Case Numbers: 2301070/18
2302281/18
2303639/18
2304431/18

EMPLOYMENT TRIBUNALS

Claimant: **Mr Ayodele Martin**

Respondent: **(1) London Borough of Southwark**
(2) The Governing Body of Evelina Hospital School

Heard at: **London South Employment Tribunal**

On: **23 – 26 September 2019, 10 – 12 February 2020 in chambers**

Before: **Employment Judge Martin**
Ms Whitlam

Ms Edwards

Representation:
Claimant: **In person** **Respondent:** **Mr P Linstead - Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant did not make protected disclosures

2. The Claimant's claims are dismissed

RESERVED REASONS

1. The Claimant made claims of detriment for making protected disclosures which were defended by the Respondent. The Claimant was still employed by the Respondent when he presented his claims to the Tribunal.

The issues

2. The issues were agreed by the parties. A list of the issues as agreed is appended to this order.

3. The Respondent disputed that the disclosures that the Claimant made were protected and therefore the Tribunal first considered whether the disclosures were protected. If not protected, then the Claimant's claim cannot succeed.

The law

4. The relevant law is as follows:

5. The Employment Rights Act1996, s47B(1) provides that a worker has the right not to be subjected to a detriment by any act "done on the ground that [he or she] has made a protected disclosure".

6. Disclosures qualifying for protection are defined by s43B, the material provisions being the following:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following – … (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …**

7. Qualifying disclosures are protected where the disclosure is made in circumstances covered by ss43C-43H. These include where the disclosure is made to the employer (s43C) or to a prescribed person (s43F).

8. The Respondent referred the Tribunal to case law. That which is relevant to the decision reached is set out below:

    a. **Blackbay Ventures v Gahir [2014] IRLR 416** which held that the Tribunal should separately identify each disclosure by reference to date and content and gave guidance as follows:

        (i) The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered, or as the case may be, should be identified.

(ii) The basis upon which the disclosure is said to be protected and qualifying should be addressed.

(iii) 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. It was not sufficient (as in the *Blackbay* case) for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations.

(iv) It is proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing they have been identified as protected disclosures.

b. **Cavendish Munro v Geduld [2010] IRLR 38** which held that there is a distinction between "information" and an "allegation". The ordinary meaning of information is conveying facts, and those facts must be disclosed. This is distinct from a point of view or statement of position.

c. **Fincham v HM Prison Service EAT 0925/01** which held that the disclosure must identify, albeit not in strict legal language, the breach of a legal obligation on which the employee relies.

d. **Chesterton Global v Nurmohamed [2017] ICR 920** in relation to the element of a protected disclosure that provides it is to be in the public interest. The Tribunal has considered this case carefully and notes the words of caution set out in it:

"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…"

9. The Chesterton case sets out matters to be considered when considering whether a disclosure is in the public interest:

"(a) the numbers in the group whose interests the disclosure served – see above;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed - a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed - disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer - "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"

The hearing

10. The Tribunal heard from the Claimant and Ms Almaz Anderson – Teaching Assistant and Ms Lene Ryden - Supply Teacher on his behalf. For the Respondent the Tribunal heard from Ms Anne Hamilton – Head Teacher; Ms Kate Bennett – Deputy Head Teacher; Ms Ann Mullins – Chair of Governors and Ms Pui Man – School Business Manager.. There were four lever arch files of documents plus some additional documents which were provided later. The witnesses had written statements and the Claimant's ran to 60 pages.

11. There were other witness statements from witnesses who did not attend to give evidence and their evidence therefore carried little weight.

12. As the Claimant was representing himself, the Tribunal gave such assistance as it could to him during the hearing to enable him to put his case..

The facts that the Tribunal found

13. The Tribunal found the following facts on the balance of probabilities having heard the evidence and considered the documents and submissions. These findings are limited to those facts that are relevant to the issues and necessary to explain the decision reached. All evidence was considered even if not set out below.

14. The Respondent is a school attached to the Evelina Children's Hospital. It caters for the year groups nursery to year 13. The school provides education to children who are admitted to hospital for short or extended periods. The school employs 19 staff members including one Head Teacher, one Deputy Head Teacher, one School Business Manager, one Office Manager and Office Administration Officers. There are eight teachers including early years, primary and secondary practitioners. Two teachers are part-time. In addition, there are support staff and contractors.

15. The Claimant was initially employed on a fixed term supply post from 15 June to 31 August 2015. The Claimant also had a separate business. The Claimant worked full-time but was given a year to run his business. The Claimant was an IT teacher and part of his remit was to run the school's IT infrastructure.

16. The Claimant was the staff representative on the board of governors and had been at some time a trade union representative.

