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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
R Mott		**Secure Care UK Limited**

Held at Ashford **On 5 August 2019**

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: **In person**

For the Respondent: **Ms J Nevins, Solicitor**

RESERVED JUDGMENT

The decision of the tribunal is that the claim for unfair dismissal brought under section 103A of the Employment Rights Act 1996 is well founded and it succeeds.

REASONS

1. This is a claim for unfair dismissal brought by Mr Mott the Claimant following his dismissal on 13 November 2018. I heard evidence from Mr Robert Taylor, Executive Chairman of the Respondent. I also heard evidence from the Claimant and from Ms Dominique Saxelby who was formerly the HR manager of the Respondent.

2. The Claimant asserts that he was unfairly dismissed for making protected disclosures, in breach of section 103A of the Employment Rights Act 1996.

The Respondent says that he was dismissed by reason of redundancy. The Claimant had less than two years' service and the burden is upon him to show the reason for his dismissal.

3. The facts I found and the conclusions I have drawn from them are as follows.

4. The Respondent employs around 130 people and provides transport services to NHS trusts for people with mental health problems including people who are being detained under the Mental Health Act. Their activities are regulated by the Care Quality Commission, and the Respondent had received an adverse report in the Spring of 2018.

5. The Claimant formerly worked for the police. Mr Taylor's statement asserts that the Claimant initially started 'informally'. I am not sure what this means. During the course of the hearing the parties agreed that his employment commenced on 6 July 2018.

6. It is not in dispute that the Respondent was facing significant recruitment and retention problems during the course of the Claimant's employment particularly for mental health transport assistants ('MHTA's'). There were problems operating the control room whose function was to accept transport assignments and deploy staff.

7. The Claimant was recruited by Ms Dominique Saxelby, Human Resources Manager of the Respondent, with whom he was in a relationship. Ms Saxelby gave evidence at the tribunal. She described raising a number of health and safety issues with the Respondent over the course of her employment and also her efforts to address issues around the contracts of employment of staff and their policies and procedures. She was made redundant at the same time as the Claimant.

8. The Claimant had the role of Logistics Manager. He was tasked with managing the control room and looking after the vehicle fleet and the management of the head office building. It is also clear that he had been brought in to try and resolve some of the Respondent's operating issues and improve performance.

I find that he made immediate efforts to address the challenges that the Respondent was facing. He carried out a review of policies procedures and operational activity. He met with all the staff but was concerned about their level of knowledge of the regulatory environment in which they were operating.

9. In early July, soon after he started, the Claimant met with Mr Taylor who is employed by an investor in the business and who sits as a director and (currently) as executive chairman. The Claimant detailed the chronic staff shortages and stated that this would need to be addressed before the service would improve. He suggested that there was a need for an on-call manager to make sure that the operations were covered 24 hours a day. He also raised the issue of the long hours that MHTAs were working and that they were having inadequate rest breaks. He says that Mr Taylor advised him that the Claimant, Ms Saxelby and the Head of Finance would form a senior management team reporting to Mr Sanusi, who would take over as Chief Executive Officer. This was important as the Claimant had made it clear that he would need to have control over operational activity in order to change and improve what was happening.

10. The Claimant asserts that this conversation amounts to the first protected disclosure that he made (Disclosure 1). Mr Taylor does not deal with this discussion in his statement at all, but I accept that it took place at some point because he emailed the Claimant on 20 July 2018 and said 'Thanks for your time yesterday. I have been thinking about our conversation'. He said it was helpful to hear things from the 'front line' and with 'fresh eyes'. He recognised the issues and that problems would not get fixed overnight. He commented that 'there are financial and operational limitations to what we can do right now'.

11. On 21 July the Claimant emailed one of the operational managers, with a copy to Mr Femil Sanusi and Ms Saxelby with a number of queries about the shift arrangements for individual staff, asserting that the shift arrangements were not possible as staff would not have adequate rest breaks. He was concerned that this would place the Respondent in breach of the Working Time regulations (Disclosure 2).

