EMPLOYMENT TRIBUNALS

Claimant: Mr M Carrington

Respondent: Platts Solicitors

Heard at: **Manchester** **On:** **7,8,9,10 January 2020**
4 February 2020 (in chambers)

Before: **Employment Judge Leach, Mr R W Harrison, Mr S T Anslow**

Representation
Claimant: in person
Respondent: Mr D Flood (counsel)

RESERVED JUDGMENT

1. The complaint that the claimant was subjected to detriments on the ground that he made protected disclosures is not well founded.

2. The complaint of unfair dismissal pursuant to s103A Employment Rights Act 1996 (protected disclosure) is not well founded.

REASONS

A. Introduction.

(1) This case concerns the claimant's employment by the respondent firm of solicitors and his dismissal from that employment. The claimant was employed by the respondent as a police station representative and clerk until his dismissal on 24 October 2018.

(2) The respondent is a small firm specializing in criminal law. Its sole principal is Naila Akhter ("NA"). The respondent firm was created from a split/division of a 3 partner firm called Platt Halpern. NA was one of the 3 partners in Platt Halpern and headed up their criminal department. Another partner headed up a family law department and the third partner headed up a civil litigation department. The 3 partners of Platt Halpern decided to divide the business and this division took place in May 2018. Platt solicitors (the respondent) then began trading and the criminal department of Platt Halpern transferred over.

(3) The claimant applied for employment with Platt Halpern and was interviewed by NA. The application was successful and the claimant's employment began on 20 November 2017. The claimant's employment was initially with Platt Halpern but there is no dispute that it transferred to the respondent and that his employment rights (including his period of continuous employment) were protected. The transfer of the criminal department of Platt Halpern to the respondent was a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

(4) The claimant was dismissed on 24 October 2018, some months after the transfer. He claims that he made a protected disclosure in the course of his employment and that the sole or principal reason for his dismissal was the fact that he had made that disclosure. He claims the protected disclosure was made on 14 May 2018 to an individual called John Stringer("JS"). JS was at the time one of the 3 partners of Platt Halpern.

(5) The protected disclosure which the claimant claims to have made on 14 May concerned NA. The claimant informed Mr Stringer that NA was deliberately delaying the billing on a number of criminal files and that she was doing so in order that the fees recovered on those files would not be paid to Platt Halpern (and so shared between the 3 partners) but would be paid at a later date to the respondent (so that NA as the sole principal of the respondent firm would benefit).

(6) The respondent denies that the claimant made a protected disclosure and, anyway, denies that he was dismissed for making a protected disclosure. NA claims there was an increasing number of complaints and concerns raised by various parties in relation to the claimant shortly prior to 14 May 2018. She claims she raised these with the claimant on 14 May 2018 and that they led to his dismissal on 24 October 2018.

(7) At the date of dismissal, the claimant had less than 2 year's continuous employment with the respondent and so he is unable to bring a claim of "ordinary" unfair dismissal.

(8) Reference to page numbers below are to the bundle of documents prepared by the respondent for use at the hearing.

B. The Hearing

(9) A number of case management issues were dealt with at the outset of this hearing. Three case management hearings had taken place but unfortunately it was apparent to the Tribunal on the morning of the first day, that there had been little or no cooperation between the parties and insufficient attention (by both parties) to case management orders.

Witness Statements.

(10) Issues were raised in relation to the witness statements of both parties.

(11) The respondent handed up 3 witness statements from Naila Akhter, Ann Dutton and Stella Maria Massey. Unfortunately, the claimant claimed only to have first received these on attending the Tribunal that morning. The claimant's position was the same in relation to the paginated bundle of documents.

(12) The respondent informed the Tribunal that the witness statements and bundle of documents had been sent by them to the claimant on 18 December 2019; that they had been sent by standard first class post and therefore they had no proof of delivery or non delivery. The claimant's position was that he simply did not receive this correspondence.

(13) The Tribunal proposed to resolve any disadvantage to the claimant by agreeing to set aside the whole of the remainder of the first day of the final hearing as a reading day for the Tribunal and the parties and not to commence with any evidence until the morning of day 2.

(14) The respondent had not received a statement from the claimant until the morning of day one of the final hearing either. The claimant accepted that he had not provided the respondent with his statement until that morning. The tribunal also received a copy of the claimant's statement (just over 2 pages comprising 20 numbered paragraphs). The tribunal queried the date of this statement. It is dated 06 August 2018 which predates his dismissal by the respondent by some 10 weeks.

(15) The claimant confirmed the date was correct and that this was a statement that the claimant had drafted prior to his dismissal and on the recommendation of an experienced barrister he had engaged at the time.

(16) The statement contained no evidence in relation to the claimant's dismissal; a key part of his case.

