EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J Robinson	and	MJM Industrial Limited

Held at Reading on 11 and 12 December 2019

Representation **Claimant:** In person
Respondent: Mr R Chaudhry, solicitor

Employment Judge Vowles **Members** Ms H Edwards
Ms J Cameron

UNANIMOUS JUDGMENT

Protected Disclosure Detriment - section 47B Employment Rights Act 1996

1. The Claimant was not subjected to a detriment by his assignment being terminated on the ground that he had made a protected disclosure. This complaint fails and is dismissed.

Reasons – rule 62 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

2. Reasons for this judgment were given orally at the hearing. Written reasons were requested by the Claimant.

Public Access to Employment Tribunal Judgments

3. The parties are informed that all judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-Tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondent.

REASONS

BACKGROUND

1. The background to these proceedings is as follows.

2. On 13 January 2017 the Claimant presented a claim to the Tribunal with complaints of unfair dismissal, automatically unfair dismissal based upon protected disclosure, breach of contract and unpaid holiday pay.

3. On 14 February 2017 the then Respondent, London Heathrow Airports Limited, presented a response and resisted all claims. It was denied that the Claimant was an employee or a worker and it was said that he was a selfemployed independent contractor.

4. At a preliminary hearing held on 9 August 2017 it was determined as follows:

   "The Claimant did not have the status of an employee or worker under section 230 of the Employment Rights Act 1996. The Employment Tribunal has no jurisdiction to consider the Claimant's complaints of unfair dismissal, breach of contract and unpaid holiday pay. These complaints are dismissed. The Claimant did have the status of a worker under the extended definition in section 43K Employment Rights Act 1996. The Employment Tribunal therefore has jurisdiction to consider a complaint of protected disclosure detriment."

5. It was also determined that the employer under section 43K(2) was MJM Industrial Limited.

6. On 24 October 2017 MJM Industrial Limited was served as a Respondent and that company presented a response on 21 November 2017.

7. On 3 September 2018 London Heathrow Airports Limited was removed as a Respondent in the proceedings.

8. The case was listed for a full merits hearing on 7 and 8 May 2019 but that hearing was postponed due to no available judicial officer and the case was then relisted for this hearing on 11 and 12 December 2019.

9. The only claim before this Tribunal is the protected disclosure detriment claim under section 47B of the Employment Rights Act 1996 as determined in the judgment made at the hearing on 9 August 2017.

EVIDENCE

10. The Tribunal heard evidence on oath from the Claimant Mr James Robinson, (Mechanical Engineer) and on his behalf, evidence from Mr Keith Parker (Mechanical Engineer).

11. On behalf of the Respondent, the Tribunal heard evidence on oath from Mr Jason Smith (Director) and also read a witness statement from Mr Adrian Stinton (London Heathrow Airport Terminal 1 Maintenance Manager).

12. Mr Stinton is now retired. Although he had initially agreed to attend the hearing to give evidence on oath and produced a witness statement, he has since confirmed that he had decided to go on holiday and had booked a flight to go abroad. The Claimant confirmed that much of Mr Stinton's witness statement should be accepted by the Tribunal as it supported his case.

13. The Tribunal also took account of the documents in a bundle provided by the parties and read written and heard oral submissions from both parties.

FINDINGS OF FACT

14. The Claimant worked alongside Mr Parker, both Mechanical Engineers, on the decommissioning of Terminal 1 at London Heathrow Airport between March 2014 and September 2016. Their employer, as stated above, for the purposes of these proceedings, at that time was MJM Industrial Limited though they worked in fact as self-employed independent contractors. Their supervisor on site, who was also employed by MJM, was Mr Mark Collins. He in turn reported to Mr Jason Smith (Director of MJM). On site however, Mr Collins received his daily briefing and instructions from Mr Stinton (London Heathrow Airport Terminal 1 Maintenance Manager). Mr Collins then passed those daily instructions on to Mr Robinson and Mr Parker to do the work which London Heathrow Airports required.

