Appeal No. UKEAT/0061/19/BA

EMPLOYMENT APPEAL TRIBUNAL

7 ROLLS BUILDING, FETTER LANE, LONDON EC41 1NL

At the Tribunal
on 25, 28 June 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

NASUWT — APPELLANT

MR RICHARD HARRIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROBIN ALLEN QC Instructed by: Slater and Gordon UK Limited 50-52 Chancery Lane London WC2A 1HL
For the Respondent	MR DANIEL BARNETT

SUMMARY

Interim relief – protected disclosure

The Claimant was employed as a branch officer of the Respondent union. Following a report that he had driven off in his 'company car' after chairing a meeting of his own union (GMB) at which he had been drinking, the Respondent's General Secretary reported the drink/driving allegation to the police; and in a letter to the Claimant advised him of this and required him to return the car. The Claimant replied in terms which included the allegations that the General Secretary had committed the criminal offence of wasting police time; that her instruction in respect of the car was a breach of his contract of employment; and that he was being treated this way because of his trade union activities. The Respondent dismissed the Claimant. He brought claims of automatic unfair dismissal on the grounds of protected disclosures (s.103A ERA), alternatively participation in trade union activities (s.152 TULCRA). He applied for interim relief in respect of the claim based on protected disclosures (s.128 ERA). He did not have the necessary certificate for an application in respect of the claim based on trade union activities (s.161(3) TULCRA). The ET granted the s.128 application, holding that the Claimant had the requisite chance of success at full trial, and made an order for the continuation of his contract of employment.

The Respondent appealed, contending that the ET's conclusion that he had a 'pretty good chance' of success (Taplin v. C. Shippam [1978] ICR 1068 and subsequent authorities) was perverse in respect of the ingredients of (1) reasonable belief as to (i) tendency to show commission of a criminal offence (s.43B(1)(a) ERA) and/or (ii) the disclosures being made in the public interest; and/or (2) the principal reason for the dismissal being the alleged protected disclosures.

The EAT allowed the appeal, upholding the Respondent's arguments on (1) but not (2). The order for interim relief was accordingly set aside.

UKEAT/0061/19/BA

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Respondent trade union against a Decision of the Employment Tribunal at Exeter (Employment Judge Housego) on 12 December 2018, with Written Reasons sent to the parties on 11 January 2019, whereby interim relief was granted to the Claimant pursuant to ss.128-130 **Employment Rights Act 1996** following his dismissal on 25 October 2018. The relief which was granted was an Order under s.129(9) for the continuation of Mr Harris' contract of employment and for pay and other benefits due under his contract from his date of dismissal until the determination or settlement of his claim.

2. The Claimant is a union official employed by the Respondent. Being employed by a trade union, it is necessary for him to be represented by another union. In this case, along with many other employees of the Respondent, the Claimant is a member of the GMB. At the date of dismissal the Claimant had been continuously suspended from his employment with the Respondent since 15 November 2017. There were three separate investigations concern alleged financial irregularities, representation of individuals while suspended and circulation of malicious emails. Thus relations between the Respondent and the Claimant were not good. Furthermore, pending resolution of the disciplinary matter, the GMB had decided not to have contact with him.

3. On the early evening of 8 October 2018, the Claimant attended a meeting of the GMB which was held at a pub near the headquarters of the Respondent in Birmingham. Following the decision taken by the GMB, he had not been invited to the meeting. The Claimant took an active part in the meeting and indeed took the chair. The Claimant drank Guinness in the course of the meeting, on his account 2 pints together with the buffet food that was available. When the meeting was over he drove off in his 'company car' and visited the Respondent's

Assistant General Secretary Mr Jim Quigley in Coventry, before returning to his home in Somerset.

4. By letter on the following day (9 October) from the Respondent's General Secretary Ms Chris Keates to the Claimant, she stated:

> **"Dear Richard,**
>
> **A further matter concerning your conduct has drawn to my attention.**
>
> **I understand that you attended a meeting of the NASUWT GMB Branch at the Generous George Pub on EP October 2018 at which you apparently consumed four pints of Guinness and then drove away in the car provided to you by your Employer.**
>
> **This is clearly a serious criminal offence and you should be aware that a person present at the GMB meeting was so concerned by your conduct that they informed the police. You should also be aware that your Employer has also now contacted the police.**
>
> **You will appreciate that your Employer not only has a responsibility to ensure your health and safety whilst driving an NASUWT vehicle but also a responsibility towards other road users. Consequently, I have taken the decision to rescind your use of the NASUWT vehicle provided to you and have arranged for Zenith to collect this on a date within the next few days which I will communicate to you in due course and I expect you to facilitate the collection of the vehicle.**
>
> **To be absolutely clear, I am also issuing you with the express instruction that you must not drive the vehicle registration number AK15 UCZ for any purpose whatsoever from the date of this letter.**
>
> **If you consider that you have any issue with regard to excessive alcohol consumption then I strongly advise that you discuss this with a medical practitioner or with the EAP on 0800371540.**
>
> **Given the number of allegations of potential gross misconduct that you are currently facing, I do not propose formally to investigate this. However, I reserve the right to make reference to it in any disciplinary procedures that may take place subject to the outcome of the current investigations.**
>
> **Yours sincerely,**
>
> **Chris Keates (Ms)**
>
> **General Secretary"**