(17) The claimant was referred to the case management orders made on 12 July 2019 (pages 55 to 59 of the bundle); specifically paragraph 4 at p57a and 58 as well as paragraph 9 of the case management order of 31 October 2019 (page 64). These orders made clear that a full statement of evidence was required.

(18) Mr Flood for the respondent addressed the tribunal in relation to the claimant's non-compliance with the case management orders and the tribunal retired to consider how to proceed.

(19) On recommencement, the Tribunal informed the parties that they would proceed with the final hearing in the 4 days allocated and would engage in case management immediately to endeavour to ensure that the parties and the Tribunal was prepared to commence with evidence at the commencement of day 2. The Tribunal was mindful of the overriding objective. There had already been 3 case management hearings in this case. A full panel was available to hear the case over 4 days. Postponement would put off the hearing of this case for many months. The overriding objective requires cases to be dealt with fairly and justly and this includes, so far as practicable, a requirement to deal with matters proportionately and by saving expense.

(20) As for the claimant's witness statement, the claimant confirmed that his position in relation to the dismissal was simply that the reasons provided for his dismissal were untrue, that the respondent knew them to be untrue and that the real reason that the claimant was dismissed was because of the protected disclosure(s) made (see below in relation to the issue of protected disclosure(s).

(21) The claimant agreed to this addition to his witness statement:

> *"I was dismissed by Platt solicitors on 24 October 2018. I received the letter of dismissal dated 24 October 2018 (which is at pages to 234 of the bundle of documents provided by the Respondent for the purposes of these employment tribunal proceedings). I was not dismissed for the reasons set out in this letter. The real reason I was dismissed was because of the protected disclosure specifically identified in the list of issues prepared at the commencement of the final hearing in this case."*
> .

(22) In discussion with the parties, the Tribunal acknowledged that this was an unorthodox approach and one which did not provide the respondent with the claimant's full evidence in relation to the circumstances of dismissal. However, it enabled to the case to proceed so that an outcome would be achieved. The Tribunal also noted that it was sometimes the case that the statement of a party representing themselves missed significant detail but that missing evidence would then be dealt with (to the extent necessary) in questioning. The claimant confirmed that he wished to proceed on this basis. Mr Flood also confirmed that the respondent agreed the approach set out by the Tribunal and wished to proceed.

Disclosure.

(23) On 31 October 2019 a number of case management orders requiring the respondent to disclose specified documents were made. The orders are at pages 60 to 65.

(24) The claimant informed the Tribunal that the respondent had not complied with all of these orders. Mr Flood asserted that the respondent had complied with the orders. It had emailed 121 pages of documentation to the claimant on 26 November 2019.

(25) The claimant's response to this was initially unclear. It did become clear however that the claimant had not reviewed the 121 pages of documents sent. The reason he claimed not to have done so was that he did not possess a computer and could not read the attachments on his mobile phone. As far as the Tribunal could understand, he had not sought to find other means of downloading the information and he had not contacted the respondent to ask for the documents in a different formal (for example a hard copy).

(26) The Tribunal recommended to the claimant that he consider the documents provided and that he cross reference the disclosure orders against these documents and also against a document prepared by the respondent commenting on the disclosure orders (pages 68 to 74 of the bundle). Should he then consider that there were issues of non-compliance with the disclosure orders, then he should identify these issues with precision (by reference to the specific disclosure order, stating what exactly has not been disclosed that should have been disclosed) and should then list and send these to the respondent and that issues of alleged non-disclosure could be considered at the beginning of day 2.

(27) During day 3 of the hearing, the issue of disclosure came up again. By this stage the respondent had provided the claimant and the tribunal with copies of correspondence that had taken place between the parties in the run up to the hearing. It was clear from this correspondence that the claimant had received the email of 26 November 2019 and also that he had replied, commenting on the bundle of documents attached to the email. It appeared that the claimant's explanation provided on day one, was not correct.

(28) As for outstanding disclosure issues, the claimant stated he had not received:-

29.1 extracts from review meetings with Mr Stringer concerning alleged procedural errors in the billing of criminal cases. The respondent's response to this was that there were no such documents.

29.2 Meeting notes made by a company called Solutions for HR. The respondent had outsourced some HR functions to this business

including the investigation of the claimant's grievance). The respondent's response was that they had been in contact with Solutions for HR and no such notes existed (or were not in existence at the date the request for documents was made).

List of Issues

(29) A list of issues had been identified at the first preliminary hearing in this case and set out in the case management summary dated 22 March 2019. The Tribunal raised the list of issues on the morning of day one, because some detail appeared to remain missing from the list of issues (particularly dates) and also in response to a protected disclosure that the claimant had referred to in the discussions taking place on day one. Mr Flood had also identified and raised the reference to a potential new or alternative alleged protected disclosure.