12. On 31 July the Claimant emailed Mr Femi Sanusi who by this time was acting as Chief Executive Officer. He detailed problems in finding staff to cover the tasks assigned and asked 'what is the company line to our stakeholders in respect of our resourcing situation?' (Disclosure 3)

13. On 1 August 2018 the Claimant sent an email to Mr Sanusi in which he described the problems with the rotas and stated that he would not be able to deliver much in the way of improvements without first addressing 'what assets we have to deploy and when? (Disclosure 4).

14. On 2 August 2018 the Claimant emailed Mr Sanusi querying why staff were not being treated as employees, and asking questions about the advice that the Respondent had received on this matter (Disclosure 5).

15. On the same day he emailed staff warning them that if they were working for other employers, they had to inform the Respondent 'in line with the working time directive' (Disclosure 6).

16. On 14 August the Claimant emailed Mr Sanusi describing how much he was struggling with the staffing situation (Disclosure 7).

17. On 16 August the Respondent announced a new staffing structure. The Claimant and Ms Saxelby were perturbed by this. The new structure differed to the version that they had been discussing with Mr Sanusi and Mr Taylor. Under the earlier version, the Claimant and Ms Saxelby were shown as being part of a senior management team with the Head of Finance. Under the new version, the reporting lines did not differ: the Claimant would continue to report to Mr Sanusi, as would the Operations Managers for the North and South regions. However the Claimant was concerned that whereas there had previously been a 'dotted' reporting line from the two operations managers to him, and he had been considered to have a degree of authority over them and an ability to instruct them over the operational changes that he was implementing, the new structure showed all these managers on the same level, with the Head of Finance being above them and reporting to Mr Sanusi.

18. The Claimant and Ms Saxelby asserted that they had effectively been demoted at that meeting. Mr Taylor stated that the changes were minimal, but that for some reason the Claimant and Ms Saxelby had been seriously 'offended' by them. I find that the changes introduced were not substantial in that reporting lines, job title and salary remained the same. I do however accept that the Claimant perceived that his ability to bring about change within the Respondent's operations had been reduced as the effect of the new structure was to make it clear that he did not have any line management authority over the operational managers.

19. The Claimant had understood that he had been given authority by Mr Sanusi to recruit additional staff but on 21 August he was instructed that the number of posts would have to be cut. He expressed his unhappiness about this in an email to Mr Sanusi, copied to Mr Taylor, dated 22 August in which he said: 'in further cutting [the Control Room] establishment and with the numbers suggested I do not believe I can meet the Control Room objectives set by Bob or provide the service required to our staff and clients' (Disclosure 8). He questioned the new structure and said that he would not be able to deliver organisational change without the necessary authority to do so. He asked for instructions about the control room staffing situation.

20. On 11 September 2018 Mr Taylor and the Claimant had an email exchange in which Mr Taylor remarked that 'we are clearly making good progress which is very exciting to see'.

21. The Claimant went on holiday in September and returned on 24 September. He says that when he returned he found that staff were unhappy as they had been working excessive hours and that NHS customers had complained.

22. It is the Respondent's position, which I accept, that the financial situation had deteriorated. Management accounts received in September for the preceding months showed a significant loss. The evidence of Mr Taylor was that they started to contemplate redundancies. The Respondent produced a copy of a business plan emailed to an HR consultant on 25 September which proposed

the redundancy of the Claimant, Ms Saxelby and two others. Mr Taylor stated and I accept that by this point they had already considered the staffing structure of the company and had identified potential redundancies. The Claimant had been provisionally selected because he was on a high salary and it was considered that his role could be carried out by the CEO and one other person, whereas they could not afford to lose any 'revenue earning' staff. Mr Taylor added that the Claimant had done a lot of 'pointing out problems' but less of coming up with solutions. Ms Saxelby was identified as being at risk of redundancy as it was deemed possible to reduce the HR function but not the Finance function. One of the operational managers was also identified as being at risk of redundancy as according to Mr Taylor he was 'not doing much'.

