EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Alan Light	AND	Comeytrowe Equestrian Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol ON **20 August 2019**

EMPLOYMENT JUDGE Bax

Representation

For the Claimant: **Mr Light (in person)**
For the Respondent: **Mrs R Mohammed (solicitor)**

JUDGMENT

The Claimant's claim of unfair dismissal contrary to s. 103A of the Employment Rights Act 1996 is dismissed.

REASONS

The issues

1. In this case the Claimant, Mr Light, claims that he has been unfairly dismissed, and that the principal reason for this was because he had made a protected disclosure. The Respondent contends that the reason for the dismissal was misconduct.

2. At a Telephone Case Management Preliminary Hearing, which was held on 16 May 2019, Employment Judge Gray discussed the issues with the parties. It was confirmed that the Claimant had insufficient service to claim ordinary unfair dismissal and was bringing a claim of automatically unfair dismissal contrary to s. 103A of the Employment Rights Act 1996 only. The Claimant confirmed that he believed that his disclosure to the police on 21 December 2019 led to his dismissal. His employment had started on 10 July

2017. The Judge set out the agreed issues for the Tribunal to determine which included whether a protected disclosure had been made and whether the Claimant satisfied the criteria in s. 43G of the Employment Rights Act 1996. In the event that a protected disclosure had been made, the reason for dismissal was in issue.

3. At the start of the hearing the Claimant confirmed that he was relying on a disclosure made to the police in relation to the non-payment of deductions of his wages to the Child Maintenance service. He confirmed his case was that the only alleged disclosure that caused his dismissal was the disclosure to the police on 21 December 2018. He also agreed that, if there was no protected disclosure, his claim for automatically unfair dismissal would fail.

4. The Claimant also confirmed that he was not relying on s. 43H in respect of an exceptionally serious failure after the Judge gave examples from the IDS handbook that had been found to have been exceptionally serious.

5. It was clarified that the Respondent's position was that the disclosure to the police was not in the public interest.

6. The Respondent had difficulties with the attendance of one of its witnesses. It was agreed with the parties that because the issue of whether or not the disclosure to the police was a protected disclosure was self-contained and could determine the claim, it would be dealt with as a preliminary issue.

The Evidence

7. I heard evidence from the Claimant. I was referred to a Maintenance Payment Statement and also to the police log dated 21 December 2018 which confirmed that the Claimant had alleged that the Respondent had fraudulently withheld the deductions.

The Facts

8. I made the following findings on the balance of probability.

9. When the Claimant was asked why the disclosure was in the public interest, he said that it involved the welfare of a child and should the situation involve more than one employee, the company would have been subject to massive scrutiny. When asked what his position was if it was suggested that the matter was personal to him and his child, he replied again that if more than one had been involved it would be in the public interest. He later tried to say he was providing an example and that his, individual, situation was in the public interest. I do not accept that the Claimant was simply providing an example, when he said that if more than one employee had been affected it would have been in the public interest, on the basis that he mentioned this on a number of occasions and he only tried to qualify it once questioned about it. I find, on the balance of probability, that his original oral evidence was in his mind at the time he contacted the police.

10. The Claimant was questioned about the fact that, before the order deducting wages was made, there were already arrears of payments. The Claimant said that he and his former partner had not agreed the amount he should pay to her and that the Child Maintenance Service ("CMS") had assessed the amount as £110. He agreed in cross examination that it was a personal matter involving his son.

11. The Claimant said that he thought it was a criminal offence because when he spoke to CMS, they told him that money from wages should not be used for anything else and should not be used for investments or paying other bills. He was told that the CMS Fraud Department was investigating it because they had made multiple attempts to contact Mr Neeld, owner of the Respondent, but he had not responded. He also was told that there was a potential for a £1,000 fine.

12. I have not been provided with a copy of any order requiring the Respondent to make payments on the Claimant's behalf.

The law

13. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

14. Section 43G provides:

(1) A qualifying disclosure is made in accordance with this section if—
(a) . . .
(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
(c) that the worker has previously made a disclosure of substantially the same information—
(i) to his employer, or
(ii) in accordance with section 43F.
(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—
(a) the identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.
(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure

15. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

16. First, I had to determine whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of *Geduld-v-Cavendish-Munro* [2010] ICR 325 in light of the caution urged by the Court of Appeal in *Kilraine-v-Wandsworth BC* [2018] EWCA Civ 1346). In Kilraine it was held that an allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-

(f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on their own, but may constitute information if accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances.