(30) Discussions then took place about the list of issues and the Tribunal resolved to record an updated list of issues. An updated list was shared with the parties who both agreed to the updated list. It is set out below.

(31) Notably, the protected disclosure raised by the claimant on the morning of day one was one he claimed to have made on 14 May 2018 in a discussion with a John Stringer. This was different to the disclosures referred to in the original list of issues (which had identified that the protected disclosures identified were allegedly made to a Ms Akhter) and this did call in to question his detriment claims (as it appears that at least some of the allegations of detriment predated the alleged protected disclosure to Mr Stringer).

(32) The claimant also asked the Tribunal what a protected disclosure was. Mr Flood shared with the claimant a copy of the relevant provisions of the Employment Rights Act 1996 and he and the Tribunal explained, in neutral terms, the requirements for a protected disclosure.

(33) The change in the protected disclosure being relied on was a surprise to the respondent. Even so, the respondent wished to proceed with the final hearing.

(34) The amended list of issues is as follows:-

34.1 Has the claimant made one or more protected disclosures as defined?

The claimant alleges that he has made qualifying disclosures pursuant to the provisions of section 43(B)(1)a, 43 B(1)(c) and 43 (B)(1)(f) of the Employment Rights Act 1996. The details of the protected disclosures relied on are as follows:

That on 14 May the claimant entered in to a discussion with Mr J Stringer when he informed Mr Stringer that (1) he was being bullied by Ms Akhter and (2) that Ms Akhter was delaying billing a number of legally aided criminal cases due to the intended separation of the (then) partnership of Platt Halpern.

34.2 Were any such disclosures in the reasonable belief of the claimant made in the public interest?

34.3 Were any such disclosures made to his employer pursuant to the provisions of section 43(C)(1)(a) ERA?

34.4 Was the claimant subjected to any detriment by any act by his employer on the grounds that he had made a protected disclosure?

34.5 The claimant alleges the following detriments –

a. on or about April or May 2018 (<u>but NOT prior to 14 May 2018</u>) Ms Akhter:-

i. told him to "mind your own fucking business."
ii. was regularly abusive in person and on the phone.
iii. swore at him on more than one occasion.
iv. made disparaging remarks about him to Counsel at Cobden house Chambers.

b. being sent a letter dated 16 February 2018 but received on or about 17 May 2018 setting out allegations and inviting him to attend a meeting on 21 May 2018.

c. learning on or about 4 June 2018 that his job was looking to be filled through a legal recruitment agency.

d. on or about 18 June 2 018 receiving what happened to be a final wage slip and not receiving money due to him.

34.6 Are there any time issues with regard to the above claims?

34.7 Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal that he made a protected disclosure?

<u>Reference to client names</u>

(35) On the morning of day 2, when starting to hear the evidence, the Tribunal raised with the parties the fact that a number of clients or former clients of the respondent firm were named in the witness statements and bundle. The tribunal reminded the parties that this was a public hearing and queried

whether real names (or full names) should be used. The parties agreed that full names should not be used in providing oral evidence. In addition Mr Flood arranged for the names of clients to be redacted from the bundle of documents provided for use by attending members of the public.

(36) Initials only were used except in relation to one client who had been referred to by using 2 different names as well as (sometimes) using these 2 different names together. This client was referred to a Mr A, Mr B or Mr AB, depending on the particular name used in the documents being referred to.

Day 2 onwards.

(37) Once further case management orders were made and the list of issues updated, the Tribunal heard the evidence. The claimant provided evidence on day 2 and the morning of day 3. The respondent's witnesses provided evidence on the afternoon of day 3 and on day 4. We heard submissions on the afternoon of day 4.

C. The Witnesses.

(38) We heard evidence from the claimant.

(39) The respondent called the following witnesses

(1) Naila Akhter (NA), solicitor; sole practitioner, trading as Platts solicitors.
(2) Stella Massey (SM), counsel of Exchange Chambers who had been instructed by the respondent on a relevant case.
(3) Ann Dutton (AD), an accounts manager employed by the respondent (and previously employed by Platt Halpern solicitors).

(40) We comment on the witness evidence where appropriate, in our findings of fact below.

D. Findings of fact.

The Claimant's CV and application for employment

(41) The claimant was recruited by Platt Halpern following a process which the Tribunal considered lacked scrutiny and rigour. The interview took place in Costa coffee, some questions were asked by NA and a brief note taken. The claimant has alleged that the notes are inaccurate. We find the notes are broadly accurate but far from complete.

