Appeal No. UKEAT/0116/18/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 12 February 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

ELYSIUM HEALTHCARE NO.2 LTD — APPELLANT

MR CHARLES OGUNLAMI — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS TALIA BARSAM (of Counsel) Instructed by: Radcliffes LeBrasseur 85 Fleet Street London EC4Y 1AE
For the Respondent	MR CHARLES DAVEY (of Counsel) Clerksroom Equity House Blackbrook Park Avenue Taunton TA1 2PX

SUMMARY

VICTIMISATION DISCRIMINATION - Protected disclosure

VICTIMISATION DISCRIMINATION - Detriment

The Respondent, a provider of hospitals with specialist treatment programmes for patients detained under the **Mental Health Act**, appealed against the Decision of the ET which upheld the Claimant employee's claim of public interest disclosure detriment pursuant to section 47B **Employment Rights Act 1996**.

The appeal was on the grounds that the ET had:

(1) for the purpose of determining whether he had made qualifying disclosures within the meaning of section 43B(1), failed to consider whether the Claimant had a subjective belief that they (i) tended to show a breach of legal obligation (section 43B(1)(b)) and (ii) were made in the public interest; alternatively that there was no evidence to support any such conclusion;

(2) wrongly concluded that one of the alleged disclosures, an email dated 2 March 2016, contained "information" within the meaning considered by the Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] IRLR 846;

(3) wrongly concluded that a subsequent email dated 9 June 2016 from the Respondent to the Claimant was "materially influenced" by the Claimant's email of 2 March 2016.

The appeal was dismissed on each ground.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Respondent employer against the Decision of the Employment Tribunal at Watford (Employment Judge Bedeau and members), sent to the parties on 28 September 2017, whereby it upheld the Claimant employee's claim of public interest disclosure detriment pursuant to section 47B of the **Employment Rights Act 1996** ("ERA"). Written Reasons were requested and sent to the parties on 22 December 2017. I will refer to the parties as "the Claimant" and "the Respondent".

2. The Respondent is in the business of the provision of hospitals with specialist treatment programmes for male and female patients who have been detained under the **Mental Health Act 1983**. These hospitals include Chadwick Lodge in Eaglestone, Milton Keynes.

3. The Claimant commenced employment with the Respondent on 28 May 2013 as a Healthcare Assistant and indeed remains in that position. He initially worked in House D, where his line manager was Ms Pamela Miles (the Clinical Team Leader or "CTL"). She reported to Mr Wale Akintola (Unit Manager). In December 2015, the Claimant was moved to House B.

4. On 3 October 2017, the Claimant presented his complaint under section 47B. As agreed between the parties and recorded in the Reasons, the Claimant contended that he had made protected disclosures to the Respondent on six occasions between 22 October 2015 and 4 February 2016 and that he had suffered three detriments on the grounds of his disclosures.

5. The particular focus of this appeal is on the first three alleged disclosures, namely that:

(1) At a meeting on 22 October 2015 he had alleged that Ms Miles was taking food from a service user, i.e. a patient identified as "FM";

(2) On 29 October 2015 he had written to Ms Karen Hill (HR Adviser) expressing his concern that Ms Miles had access to and control of witnesses relevant to an investigation; and

(3) By email on 2 March 2016 he had raised with the Respondent's designated Safeguarding Officer the alleged abuse of a service user by Ms Miles.

6. For the purpose of establishing that these were qualifying disclosures within the meaning of section 43B(1), the Claimant ultimately relied on categories (b) and (f), namely as disclosures which:

> **"(1) … 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 -**
>
> **…**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **…**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."**

7. The original claim had also relied on category (a), namely that "*a criminal offence has been committed, is being committed or is likely to be committed*". However, in his evidence he made clear that he did not believe that Ms Miles was committing a criminal offence.

8. The alleged detriments were:

(1) On or about 24 November 2015, the rejection of his application for the position of Senior Healthcare Assistant;

(2) In December 2015, being moved without his consent from House D to House B; and

(3) On 9 June 2016, receiving an email from the Hospital Director, Mr Geoff Keats, in terms which were alleged to be threatening and intimidating.