Claimant's case

15. The Claimant's case is as follows. So far as the alleged protected disclosure is concerned, in his witness statement, Mr Robinson said this:

> *"Keith Parker and myself were told to move glass panels as shown on pages 459 – 471 of the bundle. Keith pointed out we needed suckers to lift the glass and special grade gloves as well as an A-frame trolley as shown on page 467. Mark Collins did not supply us with anything we requested so we were unable to do the job safely. We were asked a second time. Same outcome.*

On the third time, I persuaded Keith Parker to do the job with me without the right equipment because I felt our jobs would be put in jeopardy. ….

On the afternoon of Wednesday 21 September 2016, Mark Collins told Keith Parker and myself we had a health and safety meeting with Adrian Stinton which we attended. After the safety talk, Adrian Stinton asked how we were getting on. We said fine and he said if you have any concerns you know where I am. We then told him about moving the glass and we needed equipment to do the job safely. We told him we had asked Mark Collins and were told to get on with it. Adrian then said "Next time you have to move glass panels, phone me and I will come down and sort out with Mark Collins what you need." We thanked him and left."

16. That account was supported by the evidence of Mr Parker. It was also supported to some extent by the evidence of Mr Stinton who recalled the Claimant and Mr Parker mentioning an issue regarding the moving of glass with him but he said that they were reluctant to provide details of the circumstances in which they were required to move the glass. The Claimant said that his conversation with Mr Stinton on 21 September 2016 amounted to a protected disclosure under section 43B(1)(d) in that it was information which, in his reasonable belief, was made in the public interest and which tended to show that the health and safety of an individual had been or is likely to be endangered.

17. In his claim form, he said this regarding the disclosure being, in his belief, in the public interest:

"Disclosure was a qualifying disclosure because it contained information revealing the health and safety of all workers asked to move and dispose of glass on the Terminal 1 site had been and was being endangered, the danger being serious risk of injury due to appropriate glass-moving equipment not being provided. Over 75 individuals had access to areas in Terminal 1 including but not limited to people working as cleaners, office staff, maintenance staff, baggage system engineers, site managers and asbestos workers. …

The disclosure was in the public interest because it was made in the context of the Claimant's concern for all other workers on the Respondent's Terminal 1 site where health and safety procedures were not being followed and precautions by way of protected equipment were not being provided."

18. So far as the alleged detriment was concerned, the Claimant said in his witness statement:

"Two days after meeting with Adrian Stinton, Friday, 23.9.16 on my way home from work Jason phoned me and said I was finished at Terminal 1 with immediate effect. He gave no reason. The following Monday, Keith and I were replaced by Neil Walton and Tota Ramkisson."

19. He also described the alleged detriment in his ET1 claim form:

"On 23 September 2016 the Claimant was informed by telephone of the decision to dismiss him with immediate effect. At 4.50pm on 23 September 2016, Jason Smith of MJM telephoned the Claimant and asked where he was. The Claimant stated that he had left the site a short time before due to having worked through his lunch hour. Mr Smith then said to the Claimant "You're finished today". The Claimant was shocked and responded "What? That's short notice Jason." Mr Smith said "Yeah. He doesn't want you anymore." In his shock, the Claimant responded I've got to go now and the conversation ended abruptly. The Claimant is not aware to whom Mr Smith was referring when he stated "he". However, due to his health and safety complaint two days earlier to Mr Stinton, the assumption was that it was the Respondent's decision to dismiss him as a direct result of his protected disclosure regarding health and safety.

20. The Claimant claims that Mr Stinton must have mentioned the disclosure regarding health and safety to Mr Collins who then told Mr Smith to dismiss both the Claimant and Mr Parker, which he did on 23 September 2016 in the telephone call. Accordingly, says the Claimant, he was subject to the detriment of having his assignment terminated because he had made a protected disclosure.

Respondent's Case

21. The Respondent's case was that whatever was said by the Claimant to Mr Stinton on 21 September 2016, it did not amount to a protected disclosure within the meaning of section 43B(1) of the Employment Rights Act 1996.

22. The Respondent said it was not repeated in writing by either the Claimant or Mr Parker and was not raised at any time with Mr Collins or Mr Smith at MJM. The Respondent said the Claimant left the Terminal 1 site early on 23 September 2016. Mr Smith went to speak to him and Mr Parker but they were not there at 4pm and he had therefore phoned them to ask where they were, and in particular to ask the Claimant to inform him of a change in the contracts, work and rotas in the coming weeks. It was denied that the assignment was terminated because of any disclosure by the Claimant and it was denied that Mr Smith had been made aware of any such disclosure.