(42) The claimant's CV (pages 94-95) is inaccurate in a number places, particularly in relation to the claimant's education. The CV claims that the claimant attended Manchester University; he did not. The claimant had attended college in Manchester (he provided a name of St Johns) for evening or day release classes for a period of time but not between the dates he claimed to have been at University. When questioned further about his CV the claimant claimed that he had adapted a CV of his sisters, who had attended Manchester University and that he had not made all the changes to his sister's CV that he should have made.

(43) We find that the information contained in the claimant's CV is inaccurate and we did not believe his explanations about his inaccuracies (effectively that they were careless errors). We found that he had sought to deliberately mislead the reader in relation to parts of his CV, particularly his attending university and his employment history as a solicitor's clerk. This evidence as well as the information provided by him during case management discussions concerning the receipt of documents from the respondent, was potentially damaging to his credibility. However the Tribunal also had regard to the fact that, just because they found him to be untruthful in relation to parts of his CV and he had been found to have been untruthful in relation to documents provided by the respondent, did not mean that he had been untruthful in other respects.

The telephone call between claimant and NA on 14 May 2018

(44) Both parties accept that a telephone discussion took place between the claimant and NA on 14 May 2018. The claimant's evidence is that NA simply asked him where he was and admonished him for being at the Wythenshawe office.

(45) The evidence of NA is that she raised a number of concerns that had arisen about the claimant's conduct or performance. She says that the list of concerns was growing but a number of issues had come to her attention on the previous working day (Friday 11 May 2018) and that the purpose of the discussion was to raise the concerns (or a number of them) that had arisen.

(46) On balance the Tribunal prefers the evidence of NA. There is documentary evidence to show that concerns had been brought to NA's attention by then and that the concerns were mounting. It is likely that these would have been raised by NA and her evidence is that she spoke with the claimant in order to raise a number of these concerns with him. We find as a fact that a number of serious concerns about the claimant's conduct and performance were raised with the claimant, by NA, during this telephone call.

The discussion between the claimant and John Stringer on 14 May 2018

(47) A discussion took place between the claimant and JS on the same day (14 May 2018) but after the telephone discussion between the claimant and NA referred to above.

(48) The claimant did not deal with this discussion in his witness statement and his evidence about what was said is far from clear. The significance of this discussion was first realized on day one of the final hearing when the claimant's allegations about when and to whom a protected disclosure was allegedly made, changed from NA (prior to 14 May 2018) to John Stringer on 14 May 2018. In reaching our decision about what was said, we were also mindful of the following:-

(1) That the discussion with JS followed the telephone call with NA. Our findings of fact about that call are noted above.
(2) That NA gave evidence that she was informed by another employee that the claimant appeared to be in an agitated state following her call with him. We did not hear evidence from the other employee but we accept that it is likely that the content of the call would have left the claimant agitated.
(3) That the claimant's discussion with JS took place at the time that NA and JS (and the other partner) were splitting/ending the professional partnership of Platt Halpern.
(4) That JS wrote to the claimant on 20 July 2018 following that meeting.
(5) That the claimant followed up the meeting on 14 May 2018 and the response from JS, with a grievance letter dated 6 August 2018 (pages 12 – 15). This letter includes detailed legal information including reference to sections of the Employment Rights Act 1996 ("ERA") which the claimant says in this letter, are applicable to his circumstances and mean that a protected disclosure has been made. The claimant accepted by this stage he had obtained (and was relying on) advice from counsel experienced in employment law. (In fact the terms of this grievance letter are in stark contrast to the comment made by the claimant on the morning of day one of this hearing which was to the effect that he did not know what the requirements were for a protected disclosure).

(49) Our findings about what the claimant said to JS on 14 May are as follows:-

(1) That he said he was being bullied by NA (or words to that effect).
(2) That he said that NA was delaying the submission of bills on some files.
(3) That he said she was doing this in order to hide billings from the other 2 partners.

(50) We also find that this discussion took place in the aftermath of the telephone discussion with NA when serious concerns were raised and NA

asked to meet with the claimant. The claimant was agitated and his decision to speak with JS was a reaction to his telephone call with NA.

The letter from the respondent dated 16 February 2018 (page 76)

(51) An issue arose about the date of a letter. The letter is dated 16 February 2018. In this letter the claimant is invited to a meeting on 21 May 2018.

(52) The claimant has alleged that the letter was deliberately dated as 16 February 2018 to give the impression that the letter predated the alleged protected disclosure on 14 May 2019.

(53) This is plainly not the case. The letter was written and sent to the claimant following the telephone discussion on 14 May 2018. It invited the claimant to a meeting of 21 May 2018. The correct date of the letter is 16 May 2018. The wrong date is simply an unintentional error.

The claimant's salary

(54) The claimant's salary was reduced in June 2018. AD provided evidence on this. We accept her evidence and make the following findings of fact:-

(1) Employees of the respondent are paid monthly on or about 15th of each month

(2) The claimant began a period of absence due to sickness on 15 May 2018. By that stage the payroll for May had already been calculated and payments were being made to employees including the claimant.