5. As to the information about the amount of drink taken and the subsequent conduct, the witness statement of Ms Keates said that she was informed of this by Mr Stephen Brown, Chair of the GMB branch at the Respondent, in an email and subsequent telephone conversations on the morning of 9 October. Mr Brown had not been present at the meeting but it had been reported to him by somebody who was present. This was Mr Justin Adams, the branch joint

secretary. Ms Keates had then spoken to Mr Adams. He stated that during the evening the Claimant had consumed 3-4 pints before driving away; and that this had been reported to the police. Mr Adams' witness statement states that when he arrived at the meeting the Claimant was drinking a pint of Guinness; and that he then drank at least 2 further pints when chairing the meeting. Members had expressed to him their concern about the potential danger to himself and others by driving in those circumstances. Accordingly, shortly after the meeting, he (Mr Adams) phoned Crimestoppers for advice. He was advised to report to the police by calling 101, which he did. Mr Adams later informed Mr Brown of all this.

6. By email reply dated 16 October the Claimant responded to Ms Keates in terms which are summarised in the Judgment (paragraph 16) as follows:

> **"On 16 October 2018 the Claimant replied to Ms Keates by email. It is this email that is said to contain the pid. It contained a series of matters:**
>
> **16.1. This was a defamatory statement.**
>
> **16.2. He asked who made the allegation.**
>
> **16.3. He correctly pointed out that anonymous allegations were not acted on, as a matter of policy, and asked who had made it.**
>
> **16.4. He complained against the person making the allegation, under the bullying and harassment policy, and as a grievance.**
>
> **16.5. He complained against Ms Keates for reporting him to the police. This was stated to be a protected disclosure as it was a malicious lie and a waste of police time which was a criminal offence.**
>
> **16.6. It was said also to be a detriment related to his trade union activity.**
>
> **16.7. He said the he declined to resign in response to what he said was a fundamental breach of contract.**
>
> **16.8. If his requests were not met he would circulate all members of the union, and the National Executive, asking the latter to suspend her, and go to the press, as further pid.**
>
> **16.9. She had no right to remove his vehicle which was his contractual right.**
>
> **16.10. As a solution, it would end the matter if she apologised, withdrew the allegation made to the police, said who had made the allegation, and rescinded the instruction to give up the company car."**

On the same date he attached this document in an email to members of the Respondent's National Executive Committee. Ms Keates replied, briefly, on 18 October.

7. There followed a series of meetings with the Respondent's National Officers and Staff Review Committee (SRC), all held on 22 October. These culminated in a decision to dismiss the Claimant with immediate effect. The dismissal was notified by letter dated 24 October which stated that "It is quite evident from your email 16th October that you have destroyed the mutual trust and confidence between the NASUWT as your employer and you" and accepted that conduct as bringing the employment to an end. The Claimant responded in detail on 31 October in terms which were reflected in his ET1 claim form presented on 30 October.

8. By his ET1 he claimed automatic unfair dismissal on two alternative bases. First, that the principal reason for his dismissal was that he had made protected disclosures in his email of 16 October 2018 : s.103A **Employment Rights Act 1996.** Alternatively, that the reason or principal reason was that he had taken part in trade union activities : s.152 **Trade Union and Labour Relations (Consolidation) Act 1992.** On either alternative, interim relief was claimed pursuant to the respective provisions in ss.128-132 **Employment Rights Act 1996** and ss.161-166 the **1992 Act**.

9. The application for interim relief under the **1992 Act** could not be pursued, as there was no certificate from an authorised official of the union (GMB) as required by s.161(3) **1992 Act**. The application accordingly proceeded under ss.128-132 **Employment Rights Act** and was heard on 12 December 2018.

10. There is no dispute that the Employment Tribunal identified the relevant statutory provisions in the Employment Rights Act 1986, namely :

Section 103A :

> **"An employee who is dismissed shall be regarded for the purposes of this Part 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"**

Section 43B(1) :

> **"In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –**
>
> **(a) 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,**
>
> **…(d) that the health or safety of any individual has been, is being or is likely to be endangered"**

Section 129(1) :

> **"This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find - (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—(i) section…103A."**

11. The Claimant alleged that his disclosures in the 16 October email fell within s. 43B(1)(a)(b) and (d), i.e. that in his reasonable belief the information therein contained tended to show that the Respondent had (a) committed the criminal offence of 'wasting police time'; (b) failed to comply with its legal obligation in respect of his company car; and (d) by its conduct endangered his health and safety. I will refer to these three categories without necessarily, on each occasion, elaborating their full ingredients.

