Case No: 2600770/2017

EMPLOYMENT TRIBUNALS

Between:

Mr G Poyser	**and**	The Chief Constable of
Claimant		Nottinghamshire Police
		Respondent

At an Open Attended Preliminary Hearing

Heard at: Nottingham On: Thursday 10 May 2018 2018

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: Mr Mr J Frederick, Solicitor For the
Respondent: Mr A Roberts of Counsel

JUDGMENT

1. The claim of whistleblowing will not be struck out as having no reasonable prospect of success but a deposit of £1,000 is ordered to be paid by the Claimant as a condition precedent of continuing with it and within 14 days of the issuing of this judgment and on the basis that it has only little reasonable prospect of success.

2. The Deposit Order notice accompanies.

REASONS

Introduction

1. On 17 April 2018, I held what was the second telephone case management discussion in this matter. Inter alia, an issue emerged as per my paragraph 6 relating to the accusation of whistleblowing pursuant to the provisions at Section 43B of the Employment Rights Act 1996, The issue being as advanced by Mr Roberts as to whether what is relied upon could pass even the first element of the test at Section 43B. Encapsulated that would mean has there been the disclosure of information which tends to show in this case as I see it in particular a failure to comply with a legal obligation by the police force apropos 43B(1)(b).

2. I say that because it seems to me that the bald statement in the pleadings of the Claimant that also engaged is health and safety under 43B(d) really does not engage. There is certainly nothing of substance to that effect in the particularisation.

3. Therefore, in terms of the adjudication today I will start with whether the whistleblowing claim should be struck out on the basis that it does not as a matter of law pass muster with the final assertion in the amended grounds of complaint, which was at paragraph 6. It reads:

> *"6. On the d[h] September 2016, the Claimant emailed TPS Hopkin to inform her about an incident where a colleague had "Cherry Picked" which jobs they wanted to deal with. The email was sent in response to TPS Hopkin's earlier request during a team briefing that cherry picking should not be done and that such should be reported. The Claimant contends that the content of his email amounts to qualifying disclosure under (there is then reference made to Section 43B as I have already made plain) and therefore he had made a protected disclosure."*

4. Post my case management discussion, the Claimant's solicitor wrote in to the tribunal on 24 April 2018 advancing the argument that in fact there was no need for the preliminary hearing to determine whether this should be struck out and on the basis that this was a public interest disclosure in that it was not just an allegation but conveyed information. In this sense, the solicitor was referring to the attachment to that email as conveying the information. As to why is fully set out in that email.

5. In reply, the Respondent (via in particular the submissions of Mr Roberts) made plain that they did not accept that this was the conveying of information apropos the definition and that therefore strike out should still apply.

6. For the purposes of today, I have had written submissions from both sides and legal authorities in support, for which I am most grateful, I have also heard oral argument.

My determination

7.The first thing to do is to look at the disclosure, I have referred to the email already. To put it simply, it is very short indeed. It makes no reference to any attachment What the Claimant said in that email to his line Sergeant on 6 April was:

"Both Andy Faulkner and Scott have looked at the fraud at the bottom of the page but done nothing"

8. There is a reference at the bottom of the page to an incident printout which has been enlarged before me and which I take as having been pasted into the emails What does it show? It shows that between 2 and 6 September a substantial number of police officers working in the department where the Claimant was deployed (which was basically clearing up stale cases) had looked at what I would describe as the fraud file under the incident number 00499-02092016, As to activity on 6 September, it shows that four officers viewed this incident on the computer but it was not then given a case reference number, which means that it was not taken any further forward. That document in itself does not show without hearing further evidence whether or not Scott and Faulkner acted any differently to any of the other officers on that screen shot. The Claimant in that one-line email conveys no further information. To turn it around another way, what it does not do is to spell out that these two officers are acting inappropriately and why by reference to the screen shot and how they can therefore be contrasted with the activity of the other officers. He has never given that particularisation. It is correct to say that he has never been asked by the Respondent for any further and better particulars but in any event it is of course for him to plead his case.

9. What Mr Roberts says to me apropos the line of authority commencing with Cavendish Munro (which I fully cited in the record of the last case management discussion) is that this simply does not do in terms of passing muster as to the first test which is that for it to be a qualifying it must disclose information. It must be more than simply an allegation. But there is no explanation given, as I have now made clear, as to how the screen shot provides the information such as to show prima facie wrongdoing which of course would the next limb of what the Claimant would need to establish, ie inter alia a failure by those officers to comply with a legal obligation.

10. Mr Frederick submits before me that this is all a matter of context and therefore an issue that would require to be developed before the tribunal at the hearing already listed because it would require findings of fact and inter alia for instance exploring why the Claimant reasonably believed that what he was disclosing, if that is what it was, would have a tendency to show for instance that there had been a failure to comply with a legal requirement, to which these officers were subject.

11. However, Mr Roberts argues that I do not need to go there. The prerequisite is that the disclosure must convey that information. He has not done that; he has simply made an allegation.