(3) The claimant therefore received a full salary payment for the whole of May. He had no contractual sick pay entitlement.

(4) AD was the employee in contact with the respondent's payroll providers and she alerted them to the claimant's absence.

(5) The claimant's salary payment for June 2018 included a correction to take account of his absence from 15 May 2018 and for the remainder of May.

(6) The claimant's absence continued until October 2018

The use of different names when referring to Mr A.

(55) A client of the respondent had been charged with murder. It was a significant and valuable case for the respondent (in terms of potential legal costs), funded by legal aid. NA was the supervising partner on the case. Stella Massey (SM) of counsel had been instructed as well as senior counsel. In his role with the respondent firm, the claimant was required to be the first and main point of contact with the client, liaise with the client and counsel,

attend meetings and relevant interlocutory hearings when the client was represented by counsel.

(56) It was apparent from the evidence that the client used more than one surname. SM attended the tribunal and gave evidence. She was questioned by the claimant and through her answers (together with her witness statement) SM provided a factual account of events which the Tribunal accepted.

(57) SM explained that the murder charge involved a family connection. The client had the same name as a co accused or an accuser (the Tribunal does not have this detail but it is not relevant to the issues). SM informed the tribunal that at some stage the client changed his name by deed poll in order to distance himself from a family connection.

(58) It is apparent from papers included in the bundle that the client used one name throughout a court process that we heard evidence on. When NA wrote to the claimant on 16 May 2018 (the letter inaccurately dated 16 February 2018 referred to above) she used a different name when referring to the client.

(59) The claimant alleges that she did so, in order to hide the fact that NA was running this potentially lucrative file, that the file had not been set up on the system of Platt Halpern and so she could unlawfully hide the file from her then partners and transfer all of the costs over to her new firm (Platts – the respondent)

(60) We do not accept that this was what happened, for these reasons:-

(1) SM explained to us that the client changed his name by deed poll. We accept SM's evidence. That led to the use of different names when referring to this client.

(2) Evidence was also provided by AD that this file was open on Platt Halpern's computer system. She referred to a travel expense claim form at pages 158 to 160. There is a reference to Mr A at page 159 and included there is the system's reference number. We accept this evidence of AD. The client had not been kept off the systems of Platt Halpern.

<u>Concerns about the claimant's conduct involving Mr A and other clients/issues.</u>

(61) We find that concerns were raised by the client Mr A. We base this finding on the evidence of NA, SM and various references in documents, to the complaints, including from Mr A himself. For example:-

(1) an allegation by Mr A at page 153 that "*the current case worker is very aggressive…"* (which we find to be a reference to the claimant)

(2) an allegation recorded in a file note of a conversation that SM had with Mr A dated 11 May 2018 (page 168) "[Mr A] *very happy with NA/SM/IP. He was* [scared] *of MC* [the claimant] *couldn't ask him questions, shouted at him, didn't explain his case and visits were never long at HMP Forest Bank*.

(62) The concerns that NA had arising from this information were genuine, serious and required investigation.

(63) We were also provided with evidence about other clients complaining about the claimant. We find that these complaints caused NA to be concerned and that the concerns were genuine, serious and required investigation. (See for example email dated 27 March 2018 from client DE at p117, email dated 19 April 2018 regarding client AS at p132, email dated 11 May 2018 regarding LS at 171)

(64) We were provided with evidence that NA received information from other firms which had engaged the claimant's services and which raised concerns about him. (see for example email of 3 May 2018 at page 163, regarding concerns raised by Yates Arden solicitors). This information caused NA to be concerned and we find that these concerns were genuine, serious and required investigation.

(65) The claimant has asked us to find that the complaints were deliberately sought or made up by the respondents, to strengthen the respondent's case to dismiss him. We do not find that is the case. As we have noted in the paragraphs above, we find the concerns were genuine, serious and required investigation.

<u>Concerns about the claimant's expense claims</u>

(66) It was AD, not NA, who raised a number of concerns about the claimant's expense claims. Some or all of the concerns might have been capable of explanation. However what was clear to AD (whose evidence we accept) is that

(1) The claimant was not completing his expenses claims correctly;

(2) His expenses were very high compared to those of his predecessor;

(3) His expenses were higher than NA's which AD found surprising;

(4) Some of the expense claims required more explanation/scrutiny as far as AD was concerned, including one day when he made 6 separate claims for visiting Ashton under Lyne police station as well as the extent of some of the mileages claimed (AD had checked mileage claims against those from an AA website).

(67) NA did not react immediately to the expense issues but asked for more details and ongoing monitoring.