12. It was not in dispute that the disclosures were made to his employer within the meaning of s.43C. The Tribunal identified the test under s.129(1) in these terms:

> **"7. There has been case law about exactly what "*it is likely*" means. It is not the balance of probabilities. It is not the criminal standard of "*beyond reasonable doubt*". It is somewhere in between. Whether that is "*a pretty good chance of success*" or other formulation does not really assist when the statute uses a word of simple English: "*likely*". Reformulating the test seems to me unhelpful, as it did to Mr Recorder Luba QC when suggesting those words. Perhaps "*probable*" conveys a similar meaning. What is clear is that this is not a low hurdle – it is a "*comparatively high*" test.**
>
> **8. My task in dealing with an application such as this is to do the best I can with such material as the parties are able to deploy by way of documents and argument in respect of their respective cases. I must then make as good an assessment as I am promptly able of whether the Claimant is likely to succeed in a claim for unfair dismissal based on public interest disclosure. The test is not whether the Claimant *is* ultimately likely to succeed in his complaint but whether it "*appears*" to me that it is "*likely to succeed*". This requires an expeditious summary assessment as to how the matter looks to me on the material that I have. Of necessity this involves far less detailed scrutiny of the respective cases and the evidence than will ultimately be undertaken. I have to do the best I can with the untested evidenced advanced by each party."**

13. By footnote to those paragraphs the Tribunal cited in support the decisions in **London City Airport Ltd v Chacko** [2013] IRLR 610, **Wollenberg v Global Gaming Ventures (Leeds) Ltd and Herd** [2018] UKEAT/0053/18/DA and **Dandpat v University of Bath** [2009] UKEAT/0408/2009.

14. At this point I observe that the phrase 'a pretty good chance of success' first appeared in **Taplin v C Shippam Ltd** [1978] ICR 1068; and that subsequent authorities have essentially reaffirmed that test over the years. Thus in **Wollenberg**, HH Judge Richardson stated at [25]:

> **"…Put shortly, an application for interim relief is a brief urgent hearing at which the employment judge must make a broad assessment. The question is whether the claim under section 103A is likely to succeed. This does not simply mean more likely than not. It connotes a significantly higher degree of likelihood. The Tribunal should ask itself whether the Applicant has established that he has a pretty good chance of succeeding in the final application to the Tribunal."**

15. On behalf of the Claimant Mr Daniel Barnett submitted that the Tribunal appeared to have proceeded on a basis more favourable to the Respondent than the test required under s.129. Thus in paragraph [29] it asked itself the question 'Were qualifying disclosures made?' and proceeded to answer that question. However I note that in another paragraph [34] the Tribunal used the statutory language of 'likely'. I conclude that the Tribunal in fact approached

A the first issue on the correct basis of the s.129 test; just as it clearly did when it proceeded to the causation issue.

B 16. Given the interim and summary nature of the application, the Tribunal rightly heard no oral evidence and made its assessment on the basis of the papers, including the witness statements and the submissions by Counsel then instructed on behalf of each party. Counsel in this appeal did not appear below.

C

17. The Tribunal held that the 16 October e-mail contained disclosures within the categories (a) and (b), or at least satisfied the 'likely' test for that purpose. It rejected the claim within

D category (d), which accordingly needs no further consideration.

18. As to category (a), it stated:

> **"33. Taking first the matter said to be a criminal offence pid. It was reasonable of the claimant to believe, in the circumstances of this case, that the allegation of drink driving was malicious and that it was malicious of the General Secretary herself to report it. She was doing so on two reports, one being double hearsay, and to no point as by the time she so decided it was the afternoon of the next day, and so there was no possibility of any action being taken by the police. The claimant was not to know that the police would be so disinterested that they would tell the respondent to log it on a webpage and that the respondent could not work out how to do it.**
>
> **34. Wasting police time is a topic that makes the headlines. The Claimant knew that the General Secretary had no reason to be helpful to him and is likely reasonably to have believed that she was doing so maliciously: therefore he was reasonable to think that it was not a genuine report: and that would (if so) be to waste police time.**
>
> **35. It was a disclosure, because it was sent to people who did not know about it (the Committee members).**
>
> **36. The disclosure was in the public interest: that it was made in the context of an employment disagreement does not preclude that conclusion. The General Secretary of the NASUWT is the leader of a union with several hundred thousand members, and those members are teachers, each of whom will teach 20 or 30 children each, all of whom have families. If the General Secretary of such a union were to be wasting police time, that is by its very description a matter of public interest."**

19. As to category (b), it stated:

> **"37. Secondly the asserted breach of legal obligation in respect of the car: the claimant had a contractual right to the car. He was reasonable to think that it could not unilaterally be taken from him by an executive action by the General Secretary without any process, and with no findings of fact. The letter which starts off with "*apparently*"**