9. The Tribunal made findings of fact that in November 2014 concerns were being raised by some Healthcare Assistants and Nurses about the management of House D. On 21 August 2015, staff members wrote a collective complaint setting out a four-page list of concerns about House D and the conduct of Ms Miles in particular. This led to a meeting on 22 October 2015 attended by a representative of management and by staff, including the Claimant and a nurse, Mr Cikolo; and which is the occasion of the first alleged qualifying disclosure.

10. During the meeting, Mr Cikolo said that he was concerned about what was happening with money given to FM and that "*It seemed that Pamela would sometimes take this patient's food into her office, can you please look into that to see whether it is correct*". The Claimant said at the meeting that they had all observed the behaviour referred to by Mr Cikolo. The Claimant asserted that the behaviour amounted to financial abuse as well as a safeguarding issue.

11. In evidence to the Tribunal, he and Mr Cikolo said they did not believe that Ms Miles was committing an offence by taking the food from FM, but that it was a professional issue and a breach of the Respondent's safeguarding policy. This was explained by reference to the Respondent's policy document "Professional Relationship Boundaries" and in particular paragraph 2.6 of that document. As the Judgment records, the documents states that the policy provides a code of practice to assist all staff in establishing and maintaining professional practice and boundaries with service users, colleagues and others. Other policy documents are cross-referenced.

12. In section 2.6, under "Financial Transactions", it includes in paragraph (d) "*Staff must not give or accept personal presents from service users, except in the exceptional circumstances when it may be appropriate*" and in paragraph (e) "*Staff should not accept any offer, or elicit offers of labour from service users, e.g. cleaning staff cars*".

13. Counsel for the Claimant, Mr Davey, today also points to the paragraph in that document (5.2.5) which includes the statement that "*... the breaking or blurring of boundaries and professional conduct is potentially a disciplinary offence ...*".

14. In the Claimant's offer letter dated 14 February 2013, he had acknowledged receipt of this and other policy documents. One of these, entitled "Relationship Boundary Form - Health Professional" stated that:

> **"It is the responsibility of the health professional to maintain appropriate boundaries within the relationship at all times. Unacceptable conduct includes accepting significant gifts (small gifts of flowers/chocs/fruits/biscuits may be acceptable)."**

Also:

> **"Any gift or loan offered by patients, visitors, relatives or ex-patients must be refused and reported to the Hospital Director/Unit Manager. (55)"**

15. The Tribunal also recited extracts from the Claimant's contract of employment. This included (Judgment, paragraph 13):

> **"You will find further terms and conditions in the employee handbook, that is issued and updated from time to time. You are required to comply with company policies and procedures contained or referred to in this handbook. Included in the handbook are details of the company's disciplinary and grievance procedures. (60)"**

16. It then referred to extracts from policy documents, including in respect of rules and standards to be observed during the employee's employment (Judgment, paragraph 16):

> **"This section set[s] out those standards, formal rules and procedures in joining Priory Group. It is understood that you accept these standards, rules and procedures as part of your conditions**

> **of employment. Employees who disregard them can cause inconvenience to colleagues, people in our care, and Priory Group and therefore might render themselves liable to disciplinary action, up to and including their [dismissal]. (369)"**

17. The handbook included (Judgment, paragraphs 18 and 19):

> **"18. Further in the handbook, in relation to relationship boundaries, it states:**
>
> > **"Overstepping any relationship boundary is a disciplinary issue and could lead to [dismissal] without notice." (375)**
>
> **19. Disciplinary action could be taken for misuse of:**
>
> > **"Priory Group's patients', clients' or supplier's property.""**

18. The non-exhaustive list of examples of gross misconduct included theft or unauthorised possession of property belonging to other employees. The Tribunal found that some service users were given money to buy and prepare food once or twice a week. The precise sum was unclear, but a figure of £30 per week was mentioned.

19. The Tribunal then considered the evidence of Mr Keats that the Respondent permitted and encouraged staff to share service users' food to aid in their recovery. The Tribunal rejected his evidence that there was any such policy. Had it existed, the Claimant and Mr Cikolo would have been made aware of it and it would have featured in the policy documents.