Concerns about excessive use of mobile data.

(68) We find as a fact that there were concerns about the extent of the claimant's use of mobile data on his work phone provided to him by the respondent. The mobile data limit for a month was being exceeded part way through a month.

(69) It may be that (as with some or all of the expense claims) the claimant had a credible explanation for the use of mobile data but we do find that the concerns were genuine and required explanation.

Concerns about criminal convictions

(70) Information was received by the respondent that the claimant may have criminal convictions. This information was received from a former partner or spouse of the claimant who is the mother of the claimant's son. The information is contained in an email from this person to the respondent dated 15 May 2018.

(71) We find as a fact:-

(1) The concerns were initially raised in the course of a telephone call which took place on or about 2 May 2018 and the email of 15 May provided written confirmation of information already provided.
(2) This was amongst a number of concerns that NA received in the run up to her telephone call of 14 May 2018.

The claimant's grievance.

(72) 2 documents were provided by the claimant to the respondent on 6 August 2018. These documents were written when the claimant was obtaining legal advice from a barrister. The documents are at pages 9 to 15 and were attached to the ET claim form. Both are dated 6 August 2018. One of the documents is the claimant's statement that he provided on day one of the hearing. The second document is stated to *"set out fully my complaint of whistleblowing against the firm."*

(73) The second document asserts that the claimant made a protected disclosure to NA (which is different to the case that the claimant put before us on day one, although was consistent with the case that the claimant had previously put in these proceedings)

(74) These documents were received and treated as a grievance. The respondent outsourced the investigation of the grievance to an HR consultancy called Solutions for HR who carried out an investigation including interviewing a number of individuals. They invited the claimant to a grievance investigation meeting on 2 occasions but the claimant did not attend either meeting.

(75) The grievance outcome was provided to the claimant by letter dated 10 September 2018 (page 209). No part of the grievance was upheld.

(76) The claimant was offered right of appeal but did not exercise it.

<u>The disciplinary hearing.</u>

(77) The respondent wrote to the claimant by letter dated 12 October 2018 to invite him to a disciplinary hearing.

(78) At that stage:-

(1) The various concerns relating to the claimant's conduct remained;
(2) The claimant grievance had been investigate and outcome provided;
(3) The claimant had not responded to correspondence asking for more information about his illness and for the claimant to attend an occupational health appointment and had indicated in a phone call with AD that he would not attend such an appointment.

(79) The claimant attended the disciplinary hearing on 19 October 2018. Handwritten notes of this hearing are at pages 216 – 231. It is apparent from the notes that the claimant did not take all of this meeting seriously. This may have been because he had decided by that stage that there was no prospect of his employment with the respondent continuing. We find that the meeting included the following:-

(1) That the claimant stated he had been advised not to consent to an occupational health assessment
(2) He was asked about the concerns concerning the client known as Mr A and his response was not to provide any information or explanation except to state (on a number of occasions) that he will respond to the allegations when *"it goes to court".* (which we find is a reference to these employment tribunal proceedings)

(3) When asked whether he wanted to respond to anything at the meeting, his response was "*if you are going to sack me, sack me"*

(4) He was asked about other client concerns and replied that he would respond *"at a later stage"*

(5) When he raised an allegation that NA backdated documents he said that he had been advised not to bring evidence.

(6) In relation to the concerns about travel claims he replied that he would respond at a later stage.

(7) When asked if he had a criminal conviction he responded that the Law Society will know all about it, that they had decided he was fit to carry on his work and he would reply further when the issue comes to court (which, again, we find to be a reference to these tribunal proceedings)

(8) When asked if there was anything else the respondent should know about him, he disclosed that he was heterosexual, a Manchester United fan and was quite good at accounts.

(80) The claimant was dismissed following this meeting. Included in the bundle of documents (page 176) is an e email from Solutions for HR to the respondent providing some advice to the respondent about holding the disciplinary meeting. The email contains the following words (which the respondent had made a poor attempt at redacting from the copy in the Tribunal bundle but, as acknowledged by Mr Flood, should not have been redacted);

> *If you can have someone in the meeting with you to take notes.*
>
> *At the meeting you are simply going through your points in the letter and asking for his response. You will then pause and communicate your decision on termination.*

(81) The redacted words might indicate dismissal would be the only outcome; that the decision to dismiss had already been made. We do not find that it was. The wording is poor and we doubt that Solutions for HR would have used that wording had they known that it would be reviewed in an employment tribunal hearing. However, Solutions for HR were providing advice to NA who was the decision maker and owner of the respondent. In the light of the evidence that NA had, dismissal was looking very likely indeed, but there was not a predetermination. The decision remained one for NA to make.