> **then states as fact that he had "*clearly*" committed a serious criminal offence. He was reasonable to consider that there was no genuine reason to do this without proper process, that it was being used as a pretext to advance the dispute between them. The claimant thought he had some proprietary right to the car. The contractual right to the use of a company car does not, of course, confer any proprietary (ownership) rights in the vehicle itself, as the claimant was asserting. He did not have to be right. He just has to have a reasonable belief in what he was saying. It seems to me that a Tribunal will find that he did have that reasonable belief. It is common ground that he had used the same car for some years. Ms Keates was unhappy about how he looked after it (or did not do so). Paragraphs 17-22 of her witness statement set out her unhappiness about this over a whole closely typed page. It is not unnatural for him to have come to regard it as "*his*" car.**
>
> **38. Was this pid in the public interest? There is case law about whether something in the private interest of the employee may also be in the public interest, to the effect that it is all a question of scale. The larger the number of people whose interests are engaged by a breach of contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest. In this case, if it was a private sector employer, no. For a union representing 300,000 or more teachers, treating its own employees this way, yes. There is a broader aspect to this matter than the interests of the Claimant. The whole scenario has "*public interest*" written through it. As indicated above, quite apart from the 300,000 members, the public has an interest in the respondent as the largest teaching union, and how it runs itself. Almost everyone has a connection with a school age child somewhere in a family or friendship circle. It is a public interest matter how the biggest teaching union conducts itself. This is far wider than one of a group of managers of estate agents. Therefore this also was a public interest disclosure."**

20. The Tribunal then considered the causation issue, i.e. whether the Claimant had a 'pretty good chance of success' of establishing the necessary causal link between the protected disclosures which it had found likely to be established and the decision to dismiss. In doing so, the Tribunal noted the Claimant's alternative case that he had been dismissed for his trade union activities and observed 'He may be right' [56]. It continued that that would be likely to be fatal to his claim for interim relief if Ms Keates had dismissed him. However she did not have the authority to do so and it was the SRC who had dismissed him. In any event : **"Even if the claimant thought it was trade union related activity that caused his dismissal, the interim relief is sought because of the reason for the respondent, not what the claimant thought it was.** [57]**.**

21. The Tribunal concluded that it was likely that the decision to dismiss was by reason of protected disclosures within the Claimant's 16 October 2018 email. Thus:

> **"58. Accordingly it is likely that the decision to dismiss was by reason of the email of 16 October 2018. That contained the public interest disclosures. That does not necessarily mean that the reason was those public interest disclosures. The respondent says that it was the *manner* in which he wrote that led to the dismissal. Without knowledge of the history that led up to this that cannot be reasonable, as set out above. It also is to ignore**

the ending of emails to General Secretary and Committee with emollient overtures. That reason also is not enough to refuse the application.

59. The reason the Staff Review Committee objected so strongly was that the claimant said that he would go to the press if his public interest disclosures were not acted on. They had no intention of acting on them. That is the principal reason that leaps from the pages. Accordingly it is likely that the principal reason for the dismissal was the public interest disclosures made by the claimant.

60. This last is an important point. The claimant had threatened to go public – to the press – but he had not done so. He had threatened to do so if his pid was not acted upon internally. The Committee refused to do so, and dismissed the claimant instead, and that was because of the pid in his email to them."

22. The Respondent challenges each of these conclusions. As to the finding concerning a protected disclosure within category (a), the 16 October e-mail in particular states :

"Passing on a malicious lie to the police involves wasting police time, a criminal offence."

"I believe you maliciously made that report to the police simply because I am President of the GMB branch who led a meeting to discuss GMB's strike action against NASUWT. It is an extraordinary thing for you to have done. I believe it a detriment to me because of my trade union activity and it is a reprehensible act for a Trade Union General Secretary to have done."

"In your letter, you make a serious and false allegation that I 'consumed four pints of Guinness and then drove away in the car provided to you by your employer'"

and that the anonymous person who had made the allegation **"…has made up a lie to harm my professional standing and reputation"**

and that **"…you have accepted a malicious complaint of drink driving."**

23. The Respondent contends that there was no basis to conclude that the Claimant had a 'pretty good chance' of establishing that in his reasonable belief the disclosure about wasting police time (i) tended to show that a criminal offence had been committed, or (ii) was made in the public interest.

Respondent's submissions

24. On behalf of the Respondent Mr Robin Allen QC of course acknowledged that, even at the trial, it was not necessary to establish that a criminal offence had been committed by Ms Keates. As was stated by Wall LJ in **Babula v Waltham Forest College** [2007] EWCA Civ 174:

> **"Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable. neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence - is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute."** [75]

25. However Mr Allen submitted that if a complaint of a criminal offence is made when the offence does not exist in law, that fact will impinge on the overall assessment of the reasonable belief of the whistleblower. It would be inconsistent with the serious purpose of the legislation to enable whistleblowers to make allegations of crime without making a serious attempt to understand what they are alleging. Random, broad-based accusations of crimes that do not exist are unlikely to be objectively reasonable, however much subjectively the complainant believes them to exist and to have been committed.

26. There was no offence of 'wasting police time'. The only potentially relevant offence was contained in s.5(2) **Criminal Law Act 1967**. This provides:

> **"Where a person causes any wasteful employment of the police by knowingly making to any person a false report tending to show that an offence has been committed, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police inquiry, he shall be liable on summary conviction to imprisonment for not more than six months or to a fine of not more than level 4 on the standard scale or to both."**

Mr Allen emphasised the words 'knowingly' and 'false report' in the ingredients of that offence. The Claimant had not referred the Tribunal to that provision; nor had the Respondent done so. The Judgment simply referred to 'the matter said to be a criminal offence pid' [33]; and stated that 'Wasting police time is a topic that makes the headlines' [34]. In consequence there had been no consideration of the ingredients of the only relevant offence.