20. The Tribunal found the Claimant to be an intelligent man and stated:

> **"61. … From reading the documents he sent to various individuals, they are clearly expressed demonstrating an understanding of the issues he was trying to convey. He studied contract and tort law for one year and was able to understand and apply basic legal concepts."**

21. The Tribunal then considered whether the Claimant had made a qualifying disclosure at the meeting on 22 October 2015. It concluded that he had. Thus:

> **"76. Was there a qualifying disclosure made by the claimant on 22 October 2015? At the meeting on that day, the claimant agreed with Mr Cikolo that Ms Miles was observed taking FM's food. He said it was a financial as well as a safeguarding issue and had in mind the respondent's policy, namely paragraph 2.6. He asserted that Ms Miles' conduct in that regard was a breach of a legal obligation, as the policies were or likely to have been included in her**

> **terms and conditions of employment. He relied on pages 52, 60, 69, 70, 369, 372, 375, 379 and 395 already referred to in our findings of fact.**
>
> **77. Was that belief reasonable? We take the view that it was. Viewed objectively, he reasonably believed that there was a breach of a legal obligation by Ms Miles. Her taking the service user's food was in breach of her terms and conditions of employment, particularly in relation to gifts from service users."**

22. As to the ingredient of the public interest, the Tribunal stated:

> **"78. Was the disclosure in the public interest? We take the view that the public interest requirement has been satisfied. The claimant's and Mr Cikolo's concerns about safeguarding and breach of the legal obligation, went beyond the confines [of] staff at the hospital as they raised wider issues of public concern, namely whether there is the practice of taking advantage of vulnerable people in the respondent's care. The respondent provides a service to the public and the public would need to know whether those in its care are either well-cared for or taken advantage of. We, therefore, agree with Mr Davey's submissions to us on this point."**

23. The second alleged protected disclosure was the letter to Ms Hill dated 29 October 2015. This stated (ET Judgment, paragraph 28):

> **"Thank you for your efforts to meet with the staff with concerns on our ward. I wish to take this opportunity to raise concerns about the ongoing investigation that you promise. It appears that the person who is the subject of the investigation was left on the ward and in the environment where the investigation will be taking place, and thereby still in control as the manager of the ward that is being investigated.**
>
> **It appears that the person, who is the subject of the investigation, still has access to and/or control of all the witnesses you intend to question in your investigation.**
>
> **I personally feel concerned in this direction and I have observed that others are much more concerned.**
>
> **I am also concerned about the safeguarding issues and the possible financial abuse of the ward's service user raised by the qualified nurse in our mi[d]st on that day, which has to do with the manager.**
>
> **However, I found it difficult to understand how justice can prevail without prejudice, if this aspect is not immediately corrected. (135)"**

24. The Tribunal concluded that this was also a protected disclosure. It stated:

> **"80. … In our view and with reference to page 135, what he was saying was that he had concerns about the safeguarding issue and breach of a legal obligation. He was aware at the time that the matter was being investigated and that Ms Miles was on the ward. He felt that there was the likelihood that the evidence may be concealed while Ms Miles was on the ward during the investigation into the safeguarding issue, as she, according to the claimant, was capable of manipulating the staff rota in such a way to benefit those whom she favoured. It was likely, therefore that she may conceal evidence unfavourable to her. Any potential concealment of evidence by a Clinical Team Leader in relation to an investigation concerning a vulnerable person in a hospital, is, in the tribunal's view, in the public interest."**

Thus the disclosure fell within category (f) of section 43B(1).

25. The third alleged protected disclosure was the Claimant's email of 2 March 2016 to Ms Grace Nyandoro, the Respondent's designated Safeguarding Officer. The Claimant wrote (ET Judgment, paragraph 50):

> **"Dear Grace,**
>
> **I am seriously concerned about a report believed to be an abuse of residence [resident] here in Chadwick Lodge.**
>
> **The abuse was verbally reported to Priory Chadwick Lodge and Eaglestone View in my presence and in front of other three staffs [sic] of Chadwick Lodge.**
>
> **I have tried all that it takes to ask management to investigate this abuse and other issues related to, but to no avail and I wish to discuss the issue with you before taking steps beyond Priory.**
>
> **I will be happy if you can reach me through this email or my mobile …**
>
> **I am on shift tonight, 2 March 2016 and can come an hour earlier, alternatively by tomorrow, 3.3.16 by 12 in the afternoon.**
>
> **Your quick response will be highly appreciated. (269)"**