12. That is the issue I have had to deal to determine today. I have found it difficult. On the one hand I will accept what Mr Roberts tells me that the email in itself just does not go far enough to be more than an allegation. I can see the force of what he argues in terms of the screen shot, taken in itself. Why, if this was meant to be a concern about the activities on this incident per se, did the Claimant not broaden out his allegation to the effect that the screen shot showed between 2 and 8 September that despite a lot of officers looking at this incident nobody did anything and because presumably it would be too time consuming and thus they were cherry picking; if that is what this screen shot shows.

13. There is also the issue of what the temporary Sergeant would have understood him to be saying and I have seen her email reply, But, there is an undercurrent, as Mr Roberts puts it, as to whether this is no more than a gripe, ie the Claimant is spending too much time looking at what others are doing as opposed to getting on with his own tasks. If so, prima facie this has got nothing to do with any concern about the public interest

14. I can see force in that argument from the pleadings as I have read them to be and in that sense the context. I say no more than there might be force in what the Respondent says but that will be a matter for findings of fact by a tribunal.

15. I can just about see therefore that in the context of matters, the screen shot might be the providing of information. But I have very substantial doubts that this element of the case, for the reasons I have now gone to, is likely to survive. I have therefore decided to err on the side of caution and in many ways exercise the justice of Solomon on this issue. I will permit the PID claim to go forward but I do so on the basis that I consider that it has only very little reasonable prospect of success. Therefore I will order the payment of a deposit.

16. Given the Claimant has retired on ill-health grounds with a pension and I gather with a substantial lump sum and that Mr Frederick was on alert that a deposit order could be made today and that I have no evidence otherwise to contradict that the Claimant is able to pay a full deposit, I am therefore going to order the same. Thus the Claimant will, as a condition precedent of continuing with the claim based upon whistleblowing pay a deposit of El 5000 within 14 days of the issuing of the deposit order. Mr Frederick is aware, and I spelled it out in any event, of the implications for the Claimant if he pays the deposit and then to lose that element of his claim in terms of potential liability for costs.

The Discovery application of the Claimant; particularization and additional orders.

1. This has resolved itself as to the first application in that the Respondent will voluntarily disclose to the Claimant the papers in relation to incident number 499 ("the fraud") and further 3108 if it is inter- related as the Claimant thinks is the case. This will be within 21 days of the issuing of these orders and because it phases in with the Deposit Order and relates to the PID based issues.

2. As to the incident reports and the Claimant's request for all of them for the period 1 September 2016 to 28 February 2017 and which the Respondent informs

me extends to some 8,000 pages. My initial thoughts are why are they needed and this does appear to be a somewhat disproportionate request. Therefore what I have decided is to go back to old practice so to speak} of my legal youth in that therefore I order that the Claimant's representative has liberty to attend by appointment upon the Respondent's solicitors in order to undertake a mutual discovery of this database and for the Claimant to then to prepare an analysis of that which is found insofar as it may be relevant, and which I understand would be to enable him to show that he was more productive than colleagues, hence the unfair accusation about breaks that he might have had. This issue relates to the disability claims. The parties will clearly need to get their skates on because the analysis will need to have been served upon the Respondent at least 7 days before the scheduled hearings

3. The next issue is that there is still a considerable lack of particularization by the Claimant in terms of the legal framework as to why direct discrimination pursuant to Section 13 of the Equality Act 2010 is engaged; and second in terms of the s 19 indirect discrimination claim and as to the defining of the pool and the inner pool and thence why the Claimant was himself part of it and detrimentally affected apropos Section 19. I have reminded Mr Frederick that in terms of Section 13, he needs to consider the purport of The Mayor and Burgesses of the London Borough of Lewisham -v- Malcolm 2008 IRLR 700 HL and in terms of Section 19 he needs to consider the seminal authority of Essop as per the Supreme Court (UKSC 2017 27).

4. Mr Roberts thought that coming out of the last case management discussion, Mr Beever (then Counsel for the Claimant) was going to give advice as to whether or not to proceed with the Section 13 and 19 claims given of course that the Claimant is claiming Section 15 unfavourable treatment for which he needs no comparators and also relying upon Sections 20 — 21, failure to make reasonable adjustments where he only needs to show that a PCP disadvantages him personally and does not need to get into the sophistications of an indirect discrimination claime Mr Frederick has made plain that he was not aware that there was going to be this consideration. What he is going to now do is to take instructions as to whether or not his client is going to proceed on those fronts. To assist him and because it would give him the relevant legal structure by way of particularization, Mr Roberts will supply him with that in the form of a request for further and better particulars by 7 days from today. The Claimant will rely within 7 days thereafter giving that particularisation.

5. Finally, I permit the amended grounds of resistance to now stand as the pleading for the Respondent apropos its application of 26 April 2018, which is unopposed.

Employment Judge P Britton

Date:10 May 2018

JUDGMENT SENT TO THE PARTIES ON

11/05/2018……..