27. The Tribunal had determined the question by reference to the Claimant's case that Mr Adams' allegation of drink-driving had been false and malicious and that Ms Keates had

then maliciously reported it to the police. Without any reference to the only relevant statutory provision there was no consideration of whether Ms Keates had knowingly made a false report tending to show that an offence had been committed; nor therefore any consideration of whether the Claimant could have had a reasonable belief to that effect.

28. In this respect I had invited submissions in respect of the guidance in respect of s.43B claims, as set out in the judgment of HH Judge Serota QC in **Blackbay Ventures Ltd v Gahir** [2014] ICR 747. The guidance includes: **'Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation."** [98.5]

29. Mr Allen submitted that in the present case this required the identification of s.5(2) CLA 1967 for the purpose of assessing the reasonable belief of the whistleblower. In any event, and putting aside the provisions of s.5(2), there was no basis to conclude that the Claimant could have had a reasonable belief that Ms Keates had committed any criminal offence in making the report to the police. On the evidence before the Tribunal, a person (Mr Adams) who had witnessed the Claimant drinking at least 3 pints in the pub had himself made a report to the police and had then informed Mr Brown. Ms Keates had in turn received the report of drink-driving via Mr Brown. Whilst that report was 'double hearsay', she had then spoken to Mr Adams, who had told her that the Claimant had consumed a minimum of 3 pints before he drove off. The Claimant in his own evidence now accepted that he had had 2 pints. In her letter of 9 October Ms Keates had referred to the responsibility of the Respondent to ensure the Claimant's health and safety whilst driving its vehicle and also its responsibility towards other road users. Given the information that Ms Keates had received, the drinking which the Claimant now acknowledged and the Respondent's duty as employer of the Claimant and owner of the car, both to the Claimant and to the general public, there could not have been any

reasonable belief that she acted maliciously and/or stated any falsehood or in any way committed a criminal offence, however defined.

30. As to the reasonableness of Ms Keates' conduct, Mr Allen also pointed to the Highway Code Rule 95 which states: 'Do not drink and drive as it will seriously affect your judgement and abilities' and the national Drinkaware website which states 'Even small amounts of alcohol affect your ability to drive and the only safe advice is to avoid any alcohol if you are driving.'

31. By contrast, in respect of his beliefs at the time of the 16 October email, the Claimant in his witness statement said:

> **"I have no doubt that the NASUWT contacting the police to report me for drink driving was a waste of police time as the police would not have been able to take any useful action on this matter because the driving concerned took place the previous day."**

In making that statement he was in effect seeking to take advantage of the passage of time between his driving and the report the following day. That was not reasonable. Furthermore, at that stage he had challenged the allegation of drinking 4 pints but had not acknowledged any drinking by himself that evening. In any event, even if the passage of time precluded the investigation for drink-driving, it remained entirely appropriate for Ms Keates to have reported the matter. All in all, the Claimant cannot have believed, alternatively had a reasonable belief, that any criminal offence had been committed. There was neither a 'pretty good' nor any chance of a finding to that effect at trial.

32. In reaching the contrary conclusion the Tribunal had observed that Ms Keates had made the report to the police on the basis of two reports, one being double hearsay, and at a time when there was no possibility of action being taken by the police [33] and that **"The Claimant knew that the General Secretary had no reason to be helpful to him and is likely reasonably to have believed that she was**

doing so maliciously: therefore he was reasonable to think that it was not a genuine report: and that would (if so) be to waste police time." [34].

33. The fact that the first report from Mr Stephen Brown was 'double hearsay' was of no significance when the second had come direct from Mr Adams with his account of at least 3 pints. The Judgment made no reference to the detail of his account, which now had support from the Claimant's belated acceptance that he had had two pints. It took no account of the position in which Ms Keates found herself as General Secretary of the union when she received and then verified the information about the Claimant's conduct. It was no answer that her report was to the police the next day. There was no basis for the conclusion that the Claimant could reasonably have believed the report not to be 'genuine'.

34. There was equally no basis for the Judge's conclusion in respect of the ingredient that, in the reasonable belief of the Claimant, the disclosure was in the public interest. The leading decision in **Chesterton Global Ltd v Nurmohamed** [2017] ICR 731 was briefly referred to in the Judgment: paragraph 38 and footnote 23. In **Chesterton** Underhill LJ made clear that **"...the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest."** He continued that the essence of the 2013 amendment was to correct the position **"…that a worker could take advantage of 'whistle-blower protection' where the interest involved was personal in character. Such an interest does not change its character simply because it is shared by another person"** : [36].

35. Underhill LJ continued:

> **" The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because**

> **the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never."** [36]

The question was to be answered by consideration of all the circumstances in the particular case. Counsel's four-fold classification of relevant factors **'…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"** [37].