26. The Tribunal concluded that the email of 2 March 2016 was also a protected disclosure. Thus:

> **"83. … He was alleging that the matter having been disclosed on 22 October, by 2 March 2016, nothing had been done by way of an investigation. He repeated his concerns about the failure to comply with a legal obligation and the respondent's failure to investigate. For the reasons given in relation to the qualifying disclosure made on 22 October 2015, we apply them to the disclosure on 2 March 2016. We have, therefore, come to the conclusion that on 2 March 2016, the claimant made a qualifying disclosure of information and it became a protected disclosure, when it was received by Ms Nyandoro."**

27. The Tribunal then considered whether the Claimant had suffered the alleged detriments and, if so, whether these had been materially influenced by the protected disclosures which it had found. This applied the causal link identified in section 47B(1) of the **ERA** and its elaboration by the Court of Appeal in **NHS Manchester v Fecitt & Others** [2011] EWCA Civ 1190, which the Tribunal cited in paragraph 69 of the Judgment.

28. The first alleged detriment concerned his unsuccessful application for the post of Senior Healthcare Assistant. The Claimant had applied for this before the meeting on 22 October 2015

and had been interviewed on 13 October. On 24 November 2015 he was informed that he had not been successful. Having considered the evidence, and in particular the scores marked by one of the interviewers, who did not know of the disclosures or of the collective complaint, the Tribunal concluded that the October 2015 disclosures had not materially influenced the outcome of his application.

29. The second alleged detriment concerned the decision to move him from House D to House B on 12 December 2015. Having particular regard to the timing and the absence of any urgent need for the move to be effected, the Tribunal concluded that the Claimant was moved to avoid contact with Ms Miles in House D and that this detriment was materially influenced by the disclosures of October 2015.

30. The third alleged detriment concerned Mr Keats' email to the Claimant of 9 June 2016. This read (ET Judgment, paragraph 54):

> **"Thank you for your email that Grace has forwarded to me.**
>
> **I need to reassure you that the issues that you allude to are under investigation and we need to allow due process to run its course; I have confidence in the integrity of the investigation process and so should you.**
>
> **You make reference to CTL and this is unhelpful as the individual is working under management instruction and supervision and carrying out tasks allocated to her. Appropriate steps have been taken to mitigate risks, whilst the safeguarding investigation is concluded and the agreement has always been that the CTL will not work directly with the service users on the ward. This does not preclude fulfilling other work relating to Cordelia House.**
>
> **May I ask if the statements in your email are based on your own observations or are you relaying information from others? If the latter, I would be very concerned as the staff on Cordelia seem to be raising issues with and expecting you to act as a conduit for communication, when in reality issues should be escalated directly by the staff concerned through the line management arrangements that I enclose. This may be putting you in a very comprising position [sic], because you do not work as part of the team on Cordelia and your role as YSF [Your Say Forum] representative does not provide you with a mandate to intervene with these types of issues - if you continue to allow staff to put you in this position, it may appear that you are targeting the CTL and I am sure that is not your intention?**
>
> **I am happy to discuss this with you at a mutually convenient date. (186)"**

31. The Claimant contended that this was materially influenced by the protected disclosure in his email to Ms Nyandoro of 2 March 2016. The Tribunal considered the chronology. Ms Nyandoro had forwarded the email of 2 March 2016 to Mr Keats. They decided to refer the matter to the Milton Keynes Adult Safeguarding Team to investigate and the Claimant was so informed.

32. On 8 June 2016, the Claimant emailed Ms Nyandoro expressing his concerns about the ongoing investigation on House D. As the Judgment records, he wrote in terms of his concern that, as Ms Miles was in control of House D, there was a risk of interference by her with evidence in relation to the safeguarding investigation. This email was forwarded to Mr Keats who responded with his email of 9 June 2016. The Claimant said that upon reading this email he felt intimidated, harassed and bullied.

