledge of the disclosure Mrs Reed cannot be personally liable in these proceedings for any protected disclosure detriment, and therefore all claims against Mrs Reed failed and were dismissed.

86. Dealing with the position of Salix, we reminded ourselves that the legal test is not whether the protected disclosure was the reason or principal reason for the decision to terminate the assignment. Instead the question for the Tribunal under section 47B was whether that disclosure had any material influence on that decision. If its influence was non-existent or merely trivial the claim would fail.

87. It was clear that there were a number of factors which together combined made Miss Green and Mrs Reed decide that the claimant was not suitable for the role due to his behaviours and focus. Broadly, there were three areas of concern.

88. The first concern arose out of comments which they had been told the claimant had made. Those comments included the alleged comments about mental health of tenants, the religious discussion the claimant was said to have engaged in with Mr Hussain, and some alleged comments about the accent of a particular caller. It is important to emphasise that it was not necessary for the Tribunal to get to the bottom of these matters in order to make our decision. It appeared to us that there may well have been a misunderstanding on some or all of these matters, but what is significant is not what happened but what Miss Green and Mrs Reed were told.

89. The second concern was about the claimant being distracted from learning the job by other matters. This included his challenges to the licence agreement, the issues about the data protection checks and querying the policy on outbound calls and transferring calls from tenants to third parties. Broadly, it was a concern that he was spending too much time on the legal aspects of those matters rather than getting on with learning the job of a customer service adviser.

90. The third concern might be termed one of customer focus. Instead of just applying Salix's policies when dealing with tenants he was agreeing with them where they challenged policy and not progressing calls as he should, leading to a perception that he was too customer focussed.

91. The protected disclosure about the tenant repairs issue was part of the second concern of being distracted by legal matters. To that extent the claimant had shown facts from which the Tribunal could infer that it formed part of the reason his assignment was terminated. We were satisfied that this was one of those cases where the respondent did have to show the ground for the decision in accordance with section 48(2) and the analysis of that provision in the decision of the Employment Appeal Tribunal in **Osipov**.

92. However, in this case the Tribunal was unanimously satisfied that Salix had shown that the protected disclosure played no material part in the decision to terminate the assignment.

93. Firstly, it was clear to us that Mrs Blair was not bothered by the disclosure; her focus was on what the claimant was saying about the licence agreement, which explained why she told Miss Green that he had "ripped it apart".

94. Secondly, although Miss Green reacted to Mrs Blair's feedback by saying the claimant was in conflict with Salix (paragraph 10 of Mrs Blair's witness statement), that was, we concluded, a response to being told that he had ripped the licence agreement apart. It was not a response to being told that he had challenged the tenant repairs issue.

95. Thirdly, although Miss Green was aware the tenant repairs issue had been raised, it was not significant enough in her mind to make it worth telling Mrs Reed about it.

96. We concluded that the protected disclosure was just another example of the claimant's focus on legal matters which were not part of the customer service adviser role. It was a further example of him engaging in those matters to the annoyance of his colleagues and to the detriment of his progress in getting up to speed as an adviser. The fact he suggested that the TCP might be unlawful did not feature in the respondent's thinking. The concern was the fact he spent time unnecessarily going through the law with his colleagues instead of just learning the job. The time spent on this issue when he should have been observing and taking calls and learning the job was the determining feature in the mind of Miss Green. It contributed to her view, shared by Mrs Reed without knowing about the disclosure, that the claimant was not carrying out the role as required, was not listening to the training and was making the team uncomfortable with his approach. Their decision was in no sense on the ground that he had raised the tenant repair issue; the content of his concern was irrelevant. Had the claimant raised the tenant repair issue in a different way, for example by a written disclosure in accordance with the whistle-blowing policy or by an email to a senior manager, there would have been no issue with that.

97. Applying the analysis of earlier authorities set out in **Panayotiou**, this perception of the claimant was genuinely severable from the fact that he had made a protected disclosure.

98. Consequently, we unanimously concluded that the complaint of detriment against Salix failed and was dismissed.

Detriment – Michael Page

99. That left the complaint against Michael Page in relation to the actions of Miss Collins.

100. The Tribunal was unanimously satisfied that Miss Collins was not part of the decision to end the assignment with Salix. The claimant's suspicion because of the timing of emails on 30 November was misconceived. It was understandable that in the early afternoon of his last working day in his first week on the assignment Miss Collins would want to find out how he was getting on, and it was genuinely a coincidence that a decision was being made around that time by Miss Green and Mrs Reed that the assignment was going to come to an end. We were satisfied that Mrs Reed was conveying a decision already taken within Salix to end the

assignment, not involving Miss Collins in the decision. The commercial reality in this situation was that the agency was stuck with what the client decided.

101. In any event, we were satisfied that Miss Collins did not know of the protected disclosure. She was unaware the claimant had raised anything about tenant repairs. She said in her oral evidence to our hearing she had never heard about that until this week. Mrs Reed did not know the claimant had raised it and therefore could not have told Miss Collins about it. The claimant misconstrued what he was told by Miss Collins about challenging policies as a reference to the tenant repair issue, no doubt because it played a much bigger part in his mind than it did in the mind of the respondent. That explained why he made a reference to it in his email sent shortly after midnight at page 189.

102. Indeed, his discussion with Miss Collins was unfortunately beset by a number of misunderstandings. We were satisfied the claimant genuinely thought that Mrs Reed was saying to Miss Collins that she had had a meeting personally with the claimant where he behaved inappropriately. He was understandably incensed by that because no such meeting had occurred. However, there had been a misunderstanding. We were satisfied that Miss Collins asked Mrs Reed if "you" (meaning Mrs Reed) had spoken to the claimant, but Mrs Reed answered on behalf of Salix generally. Others had spoken to the claimant, not Mrs Reed.

103. More broadly it was also clear that the decision not to speak to the claimant directly on Thursday before he left work but to allow the agency to communicate with him later on contributed significantly to the misunderstanding which caused the claimant to believe there was an improper reason for the decision to end his assignment. That was plain from the email he sent in the early hours of 1 December at page 189. Salix may wish to consider whether it would be better practice to speak directly to an agency worker when the assignment is terminated rather than rely on a third party to do so.

104. Finally, the allegation that Michael Page deliberately withheld work because of a protected disclosure failed because Miss Collins did not know any protected disclosure had been made. In any event it was clear to us from the evidence that neither party sought to make further contact about further assignments after the unfortunate way in which the claimant's assignment with Salix ended.

105. For those reasons the complaints against Michael Page were also dismissed.

Employment Judge Franey

14 January 2019

REASONS SENT TO THE PARTIES ON

16th January 2019

FOR THE TRIBUNAL OFFICE

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