36. Those four factors were (a) the numbers in the group whose interests the disclosure served (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed (c) the nature of the wrongdoing disclosed and (d) the identity of the alleged wrongdoer : [34]. In agreement with Underhill LJ, Beatson LJ described this as a 'more nuanced approach' to the question : [44].

37. Mr Allen submitted that, set against **Chesterton,** the Tribunal was wrong to state that the transition from a private to a public interest was "all a question of scale" (Judgment para. 38). The Judge had in effect focused on numbers and failed to take the necessary nuanced approach. This error affected its consideration of the issue in paragraphs 36 and 38. As to paragraph 36, the fact that Ms Keates was General Secretary of a union whose large membership was of teachers, who in turn each taught children and had families, provided no basis to conclude that this took it beyond the context of a private employment disagreement. The statement that wasting police time by the General Secretary was "by its very description a matter of public interest" was equally unsupportable.

38. As to paragraph 38, neither the size of the Respondent's membership nor the "other features of the situation" which it identified could reasonably take the disclosure into the sphere

of public interest. Its status as a union, rather than a private employer, and the reference to connection with school age children "in a family or friendship circle" (paragraph 38) in each case provided no basis for the conclusion reached. As a matter of substance this could only be viewed as a personal employment issue between the Claimant and his employer.

39. As to the finding on category (b) - i.e. breach of contract in respect of the car - the challenge is to the Judge's conclusion on the ingredient of public interest. In this case Mr Allen pursued the same essential arguments. There was no basis for the conclusion that the Claimant had a 'pretty good chance' of establishing that the Claimant had a reasonable belief that his disclosure in respect of the Respondent's interference with the use of the car was made in the public interest.

40. The final ground of appeal challenges the Judge's conclusion on the causation issue, namely whether the Claimant had a 'pretty good chance' of establishing that the alleged protected disclosures were the reason or principal reason for his dismissal. Mr Allen's essential argument is that the Tribunal's conclusion failed to take account of the fact that the Claimant's primary case was that the principal reason for his dismissal was his trade union activity. The only reason that the claim for interim relief had not been advanced on that basis was because of the absence of the requisite certificate under s.161(3) **1992 Act**. The primacy of the case based on trade union activity was to be seen in the Claimant's 16 October email ("I believe you maliciously made that report to the police simply because I am President of the GMB branch who led a meeting to discuss GMB's strike action against NASUWT") and was followed through into the particulars of claim, albeit not in the ordering of the alternatives in the prayer for relief.

41. The Judgment had noted at [4] that:

> **"He also claims that trade union activity is part of the reason why he was dismissed, but did not provide the necessary certificate for the application for interim relief, and so that part of his claim is not for consideration, save that if it appears that a trade union reason is "*likely*" to be the reason for dismissal that may undermine the claim that it was "*likely*" to be for a pid reason."**

42. However, when considering what was the principal reason for dismissal, the Tribunal had brushed this aside on the bases that Ms Keates did not have the authority to dismiss him and that he had been dismissed by the SRC and/or that the Claimant's belief in respect of the reason for his dismissal was not material. The Tribunal had failed to take account of this alternative reason for dismissal which the Claimant had presented and/or had failed to give adequate reasons as to how it reached the conclusion that the principal reason was the alleged protected disclosures.

Claimant's submissions

43. In support of the reasoning and conclusion of the Tribunal, Mr Barnett first emphasises that applications for interim relief require it to carry out an urgent and summary assessment; and in consequence that it must be a rare case where the appellate tribunal will interfere with the decision. As HH Judge Eady QC observed in **His Highness Sheikh Khalid Bin Saqr Al Qasim v Robinson** [2018] UKEAT/0203/17/JOJ:

> **"59. I start by reminding myself of the exercise that the ET had to undertake on this application. By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The ET3 was only served during the course of the hearing and it is apparent that points emerged at a late stage and had to be dealt with as and when they did. The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus very much an impressionistic one: to form a view as to how the matter looked, as to whether the Claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied.**
>
> **60. The nature of interim relief also informs the approach the EAT has to take. An ET is charged with this summary assessment, precisely because it is best qualified to carry out this role; an Employment Judge will have the experience of having heard many similar cases at Full Hearing and will thus be able to bring that experience to bear in**

> **determining what is likely to be the outcome of the case thus presented on a summary basis. It is right, therefore, that the EAT should be reluctant to interfere and, in my judgment, should only do so if satisfied that the ET erred in law or reached a decision that might properly be characterised as perverse or took into account an irrelevant factor or failed to have regard to the relevant."**

44. As to category (a) in s.43B(1) (wasting police time), Mr Barnett points to **Babula** and its clear statement that the fact that the information which the whistleblower believes to be true does not in law amount to a criminal offence is not in itself sufficient to render the belief unreasonable. He submits that, whatever the precise terms of the ingredients of s.5(2), the offence is widely known to the general public as "wasting police time". As the Tribunal stated, "Wasting police time is a topic that makes the headlines." [34]. I add that, following the hearing, the Claimant forwarded a link to the CPS "Public Justice Offences incorporating the Charging Standard" which indeed contains the heading "Wasting police time – section 5(2) Criminal Law Act 1967".