33. The Tribunal concluded that the email was indeed threatening and a detriment and that it resulted from the protected disclosure in the email of 2 March 2016. Thus, it stated:

> **"88. In relation to Mr Keats' response on 9 June 2016, page 186, he was aware of the claimant's email the previous day, as it was forwarded to him. There was the 2 March 2016 disclosure in which he referred to information from others being forwarded to the claimant concerning Ms Miles. He knew that the claimant did have safeguarding concerns about Ms Miles. He also knew that the claimant was a YSF representative and was required to raise issues of concern of staff, yet he warned him about his conduct because he, apparently, no longer had an involvement in House D. The claimant was a representative and inextricably linked to the safeguarding issue concerning Ms Miles, yet Mr Keats wrote:**
>
> > **"This may be putting you in a very compromise position [sic], because you do not work as a part of team [sic] on Cordelia and your role as YSF representative does not provide you with a mandate to intervene with these types of issues - if you continue to allow staff to put you in this position, it may appear that you are targeting CTL and I am sure this is not your intention."**
>
> **89. We have concluded that this email was indeed threatening. It threatened the claimant because he had an interest in the safeguarding issue. It also threatened him because he was a YSF representative. The claimant was entitled to take the view that it was threatening and intimidating as Mr Keats stated he must not intervene in the very issues which were of concern to him. It was a clear warning not to get involved. As such, the claimant suffered a detriment as [a] result of the qualifying disclosure on 2 March 2016. This aspect of the claim is also [well]-founded."**

34. The claim having succeeded to the extent I have indicated, the Tribunal then considered remedy. It awarded a compensation of £7,500 for injury to the Claimant's feelings.

35. The first ground of appeal is that the Tribunal erred in law by failing to consider adequately or at all the Claimant's subjective belief in respect of the matters identified in the two categories relied on under section 43B(1)(b) and (f). For the purpose of this appeal, the relevant category is section 43B(1)(b), namely - and using shorthand - breach of legal obligation. Success on category (f) in respect of the disclosure of 29 October 2015 is itself dependent on success on category (b).

36. Counsel for the Respondent, Ms Barsam, points first to the authority identified by the Tribunal, namely **Eiger Securities LLP v Korshunova** [2017] IRLR 115, where Slade J following earlier authority observed that, save where obvious, the Tribunal must identify the source of the legal obligation and how the employer failed to comply with it. The Judge added that:

> **"46. … The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgment the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."**

37. Ms Barsam acknowledged that the Tribunal had made an unassailable finding of fact that the Claimant believed that the taking of food from a patient "*was a professional issue and a breach of the respondent's safeguarding policy*" (see ET Judgment, paragraph 26). However, that left open the question of whether he believed that the disclosed information also tended to show a breach of a legal obligation. In this respect, she pointed to the evidence and finding that the Claimant was an intelligent man who had studied the law of contract and tort for a year.

38. In paragraph 76 of the Judgment, and following reference to paragraph 2.6 of the policy document "Professional Boundaries", the Tribunal had stated that the Claimant:

> **"76. … asserted that Ms Miles' conduct in that regard was a breach of a legal obligation, as the policies were or likely to have been included in her terms and conditions of employment. He relied on pages 52, 60, 69, 70, 369, 372, 375, 379 and 395 already referred to in our findings of fact."**

39. In the following paragraph (77), the Tribunal concluded that the Claimant's belief to that effect was reasonable. However, the Claimant had given no such evidence. The only policy document to which he had referred in evidence was the policy document on professional relationship boundaries. All the other documents referred to in the Judgment - i.e. the Claimant's offer letter, the contract of employment, the employee handbook and other policy documents - had been produced after he had given evidence and then relied on by his Counsel in closing submissions. Furthermore, these documents all concerned the legal obligations of the Claimant rather than Ms Miles.

40. Turning to the notes of evidence given by the Claimant, these showed that he went no further than the statement, in answer to a question from the Judge, that a breach of the policy document would lead to disciplinary action. Ms Barsam agreed that breach of an employer's policy might have that result in a particular case, but it did not necessarily follow that such a breach involved a breach of contract. Disciplinary sanctions might be imposed for matters which did not constitute strict contractual obligations.

41. Thus the Tribunal had confused the question of the Claimant's subjective belief that the information tended to show breach of a legal obligation with his Counsel's submission that as a matter of law the policy terms were incorporated in Ms Miles' contract of employment. The Tribunal's evident acceptance of that legal submission was demonstrated by its conclusion in

paragraph 77 that the Claimant's belief was reasonable since "*Her taking the service user's food was in breach of her terms and conditions of employment, particularly in relation to gifts from service users*".