17. Next, I had to consider whether the disclosure indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (*Western Union-v-Anastasiou* UKEAT/0135/13/LA).

18. I also had to consider whether the Claimant had a reasonable belief that the information that he had disclosed had tended to show that the matters within s. 43B (1)(a) and/or (b) had been or were likely to have been covered at the time that any disclosure was made. To that extent, I had to assess the objective reasonableness of the Claimant's belief at the time that he held it (*Babula-v-Waltham Forest College* [2007] IRLR 3412 and *Korashi-v-Abertawe University Local Health Board* [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk.

19. Next, I had to consider whether the disclosures had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, I had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see *Babula* and *Korashi* above). That test required me to consider his personal circumstances and ask myself the question; was it reasonable for him to have believed that the disclosures were made in the public interest when they were made.

20. The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Normohamed* [2017] IRLR 837 was of assistance. The Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure.

21. As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

22. At paragraph 31 Underhill LJ said that he did not think "*there is much value in adding a general gloss to the phrase 'in the public interest. … The relevant*

context here is the legislative history explained at paragraphs 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest."

23. Further at paragraph 36 to 37 Underhill LJ said:

"*36. …The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.*
37. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character [5]), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at paragraph 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

24. The factors referred to in paragraph 34 are:

(a) *the numbers in the group whose interests the disclosure served – see above;*
(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 – as Mr Laddie put it in his skeleton argument, 'the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest' – though he goes on to say that this should not be taken too far.

Conclusions

Did the Claimant disclose information?

25. The Claimant did disclose information that the Respondent had failed to pay the deductions to the CMS.

    In the Claimant's reasonable belief did the information tend to show that a criminal offence had been committed by the Respondent or that the Respondent was in breach of its legal obligations to pay the deductions to the CMS?

26. The Claimant having been told that the CMS fraud service were investigating reported the matter to the police. I find that he reasonably believed that an offence had been committed.

    Did the Claimant reasonably believe the disclosure was made in the public interest?

27. The Claimant accepted that the non-payment to the CMS was a personal matter involving him and his son. He repeatedly said that if more employees had been affected by non-payment that it would have been in the public interest. The Claimant's reference to 'if non-payment had affected more employees', was significant because it tends to show that he did not reasonably believe that the disclosure was in the public interest. After giving his evidence the Claimant said that he had not considered the disclosures to Mr Neeld on 1 December 2018 and Mrs Neeld on 20 December 2018 to have been in the public interest at that stage, but things changed when he reported it to the police. I take into account that the Claimant says that it is a criminal offence, however if convicted the maximum penalty was a £1,000 fine which is at a level for the least serious offences.

28. In this case the Claimant contacted the police in relation to a matter personal to him and his child. It is necessary to consider whether such a report had a wider public interest. No other employees were affected in a business that employed 6 or 7 people, including the owners. Taking into the account the nature of the allegation and that at best it is one of the least serious offences and that in his evidence the Claimant repeatedly referred to if more employees had been involved it would have been in the public interest I am not satisfied that he had a reasonable belief that it was in the public interest at the time he contacted the police.

    Was it a protected disclosure?

29. Accordingly, I find that this did not constitute a protected disclosure within the meaning of the Employment Rights Act 1996.

30. It is therefore unnecessary to consider whether s. 43G of the Employment Rights Act 1996 applied to this case.

31. As conceded by the Claimant at the start of the hearing, if the disclosure to the police was not a protected disclosure, he had insufficient service to bring

a claim for ordinary unfair dismissal. He only relied upon the protected disclosure to the police as the cause of his dismissal. In consequence of my finding, the Claimant is unable to prove that he was dismissed because he made a protected disclosure and therefore the claim is dismissed.

32. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 6; the findings of fact made in relation to those issues are at paragraphs 8 to 12 ; a concise identification of the relevant law is at paragraphs 13 to 24; how that law has been applied to those findings in order to decide the issues is at paragraphs 25 to 31.

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Employment Judge Bax

Date: 21 August 2019