23. Mr Smith said in his witness statement: *"The work at Heathrow T1 had been winding down for a number of years. More staff were required. The wind-down required further staff from MJM. However, Heathrow added a new requirement for the contractors working at the site that they were required to have incident response training. Furthermore, Heathrow added a further requirement that they wanted contractors to work on shift patterns four days on and four days off. This arrangement was proposed to Mr Robinson. However, he declined to change his working pattern which was Monday to Friday.*

The contract for the provision of works which was overseen by Carillion ended on 30 September 2016 and Mitie took over thereafter. Mr Robinson's refusals to undertake the incident response training and to change to a four day shift pattern were the core reasons why his engagement with Heathrow T1 work ended. MJM nor I were aware that Mr Robinson had raised any health and safety concerns about the working conditions at T1. Mr Robinson never raised this directly with MJM and this is consistent with his ET1 claim form. MJM did not have any discussions with any third parties that Mr Robinson had raised concerns about this and nor was this brought to our attention. Mr Robinson claims that he raised concerns with Mr Adrian Stinton. However, he never spoke to MJM nor suggested that the Claimant's engagement should be terminated.

MJM first informed Mr Robinson that his current assignment with Heathrow T1 was coming to an end on the 6-8 weeks before 23 September 2016 near the time when the Carillion contract was coming to an end and Mitie were taking over.

I have tried to meet with Mr Robinson before his assignment came to an end. However, he left the site before I could meet him. I wanted to reassure Mr Robinson there was still plenty of work that MJM were prepared to assign to him and to check if he had changed his mind about undertaking the training and changing his working pattern so he could continue to work at Heathrow T1. MJM always had a need for experienced engineers and Mr Robinson had demonstrated that he could undertake the work required for Heathrow T1.

When I spoke to Mr Robinson on 23 September 2016 to confirm that his current assignment was going to end he did not confirm to me his belief that the assignment was brought to an end because he had raised health safety concerns. He knew clearly the reasons why the assignment had been brought to an end because Mitie had come on board with new working requirements for contractors which Mr Robinson was not prepared to accept. … I note that Karen Heany invited the Claimant to undertake further assignments issued from MJM but the Claimant declined."

RELEVANT LAW

24. The relevant law so far as this case is concerned is set out as follows.

25. Section 43B Employment Rights Act 1996: *"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:*

    …

    (d) That the health or safety of any individual has been, is being, or is likely to be endangered."

26. Section 47B Employment Rights Act 1996: *"A worker has the right not to be subject to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."*

DECISION

27. In considering whether what the Claimant disclosed to Mr Stinton on 21 September 2016, the Tribunal took account of the requirement for a reasonable belief in the public interest in making a disclosure. In his written submissions, the Claimant referred to the case of Chesterton Global Ltd v Nurmohamed [2018] ICR 731 in which it was said:

    "The question whether a disclosure is in the public interest depends on the character of the interests served by it rather than simply on the number of people sharing it. CG Limited went too far in suggesting that multiplicity of persons sharing the same interest can never by itself convert a personal interest into a public one. The statutory criterion of what is in the public interest does not lend itself to absolute rules and the Court of Appeal was not prepared to discount 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 employees share the same interest. Tribunals should however be cautious about reaching such a conclusion. The broad intent behind the 2013 statutory amendment is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers even where more than one worker is involved."

28. The Court of Appeal went on to hold that where the disclosure relates to a breach of the worker's own contract of employment, or some other matter where the interest in question is personal in character, 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.

29. There were then four factors which it was suggested might be relevant.

30. First of all the numbers in the group whose interests the disclosure served. In his ET1 claim form the Claimant said it was in excess of 75. In his closing submission he said it was in the hundreds.

31. Second, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. The Claimant said that in this case that was health and safety and the possibility of injury.

32. Third, the nature of the wrongdoing disclosed. The Claimant said that was the deliberate wrongdoing was not to provide the necessary safety equipment to move glass.