<u>The dismissal letter and reasons for dismissal</u>

(82) The reasons for dismissal were set out in the dismissal letter of 24 October 2018 (pages 232 to 234 and particularly the bullet points at 234). There

were various reasons contributing to the decision and we find that these were the true reasons for dismissal. In summary:-

(1) A lack of cooperation from the claimant during a long period of sickness, a refusal to share medical information and explore a supported return to work

(2) A refusal to provide details to the employer to clarify information that it had received about possible criminal convictions that the claimant may have.

(3) The claimants poor conduct towards his work and the respondent's clients.

(4) The claimants lack of cooperation during the disciplinary meeting itself

(5) A further sweeping and unsubstantiated allegation made during the disciplinary hearing, that NA was not above backdating documents. This was a reference to the letter dated February 2018 but sent in May 2018 and referred to earlier in this judgment. As we have found, the reference to February rather than May is a clear, unintentional error and there is no evidence that the claimant has been able to point to that indicates otherwise.

(83) We find that the disclosures made by the claimant to JS on 14 May 2018 and/or those made in the course of the claimant's grievance (6 August 2018) were not relevant to the decision to dismiss.

E. The Law

(84) In this claim the claimant claims that he was subjected to a detriment on the ground that he had made a protected disclosure and that the principal reason for his dismissal was the alleged protection from suffering detriment pursuant to section 47B Employment Rights Act 1996 ("ERA"):

"(1) A worker has the right not to be subjected 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."

Protection from dismissal

(85) Section 103A ERA provides:

"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."

(86) Section 43A - Meaning of "Protected Disclosure:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

(87) Section 43B – Disclosures qualifying for protection

" *(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;

c. That a miscarriage 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 of the preceding paragraphs has been or is likely to be deliberately concealed.

…"

(88) Section 43C:

"A qualifying disclosure is made in accordance with this section if the worker makes the disclosure... –

(a) *to his employer, or*

(b) *where the worker reasonably believes that the relevant failure relates solely or mainly to –*

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

…"

(89) In closing submissions Mr Flood referred the Tribunal to the case of Chesterton Global Limited v Nurmohamed [2017] IRLR 837 ("Chesterton"), and to the case of Parsons v Airplus International Limited UKEAT/0111/17.

(90) These cases were referred to particularly in relation to the requirement that the worker making a disclosure has to reasonably believe that it is made in the public interest and also has to reasonably believe that it "tends to show" one or more of the subject matters listed at 43B(a) to (f) ERA (see above).

(91) The Tribunal also had regard to the following:

(1) Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 ("Korashi");

(2) Wharton v Leeds City Council EAT 0409/14;

(3) Kilraine v London Borough of Wandsworth [2018] ICR 1850.

(92) Having regard to the terms of the statute and the case law referred to above, the following is relevant:

(1) The terms of section 43B require a reasonable belief of *the worker making the disclosure* (our emphasis). This wording provides a mixed objective and subjective test. The test is not whether there is a reasonable belief on the part of a reasonable worker; rather the test is whether the particular worker making the disclosure has a reasonable belief.

(2) The question whether a disclosure is in the public interest depends of the character of the interest served by it rather than simply on the numbers of people sharing the interest (Chesterton - paragraph 35).

(3) The question as to whether the particular worker has a reasonable belief that there is or is not a disclosure in the public interest is a question to be answered by the Tribunal on a consideration of all the circumstances of the particular case.

(4) There must be some objective basis for the worker's belief in order for that belief to be reasonable. Some evidence is required; rumours, unfounded suspicions, uncorroborated allegations and the like will not be good enough to establish a reasonable belief (Korashi).

(5) The information disclosed only has to "tend to show" one or more of the matters set out in (a) to (f) of section 43B. It does not have to prove the matter and information may, in the reasonable belief of the worker "tend to show" one or more of the matters at section 43B(a) to (f) even if the worker is in fact mistaken. (Kilraine)

(6) Where a claimant relies on breach or likely breach of an unspecified legal obligation as the relevant failure, that claimant may have difficulty in persuading a Tribunal that his or her belief was reasonable (Kilraine).

Time Limits

(93) Section 48 ERA sets out the time limit in relation to detriment claims. Section 111 ERA sets out the time limit in relation to dismissal claims. The wording is the same in both sections. It requires claims to be brought within 3 months of the relevant detriment/dismissal unless that is not "reasonably practicable" to do so in which case the claim has to be made within such further period as the tribunal considers reasonable.

(94) Sections 48(4A) and 111A ERA extends the time limit noted above to take account of the requirement for ACAS early conciliation

F. Analysis and findings– application of the facts and law to the issues

(95) Issue One - Has the claimant made one or more protected disclosures as defined?