42. In my judgment, it is clear that the Tribunal did reach a conclusion that the Claimant had a subjective belief that Ms Miles' conduct was in breach of a legal obligation. That is apparent from a combination of paragraphs 76 and 77 and of the consequent question which it asked, namely, "*Was that belief reasonable?*" I also conclude that the Tribunal had adequate evidence to support that conclusion as to the Claimant's subjective belief. The notes of evidence demonstrate that the Claimant was not suggesting that Ms Miles' conduct was viewed by him simply as wrong or morally wrong or contrary to mere guidance. His evidence was that the conduct involved a breach of company policy. He identified one relevant policy and its provisions. As noted in cross-examination, he said that "any breach of policy would lead to a disciplinary action".

43. Whether or not disciplinary measures may be taken in respect of conduct which does involve a breach of a contract of employment, the disciplinary process would typically be the consequence of a breach of contract. In my judgment, that evidence is sufficient to establish a belief that the information tended to show a breach of legal obligation. True it is that the notes of evidence do not record him using the words "breach of legal obligation", nor for that matter "tendency to show" the same. However, to make any such requirement is both to confuse the substance with the form and to impose too high a requirement on the worker.

44. For this purpose, it is relevant to consider the policy arguments which the Court of Appeal accepted in **Babula v Waltham Forest College** [2007] ICR 1026. As Wall LJ stated at paragraph 80:

> **"80. … The purpose of the statute, as I read it, is to encourage responsible whistleblowing. To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute."**

This of course must apply equally to knowledge of the civil law.

45. Nor do I accept that the Tribunal's conclusion as to the Claimant's subjective belief is undermined by its finding that he is an intelligent man who had studied contract and tort law for one year, was able to understand and apply basic legal concepts and had demonstrated an understanding of the issues he was trying to convey. If anything, this background rather weakened the argument that his belief was limited to some unfocused sense of wrongdoing on the part of Ms Miles.

46. True it is that the documents relied on by the Claimant related to his own contractual position rather than that of Ms Miles. However there was unsurprisingly no suggestion before the Tribunal or here that her legal obligations were any different. Nor is there any independent challenge to the conclusion of the Tribunal on the issue of reasonable belief. Accordingly, that point takes the matter no further. I therefore reject the first ground of appeal.

47. The second ground is that when considering the ingredient of the public interest, the Tribunal again failed to consider the subjective belief of the Claimant. Section 43B(1) includes the requirement that the disclosure "*in the reasonable belief of the worker making the disclosure, is made in the public interest*". In respect of the disclosures of 22 and 29 October 2015, the

respective conclusions on public interest are contained in paragraphs 78 and 80 of the Judgment. Ms Barsam submits that in each case the Tribunal omitted consideration of the Claimant's belief and substituted its own belief that the disclosure was in the public interest. In any event, there was no evidence of the Claimant's belief in respect of the public interest.

48. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731, the Court of Appeal traced the history of the amendment which introduced the element of public interest including citation from *Hansard*. The purpose of the amendment was to restore the original intention of the **Public Interest Disclosure Act 1998** and to remove protection from disclosures which were made purely to pursue the worker's private or personal interest as opposed to the public interest (see paragraphs 12 to 13, and also paragraph 31). The Court then observed that, in the light of statutory language, a tribunal has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable (see paragraph 27). The Court noted "*All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker*" (paragraph 28).

49. In my judgment, proof that the worker did hold that belief cannot be dependent on the provision of a statement in those terms. That would be merely formulaic. The question of whether the worker held the relevant belief is ultimately a matter of inference for the tribunal to determine.

50. In the present case, the particulars of claim stated that:

> **"3. … The Claimant and his colleagues had a reasonable belief that the information disclosed was a qualifying disclosure and was, therefore, in the public interest for them to make the disclosure because it concerns breach of legal obligation and also they considered it a criminal offence. …"**

51. Whilst there is no such statement in the Claimant's witness statement, and it is ultimately for the Claimant to prove his case, it is striking that there was no cross-examination to the effect that his belief was confined to his private and personal interest.