23. Matters over staffing appear to come to a head on 26 September 2018. The Claimant says and I accept that Mr Sanusi had instructed him to inform a client that they had staff available to cover an assignment when they did not. He told Mr Sanusi that 'I do not work like this'. He went on to say that the Respondent was in breach of CQC regulations, health and safety law and working time regulations. He said that the health and safety of patients and staff was in danger. He threatened to contact the CQC and the Information Commissioner. (Disclosure 9). The Respondent argues that none of this was put in writing and that the conversation did not take place. Mr Sanusi did not give evidence about the conversation. I accept that it did take place first because Mr Sanusi was not present to provide his version of what happened, and second because the events of the following day.

24. On 27 September 2018 the Claimant, Ms Saxelby, the operations manager and one other were called into a meeting with Mr Taylor and Mr Sanusi. They were advised that they were at risk of redundancy. They were asked to leave the premises immediately, to return any company equipment and not to speak to other members of staff. By the time the Claimant got home, he realised that his email access and access to all the Respondent's systems had been removed. Mr Taylor agreed that this had been done, and stated that the Respondent was concerned that the Claimant would 'bad mouth' them because of the 'sort of man he was'. I find that this was a reaction to the conversation between the

Claimant and Mr Sanusi the previous day when he had threatened to report the Respondent to the CQC and the IOC.

25. The consultation process was outsourced to an HR company. A representative met with the Claimant on 1 October. The Claimant did not state that he believed that he was being dismissed for making protected disclosure, but did refer to the fact that he had a disability. By letter dated 7 November 2018 the Claimant was dismissed on the ground of redundancy.

26. In a letter dated 15 November, the Claimant appealed against his dismissal. He said that he believed that he had been dismissed because he had challenged the Respondent's willingness to breach health and safety, working time, employment and other laws.

27. The Claimant was invited to an appeal meeting on 19 December 2018 which the Respondent refused to adjourn. However when the Claimant turned up, travelling from Essex to Sussex to do so, there was no-one available to conduct the meeting. He did not attend the re-arranged meeting on 18 February. His appeal was rejected.

Decision

28. The Claimant asserts that the principal reason for his dismissal was that he was making protected disclosures. I must consider whether the disclosures he relies upon can amount to qualifying disclosures under section 43B of the Employment Rights Act 1996. The Claimant's position is that he made disclosures tending to show that the Respondent was in breach of a legal obligation, or that the health and safety of a person was being endangered.

29. Ms Nevins referred me to the case of *Cavendish Munro Professional Risks Management Ltd v Geld.* I have considered this authority and also the more recent Court of Appeal decision of *Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436.*

30. The case of *Kilraine* considered the *Cavendish Munro* decision and cautioned against drawing too rigid a line between an 'allegation' and 'information' that tended to show one of the matters set out at 43B. Lord Sales provided the following guidance at paragraphs 34 and 35 of the decision:

> *However, with the benefit of hindsight, I think that it can be said that para. [24] in Cavendish Munro was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that Cavendish Munro supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in Cavendish Munro also tends to lead to such confusion by speaking in [20]-[26] about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).*
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> *The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). **In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).** The statements in the solicitors' letter in Cavendish Munro did not meet that standard.'* (My emphasis).

31. In a number of the communications referred to above the Claimant expresses his concern about the staffing arrangements that are operating but I find that these do not amount to qualifying disclosures. Disclosure 1 relates to a preliminary conversation between the Claimant and Mr Taylor about the staff shortages, which they both recognised as being a problem. Disclosures 3 4 and 7 set out general concerns about the situation but no suggestion that a legal obligation is being breached or that health and safety is being endangered.

32. Disclosure 5 contains a query from the Claimant about the basis on which the Respondent were treating staff as workers but not employees. Although the

Claiamant challenges the advice received, he does not assert that the company is breaking the law or set out information that 'tends to show' that the position is wrong. His email is in the nature of a query.