45. The Judge had specified the criminal offence relied on by the Claimant, i.e. wasting police time, and had concluded that the Claimant was 'likely' to establish that he had a reasonable belief that his disclosure tended to show that Ms Keates had committed that offence. In reaching that conclusion he in particular found that in the circumstances it was reasonable for the Claimant to believe that the allegation of drink-driving was malicious and that it was malicious for Ms Keates to report it to the police.

46. The guidance of HH Judge Serota QC in **Blackbay** was no obstacle to this conclusion, for three reasons. First, because the focus of paragraph 98.5 was on the type of disclosure where a number of different complaints were intermingled within the disclosure. That was not this case. Secondly, because an offence as well-known to the general public (and evidently to the CPS) as 'wasting police time' was caught by Judge Serota's opening words "Save in obvious

cases". Thirdly, because it was not consistent with **Babula**, which had not been cited in **Blackbay**. In consequence it was not necessary, at least in this case, to test the reasonableness of the Claimant's belief against the particular ingredients of s.5(2).

47. Thus it was irrelevant that the Claimant did not know the precise formulation of a criminal offence which he reasonably believed to have been committed. It was likewise irrelevant that Ms Keates might have had an arguable defence, whether factual or legal, if she had been prosecuted. In any event, the Respondent had not raised s.5(2) before the Tribunal and therefore could not criticise the Decision on that basis.

48. For the reasons given by the Tribunal, there was ample basis for the conclusion which it reached on this issue. It was self-evident that, if someone had taken 3 or 4 pints by no later than 7.30pm, a report to the police to the next day would be futile. This only supported the conclusion that the Claimant reasonably believed that Ms Keates had maliciously reported the matter to the police; and thereby supported his reasonable belief that she had committed an offence of wasting police time.

49. As to the finding in respect of the public interest, the Judge had expressly referred to **Chesterton**. Not least in a summary assessment, he must be taken to have its observations and the ingredient of the public interest fully in mind. It was a misreading of paragraph 38 to suggest that he considered "numbers" or "scale" to be the only factor which was relevant to the dividing line between the private and the public interest. That paragraph specifically identified "other features of the situation which will engage the public interest." Turning to the four potentially relevant factors which had been approved in **Chesterton** as a potentially useful tool for this purpose, these all effectively came into play in the Decision : in particular, the numbers

in the group whose interest the disclosure served; the nature of the wrongdoing disclosed, i.e. in this case, a deliberate and malicious report; and the identity of the wrongdoer, i.e. the General Secretary of this large union. As the Tribunal accepted, if a General Secretary of a major trade union was reasonably believed to have reported a matter to the police when motivated by malice, it was self-evidently reasonable to believe that the disclosure of such conduct was in the public interest. The Tribunal had also been right to accept the argument to the effect that it was a matter of public interest if a union was hypocritically treating its own employees in a way which was at odds with the demands for fair treatment which it made on behalf of its members when dealing with their employers.

50. In any event, Claimant at this stage had only to establish that he had a 'pretty good chance' of establishing that at trial. The Tribunal had made a reasonable assessment. There was no basis to challenge its conclusion.

51. As to the challenge on the causation issue, the Judgment made clear that the Tribunal had kept firmly in mind the Claimant's alternative argument that the principal reason for his dismissal was his trade union activities. This was apparent from paragraphs 56 and 57 of the Judgment. The Judgment had previously recorded the evidence of Mr Fred Brown, the chair of the SRC which made the decision to dismiss, that he knew nothing of the background, and that all he knew was the Claimant's email of 16 October. In paragraph 56 the Tribunal correctly distinguished between the position of the General Secretary and the SRC. In paragraph 57 it correctly observed that the true reason for dismissal was an objective question which did not depend on the belief of the Claimant. Its conclusion, and in particular on the 'pretty good chance' test, was thus unimpeachable.

Analysis and conclusions

52. In considering these arguments, I keep firmly in mind that these applications for interim relief involve a speedy assessment on the papers by Employment Judges who have the advantage of their daily and particular experience and expertise. Accordingly, it will be a rare case where appellate interference is justified : see in particular the observations of HH Judge Eady QC in **His Highness Sheikh**, cited above. In this respect I also caution myself against the error of mere substitution of my own assessment for that of the Tribunal.

53. I am not persuaded by the appeal on the issue of causation. Contrary to Mr Allen's argument, I consider that the Tribunal did have appropriate regard to the Claimant's alternative case that the principal reason for his dismissal was his trade union activities. The Judge noted that alternative at the outset of the Judgment and did not overlook it in his conclusions. Thus in particular the Judge properly took account of the evidence from the Chair of the SRC, Mr Fred Brown; and rightly noted that identification of the principal reason for the decision to dismiss was an objective question which was not governed by the employee's belief as to that reason. At least at this preliminary stage in applications for interim relief, there was sufficient to justify the conclusion that there was a pretty good chance that the alleged protected disclosures in the email of 16 October were the principal reason for the dismissal.

54. However, for the reasons largely advanced by Mr Allen, I am persuaded that the Tribunal's conclusion in respect of the alleged protected disclosures cannot be sustained.