52. Paragraph 78 of the Judgment then deals specifically with the concerns of the Claimant and Mr Cikolo. In my judgment, the third sentence of that paragraph constitutes, either expressly or by necessary implication, a finding that the Claimant had made the disclosure in the subjective belief that it was in the public interest to do so. As the Tribunal in effect concluded, the Claimant's concerns went beyond the private and personal or even the circumstances of the particular hospital. The evidence supported that conclusion.

53. As to the second disclosure of 29 October 2015, paragraph 80 includes the statement that "*In our view and with a reference to page 135, what he was saying was that he had concerns about the safeguarding issue and breach of a legal obligation*". Set against the evidence of his expressed concerns and the Tribunal's earlier observations in paragraph 78, that, in my judgment, constitutes a clear finding in respect of his subjective belief. Indeed, I see no factual basis upon which the Tribunal could, in respect of either disclosure, have reached an alternative conclusion that the Claimant did not act in this belief.

54. The third ground of appeal is that the Tribunal erred in concluding that the email of 2 March 2016 contained a disclosure of information. The conclusion in paragraph 83 was that in this email "*The claimant again repeated his concerns about the abuse of the service user*" and that "*He was alleging that the matter having been disclosed on 22 October, by 2 March 2016, nothing had been done by way of an investigation. He repeated his concerns about the failure to comply with a legal obligation and the respondent's failure to investigate*".

55. Ms Barsam submits that the email did not repeat concerns about the failure to comply with the legal obligation. The only relevant concern that was repeated was that there had been an abuse of a resident in Chadwick Lodge. However it did not identify the resident, the alleged abuser, what the abuse was or when it took place. This was analogous to the example given in **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] ICR 325 EAT, and cited in **Kilraine v London Borough of Wandsworth** [2018] IRLR 846, of a statement which merely took the form "*you are not complying with health and safety requirements*". As with that example, the email lacked the necessary specific factual content to amount to the disclosure of information.

56. Whilst in principle a disclosure could be read together with an earlier communication "embedded" within it (see **Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540), the Tribunal had wrongly aggregated the email with the earlier disclosure of 22 October 2015. The email did not suggest that the Claimant had made an earlier disclosure on 22 October or refer to his disclosure, but rather referred to the disclosures of others made "*in my presence*". That provided no basis for aggregation of the two disclosures.

57. For the reasons advanced by Mr Davey, I am quite satisfied that the Tribunal properly aggregated the two disclosures and reached an unimpeachable conclusion. On any fair reading, the email referred back to a previous report of an abuse of a service user at Chadwick Lodge; that the report had taken place at a meeting involving a number of members of staff, including the Claimant and that the Claimant had been unsuccessful in his attempts to get management to investigate the matter. That was the meeting on 22 October.

58. Indeed, the Respondent had evidently read this email as referring back to the 2015 disclosure concerning Ms Miles and FM. The email had prompted it to refer the matter to the Milton Keynes Adult Safeguarding Team with details of the alleged abuse and the individuals involved. Accordingly, I do not accept this ground of appeal.

59. The final ground is that the Tribunal erred in its conclusion that the Claimant suffered a detriment as a result of the disclosure email of 2 March 2016. Ms Barsam acknowledges that the Tribunal identified the correct test of material influence. However it misapplied that test. In the relevant paragraphs (88 and 89), it failed to explain how that email could have been a material influence on Mr Keats' detrimental email of 9 June 2016, i.e. three months later. As the Tribunal had found, that email was in response to the Claimant's email on the previous day (8 June 2016). That contained sharp and wider criticism of Ms Miles; and Mr Keats' responding email was to the effect that the Claimant was "targeting" her. There was no basis to conclude that the much earlier email of 2 March had any causative influence on this response.

60. I again disagree and conclude that this was a finding of fact which the Tribunal could properly reach. The Claimant's email of 8 June included a reiteration of the concerns expressed by him in his email of 2 March. Mr Keats, who had become Hospital Director shortly before that email, had responded to it by referring the matter to the Milton Keynes Safeguarding Team. Given the links of content between the Claimant's two emails, in each case forwarded to Mr Keats and producing a response by him, the Tribunal was fully entitled to reach the conclusion in which it did. There is no basis to interfere with that assessment.

61. For all these reasons, and notwithstanding the skilful presentation of the arguments by Ms Barsam, I conclude that the appeal must be dismissed.