33. Disclosure 6 is not a disclosure to the Respondent but an instruction to staff requiring them to inform the Respondent if they had other employment so that the working time regulations could be complied with. It does not contain information tending to show that the Respondent was breaking the law.

34. Disclosure 2 is different. The Claimant raised a number of queries about the rostering arrangements for particular staff. He sets out the factual situation in some detail and concludes: 'in short it is not possible for staff to be on a 24-hour retainer immediately following a rostered day shift and not possible for staff to be on a 24-hour retainer immediately following a night shift'. The Claimant clarified in his evidence that he meant that such arrangements breached the working time regulations. I find that the implication of this email is clear. Although the Claimant does not refer to the Working Time regulations explicitly, I find that the information that he includes in the email about the shift patterns 'tends to show' a breach of the regulations in relation to rest breaks. His assertion that the shift patterns are 'not possible' refers to the fact that he believed them to be unlawful.

35. Disclosure 8 is also of a different character. In addition to setting out information about the problems, the Claimant states clearly that the lack of staff meant that he could not 'provide the services required to our staff and clients'. I accept that the situation he describes 'tends to show' that the Respondent was in breach of legal obligations towards NHS clients and regulatory requirements imposed by the CQC.

36. The conversation between the Claimant and Mr Sanusi on 26 September 2019 which is not dealt with by Mr Taylor in his witness statement and which I have accepted took place, contained a number of statements about the legal obligations that the Respondent was breaching, and how this was putting staff

and patients at risk. I find that this conversation amounted to a protected disclosure.

37. I find that the Claimant had a reasonable belief that the chronic staffing and operational problems, which he sets out in some detail in the communications referred to above, tended to show that the Respondent was failing to abide by the Working Time regulations, in breach of CQC regulations (in relation to which the Respondent had received a number of Requirement notices) and in breach of health and safety law. The implications of the staffing problems were raised by the Claimant early on and repeatedly in the few months for which he was employed. He made it clear that staff and patient safety was a matter of real concern to him.

38. I also find that these disclosures were made in the public interest. The Respondent is engaged in work with highly vulnerable clients with serious mental health problems. He had concern not just for the safety of these patients during transportation but also for the staff dealing with them, who were required to work long hours and whose personal safety was sometimes jeopardised. An assertion that legal and regulatory requirements were not being observed in this complex area is plainly a matter of public interest.

39. The Claimant can only succeed in his claim for unfair dismissal if he can show that 'the reason (or if more than one the principal reason) for the dismissal is that the employee has made a protected disclosure'.

40. The case of *London Borough of Harrow v Knight [2003] IRLR 140* makes it clear that I should not apply a 'but for' test but that I should consider the mental processes of the decision maker in looking at the reason why a particular action was taken. The case of *Fecitt v NHS Manchester [2012] IRLR 64* makes it clear that there is a causal link if the protected disclosure materially influences in the sense of being more than a trivial influence, the employer's treatment of the whistle-blower.

41. I accept that the Respondent was in a serious financial situation by September 2018 and that a genuine redundancy situation had arisen out of a need to cut

costs. I further accept that the Respondent needed to retain a finance function, and that it could not afford to cut 'revenue earning' staff. Their attention therefore turned to the HR, logistics and operational functions within the company. I note also that the Claimant and Ms Saxelby were both earning high salaries.

42. Having said that, it is a matter of concern that no 'pools' for potential redundancies had been identified and that a questionable selection process appeared to have been carried out before the four members of staff were put at risk of redundancy. In the case of Ms Saxelby, there were four members of the HR team, two of whom were made redundant. The Claimant appears to have been treated as being in a stand-alone role although the work he had been doing was redistributed to other people. The operations manager for the South was put at risk because, according to Mr Taylor he had 'not been doing much'. His colleague in the North was not affected. It is also a matter of concern that Mr Taylor stated in evidence that the Claimant had been 'pointing out a lot of problems but not finding solutions'. This evidence suggested that rather than conducting an objective assessment of the Respondent's needs going forward, a number of subjective elements had been considered in relation to the employees put at risk. In the case of the Claimant, the fact that he had been 'pointing out problems' (in a number of communications some of which amounted to qualifying disclosures) clearly had a material effect on his selection.