55. As to s.43B(1)(a) and wasting police time, I accept that this is an established description for a particular criminal offence. That is further confirmed by the CPS document. Accordingly the reference to such an offence in the 16 October email provides at least a starting point for the enquiry which the Tribunal then had to undertake under category (a).

56. In principle, I consider that for the purpose of that enquiry it would be necessary for the Tribunal to consider the terms of the statutory provision which creates the offence of wasting police time, i.e. s.5(2) **CLA 1967.** Its terms are inherently relevant to the question of whether the Claimant made the disclosure in the reasonable belief that a criminal offence had been committed. I do not accept that, well-known as is its headline description, the true nature of the offence can be treated as 'obvious'. On the contrary, the provisions of s.5(2) demonstrate that the ingredients of the offence are exacting and require much more than the headline might suggest.

57. All that said, in the particular circumstances where the Respondent did not put s.5(2) before the Tribunal, it would not be right or fair to criticise its reasoning on that basis.

58. Conversely, it is right to test the Tribunal's conclusion against the terms in which the Claimant identified the alleged criminal offence in his disclosure and subsequent arguments. The essence of the complaint which he made in the 16 October email was that Ms Keates had wasted police time by 'maliciously' passing on a report of his conduct which was a lie. The allegation of malice was further supported on the basis that by the following day it would have been too late for the police to take any action by way of prosecution of an offence of drink driving.

59. In reaching its conclusion that the Claimant was 'likely' to have reasonably believed that Ms Keates made the report maliciously and that the report was not 'genuine', the Tribunal pointed to the fact that she had done so on the basis of two reports, 'one being double hearsay', and to the impossibility of any action being taken by the police.

60. I do not consider that either factor has any weight that can support the Tribunal's conclusion. The fact that the first report from Mr Stephen Brown was double hearsay is of no significance, given that Ms Keates had subsequently spoken to Mr Adams and received his direct account of what he saw at the meeting. The factor, if so, that the police would not have been able to prosecute on the basis of information received from Ms Keates on the following day, takes no account of the Claimant's subsequent acknowledgement that he had consumed 2 pints of Guinness before driving off, or of the position in which Ms Keates found herself in the light of the information that she had received.

61. Whether or not a criminal offence had been committed, it was evidently not a lie that the Claimant had been drinking and driving on the evening of 8 October. The dispute over the events of that evening was essentially limited to whether the Claimant had drunk more than 2 pints. As General Secretary of the Respondent Ms Keates had been told that its employee had drunk a very substantial amount of beer before driving off in the company car. Although there was a dispute about the quantity, those essential facts were not in dispute. Ms Keates' witness statement also states:

> **"I also felt that, as a responsible Employer, and being unaware that there had been any accident or incident the previous evening after C left the Generous George Pub, it was important for the NASUWT also to report the matter to the police."** [24].

62. In those circumstances, the Claimant's argument based on the time delay between his drinking and the report by Ms Keates to the police deserved no significant weight. It did not lie in his mouth to take advantage from that interval and provided no basis for the assertion that she had acted maliciously. In my judgment, and giving all weight to the fact that the application involved a speedy and summary process, there was no basis to conclude that the Claimant had a pretty good chance of establishing that it was reasonable for him to think that Ms Keates had not made a 'genuine' report to the police but had acted maliciously, nor

therefore that the information tended to show the commission of the criminal offence which he had identified as wasting police time.

63. As to the public interest, the Judgment took express account of the Court of Appeal decision in **Chesterton**. However its statement, that the question of whether something in the private interest of the employee may also be in the public interest 'is all a question of scale', was not a fair reflection of the discussion in that authority. This caused the Tribunal to give undue weight to the size of the Respondent's membership and to overlook the multifactorial assessment that was necessary even at the stage of considering interim relief.

64. In the context of the disclosure in category (a) - wasting police time - I cannot see any real basis for the Tribunal's reliance on the fact that the Respondent had several thousand members, or that these in turn were teachers of children who in turn had families, or that Ms Keates was the General Secretary. Set against the overall analysis in **Chesterton** and the four factors which it had accepted as a potentially useful tool, I do not consider that it can be concluded that there was a pretty good chance that any of these were truly engaged.

65. In the context of the alleged breach of contract in respect of the company car, I again see no reasonably arguable significance in the number of members, nor their connection with school-age children in a family or friendship circle. The hypocrisy argument, i.e. based on a suggested difference between the employment standards urged by the Respondent on behalf its members and those which it imposed on its employees, in my judgment fares no better as a route to the public interest on the evidence in this particular case.

66. All in all, I see no tenable basis for the conclusion that the Claimant had a pretty good chance of establishing that he reasonably believed that the disclosures said to be within

A categories (a) and/or (b), were made in the public interest and so as to take it beyond the scope of a communication made in the course of a private employment dispute.

67. For all these reasons, I conclude that this decision was wrong and cannot be sustained. B Mr Barnett accepted that, if I were to reach this conclusion, there would be nothing to remit for further consideration. Accordingly the Order for interim relief must be set aside.

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