33. Fourth, the identity of the alleged wrongdoer. The Claimant said that was MJM.

34. The Tribunal found as a fact that the number of persons whose interests the alleged disclosure served was not in the hundreds as submitted by the Claimant but two. That was the Claimant and Mr Parker. There was no evidence that anyone else had been instructed to move the glass nor that anyone else had been denied proper gloves and equipment to enable them to do so or would be denied those materials in the future. The nature of the interests affected was health and safety but those interests were not so seriously affected that the Claimant and Mr Parker, both of whom said that they were well versed in health and safety matters, refused to carry out the glass removal. In fact they eventually agreed to do so without the requested equipment.

35. The nature of the alleged wrongdoing was not that the equipment was actually refused by Mr Collins, as the Claimant confirmed, but that the equipment was simply not provided. There was no evidence that either the Claimant or Mr Parker were actually put at risk or injured when they were removing the glass and it was the Claimant who eventually persuaded Mr Parker to do the job without the requested equipment.

36. In the circumstances described by the Claimant, the Tribunal found that he could not have held a reasonable belief that the disclosure was made in the public interest. It was made in the interests of the Claimant and Mr Parker alone. The interests of no other employees were affected. There were no wider consequences other than to themselves.

37. It follows that a reasonable belief in public interest having not been established, the disclosure was not a qualifying disclosure within section 43(B)(1). The Claimant cannot therefore succeed and his claim must fail on this basis alone.

38. The Tribunal went on, however, to consider what the decision would have been if we had determined that the disclosure was a qualifying disclosure within the meaning of section 43B(1). Section 48(2) states that on a complaint under section 48(1) it is for the employer to show the ground on which any act or deliberate failure to act was done.

39. The Claimant was asked on what basis he asserted that there was a causal link between the alleged protected disclosure and the termination of his assignment. He said that it was based on his instinct and assumption. The assumption was that Mr Stinton had told Mr Collins about the protected disclosure, that Mr Collins had instructed his superior, Mr Smith, to dismiss the Claimant and that Mr Smith then did so.

40. There was no evidence to support the Claimant's assertion. Instinct and assumption are no basis for a claim of protected disclosure detriment.

41. The Tribunal found that the Respondent had complied with the burden of proof placed upon it in section 48(2). Mr Smith's account was supported by documentary evidence regarding the change between the Carillion contract and the Mitie contract and the timing and effect of that change on MJM workers including the Claimant. The manner and the circumstances in which he spoke to the Claimant on 23 September 2016 and the content of that call was also supported by the documentary evidence.

42. The Claimant's account was wholly inconsistent with the documentary evidence in the form of texts between Karen Heany and the Claimant offering him work with MJM after 23 September 2016. Texts of that nature were produced dated 3, 7 and 14 October 2016. The Claimant never took up the offers nor chased them up. He responded saying that he was busy with other work.

43. Mr Parker was similarly offered other work by MJM after 23 September 2016.

44. The Claimant said the offer of further work after 23 September 2016 was a sham and the real reason was to recover his airside pass. The pass was eventually requested and returned by the Claimant with some security keys and collected by Mr Smith from the Claimant's home.

45. The Tribunal accepted Mr Smith's account that the recovered pass was not in fact disabled for some months and that the Claimant had been able to use it on

25 September 2016 to recover his tools. Mr Parker had also used his airside pass on 27 September 2016 for the same reason.

46. The Tribunal found that the evidence of Mr Smith provided credible and nondiscriminatory reasons for the treatment of the Claimant, both on 23 September 2016 and in the weeks thereafter. There was no reliable evidence of a causal link between the alleged protected disclosure and the alleged detriment and the claim would have failed on that basis also.

47. During the hearing the Claimant questioned Mr Smith on an alleged failure to disclose risk assessments he had requested and he sought to establish that the Respondent company was generally lax in health and safety matters. The Tribunal took the view that neither matter was of any direct relevance to the issues which the Tribunal had to determine, nor did they affect the fairness of the hearing.

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Employment Judge Vowles

14/01/2020

Sent to the parties on: 27/01/2020

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For the Tribunals Office