43. I consider the circumstances that applied towards the end of September when redundancies were being considered. The Claimant had, on numerous occasions, expressed his concerns about the staffing situation within the company and the need for investment to address this. He had on at least two separate occasions suggested that the staff situation was putting the Respondent in breach of legal obligations.

44. There does also seem to have been a deterioration in the relations between the Claimant and the Respondent at this point. Although initially promised that he would be part of a senior management team with a mandate and authority to

bring about change and improve the service, by late August the Claimant was clearly unhappy with what had been happening. First, he had seen the new staffing structure which gave him less authority over the operational side (even if this did not amount to a demotion). Second, although he had understood that additional staffing resource would be provided, and so he had started to recruit, he was later told that the levels had been reduced (leading to the disclosure he made on 22 August 2018 in which he expresses his dissatisfaction in fairly strong terms).

45. Taking all these matters into account I find that the fact that the Claimant kept raising his concerns about the staffing levels and their impact had a more than trivial impact on the decision to provisionally select him for redundancy.

46. The Claimant's selection was not the end of the matter. The Respondent engaged a third party to carry out consultation and to advise them on a fair process. This suggests that a final decision to make the Claimant redundant had not been made prior to the meeting on 27 September 2018 when he was put at risk.

47. Just prior to that the Claimant had a confrontation with Mr Sanusi in which he said he would not lie for the company, that they were in breach of a number of obligations and were putting health and safety at risk, and that he was threatening to report them to clients and regulators.

48. I find that this made the Claimant's dismissal all but certain. Although he was informed the following day that a consultation process would commence, the fact that his access to the company systems was suspended and he was asked to return any equipment and not speak to staff suggests that there was almost no possibility that his employment would continue. Mr Taylor made it clear that these steps were taken because of a fear that the Claimant would 'bad mouth' them. Although the HR consultants continued to conduct the dismissal process followed by the appeal, this has the appearance of 'going through the motions', as perhaps exemplified by the fact that the Claimant was called to an appeal which the Respondent insisted he attended on a particular date, and then failed to show up itself.

49. I have considered the fact that other employees were made redundant at the same time. Does this show that the Respondent was not motivated by the fact that the Claimant had made disclosures when it decided to dismiss him?

50. Ms Saxelby's evidence which was largely unchallenged demonstrated that she too had raised a number of issues about health and safety and about working practices at the Respondent prior to her dismissal. She was selected for redundancy without all members of the HR department being put at risk.

51. The operations manager (south) appears to have been selected for redundancy largely on the basis of performance concerns, according to Mr Taylor.

52. I have to conclude from the Respondent's evidence that the entire process of redundancy selection was tainted by a significant degree of subjectivity relating to the Respondent's views of the actions and performance of these members of staff. Therefore I find that the fact that the Claimant was not alone in being made redundant does not lead me to a conclusion that his dismissal was unaffected by the disclosures he had made.

53. Having considered the chronology of events and the communications between the parties I conclude that the fact that the Claimant had made protected disclosures had a material influence upon his selection for redundancy and eventual dismissal. I find that his claim under section 103A of the Employment Rights Act 1996 is made out.

54. Ms Nevins invites me to consider *Polkey* and it is right that I should do so. I have found that a genuine redundancy situation existed in September 2018. The Claimant was a high earning member of staff. Had he not made any protected disclosures, there is a reasonable chance that he would have been made redundant anyway. I put this percentage chance at fifty per cent. That will have an effect on the level of compensation awarded.

55. There will need to be a remedy hearing to determine what award should be made to the Claimant. This is listed for **7 October 2019 at 10am** at the London South employment tribunal, Montague Court, London Road Croydon CRO 2RF.

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Employment Judge Siddall
Date: 6 August 2019