The claimant alleges that he has made qualifying disclosures pursuant to the provisions of section 43(B)(1)a, 43 B(1)(c) and 43 (B)(1)(f) of the Employment Rights Act 1996. The details of the protected disclosures relied on are as follows:

That on 14 May the claimant entered in to a discussion with Mr J Stringer when he informed Mr Stringer that (1) he was being bullied by Ms Akhter and (2) that Ms Akhter was delaying billing a number of legally aided criminal cases due to the intended separation of the (then) partnership of Platt Halpern.

95.1 A discussion took place between the claimant and John Stringer on 14 May 2018. In that discussion, the claimant raised allegations that NA was delaying the billing of some criminal files and we accept that the claimant alleged that she was doing so in order for her to benefit personally from billings (and so for the other partners to lose out)

95.2 We accept that the content of the disclosure was capable of falling under s43B(1)(b) ERA (that a person – in this case NA – is failing to comply with a legal obligation to which she is subject) and/or 43B(1)(a) (that a criminal offence was being committed). We also accept that the content of the disclosure was capable of being

in the public interest, in that it involved allegations of wrongful/fraudulent conduct involving a solicitor (and therefore a member of a regulated profession) and the misuse of public funds (Legal Aid).

95.3 However, the "reasonable belief" requirement has not been met, either in relation to the alleged wrongdoing itself or the public interest requirement. The discussion took place shortly after the claimant had been told about a number of serious concerns in relation to his performance/ conduct and just before he left his place of work to begin a long period of absence due to sickness. The claimant made these allegations/disclosures with no information other than some information that the claimant had picked up, that extensions of time were being applied for in relation to some criminal legally aided files.

(96) Issue 2 - Were any such disclosures in the reasonable belief of the claimant made in the public interest?

96.1 There is no evidence relied on by the claimant to indicate that the claimant had a reasonable belief in any wrongdoing

96.2 Even if there was a whatsapp message from NA to an employee of the respondent, all that was doing was relaying an instruction that may well have been a legitimate one and with no information to indicate it may not have been a legitimate one.

96.3 Missing file numbers from expense claims was another point that the claimant relied on as an indication that there were illegitimate activities. However the evidence of AD made clear that the reason the file numbers were not on some expense claim details was, quite simply, because the claimant himself had not completed his expense claims properly.

96.4 We do not accept that the claimant had a reasonable belief that files were being operated "off the system" or of any wrongdoing (whether or not it fell within section 43B ERA)

(97) Our findings on issues one and 2 are sufficient to dismiss the claims. However and on the basis that the Tribunal has had the benefit of hearing all of the evidence in this case, our findings in relation to the other issues are below.

(98) Issue 3 - Were any such disclosures made to his employer pursuant to the provisions of section 43(C)(1)(a) ERA?

Yes. This is not in issue. The respondent accepts that disclosures were made to the claimant's employer.

(99) Issue 4 - Was the claimant subjected to any detriment by any act by his employer on the grounds that he had made a protected disclosure?

99.1 The claimant alleges the following detriments –

on or about April or May 2018 (but NOT prior to 14 May 2018) Ms Akhter:-

a. told him to "mind your own fucking business."
b. was regularly abusive in person and on the phone.
c. swore at him on more than one occasion.
d. *made disparaging remarks about him to Counsel at Cobden house Chambers.*

99.2 This alleged behaviour predated the alleged protected disclosure of 14 May 2018. This was a point specifically raised on day one f the hearing and emphasised in the amended list of issues. At no point in the hearing did the claimant allege that this behaviour occurred after 14 May.

99.3 The claimant also alleges:-

being sent a letter dated 16 February 2018 but received on or about 17 May 2018 setting out allegations and inviting him to attend a meeting on 21 May 2018.

99.4 Our findings of fact on this are set out above. The reference to February rather than May was an un-intended error.

99.5 As for the allegation

"*learning on or about 4 June 2018 that his job was looking to be filled through a legal recruitment agency;*

no evidence was provided on this point and we have made no finding of fact.

99.6 The final alleged detriment s that " *on or about 18 June 2018 receiving what happened to be a final wage slip and not receiving money due to him."*

AD provided an explanation about this as she is the person at the respondent who liaises with the payroll company used by the respondent. The explanation is a straightforward one

as we have noted above and which we accept. This had nothing to do with the claimant's discussion with John Stringer.

(100) Issue 5 - Are there any time issues with regard to the above claims?

The detriment claims may have been issued out of time. The dismissal claim was brought in time. Given the findings made, there is no requirement for us to address the time limit issue in relation to allegations of detrimental treatment.

(101) Issue 6 - Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal that he made a protected disclosure?

No. the reasons for dismissal were as already noted.

Employment Judge Leach

Date: 17 February 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25 February 2020

FOR EMPLOYMENT TRIBUNALS