17. The Claimant's claim is predicated on him having made protected disclosures. The Tribunal therefore first considered whether the disclosures he relied on amount to protected disclosures pursuant to section 43B of the Employment Rights Act. The law is set out above. If the Tribunal concludes that the disclosures are not protected, then the Claimant's claims will fail.

Disclosure 1 - to Anne Hamilton dated 9 July 2017

18. This is an email sent to the Head Teacher about working hours and Directed Time. The email starts **"I am looking at our working hours for teachers and seem unable to reconcile them to statutory guidance, and all my conservative calculations, clearly I may be missing something"**. The Claimant then gives calculations and ends the email with "**the deductions and additions to the excess of Directed Time cancel. From my calculations the excess of directed time for each full-time teacher is in excess of 97.5 hours for this academic year 05/09/16-21/07/17, clearly I may be missing something. Please may we discuss this?**"

19. Whilst the Tribunal accepts that this email relates to a legal obligation in relation to directed time and sets out some, the Tribunal does not find this to be a protected disclosure. A protected disclosure must provide information "**that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …".**

20. On examination of this email the Tribunal finds that it is an email raising a potential concern. It is not alleging that there was a breach of a legal requirement or that there was a likelihood of a legal obligation being breached. It is clear from the wording that the purpose of the letter is to invite a discussion to see whether he has been "**missing something**", or whether the Claimant was correct in the assertions that he made. The Tribunal finds this to be an enquiry rather than a disclosure of information that tends to show that there has been a breach of a legal obligation or is likely to be a breach of a legal obligation. The Tribunal does not find this to be a protected disclosure.

Disclosure 2 - to Ann Mullins, chair of Governors on 17 and 19 July 2017

21. This email is also about the Directed Time issue which was the subject matter of the first disclosure to Ms Hamilton. There is reference to the email chain regarding this issue (ie disclosure 1) being sent with this email.

22. The Claimant sent this email in his capacity as school governor. In this email the Claimant says **"According to the 'governance handbook for academies, multiacademy trusts and maintained schools' - January 2017 page 69, we, the governing body, are responsible for "making sure that headteachers benefit from any statutory entitlements and comply with the duties imposed on them which are contained within the STPCD (School Teachers' Pay and Conditions Document). I am concerned we may be in breach of the second part of this. I have emailed the head about my concerns and the email trail is below."**

23. The Claimant goes on to say "**it is likely that, over the past two years teaching staff of worked in excess of 212 hours over the statutory directed time. This is likely to be more if you look further back.….**" and that "**Issues to be discussed include: whether or not we are in breach of the statutory guidance and if so, by how much and for how long for each teacher.…….".**

24. At the end of this letter the Claimant's sets out some of the statutory, legal and financial references which he thinks are relevant to this issue. The Claimant ends the email: **"I would be grateful if you could confirm receipt of this email and advise me how we intend to proceed".**

25. The Tribunal notes that the Claimant included the email which he had sent to Ms Hamilton which for the reasons set out above the Tribunal has found was an enquiry, and not a disclosure of information tending to show, a breach of a legal obligation or the likelihood of such a breach. Taking these two emails together (so as to form one chain) the Tribunal does not find that this email is a protected disclosure because it is not saying that there is a breach of a legal obligation but is querying certain data. It is simply a followon from the previous email.

26. As this was the end of the school year, Ms Mullins responded on 19 July 2017, **"Thank you for your email. I need to take advice on these matters as we are so near the end of term, I expect this to be next term."** This issue was put on the agenda for the first governor's meeting in the following term.

Disclosure 3 – email to Dawn Hill, Ann Mullins, Oliver Coddington, Anne Hamilton and Marion Ridley on 16 October 2017

27. This disclosure was sent to various governors of the school at the same time as the committee meeting began. This was a committee meeting which was already going to discuss the Claimant's issues with Directed Time which was on the agenda for discussion. The Claimant was to attend that meeting in his capacity as staff governor.

28. The Respondent submits that the Claimant cannot contend that an email sent to governors for information about an existing agenda item was a

disclosure in the public interest. The Tribunal has considered this email carefully. This email refers to statutory guidance in relation to directed time and sets out what many schools do in relation to this. At the end of this email the Claimant gives an "**explanation of directed time**" it is not clear, whether this was his view of what directed time was or was taken from any guidance or other statutory provisions. Within this document as an allegation that directed time has been exceeded by the Respondent over the previous two years and states **"I hope that this team will ensure that a budget of directed time' or similar instrument is used going forward so that we are come in compliance with statutory guidance**". He goes on to say that the governors are "**collectively responsible for this situation that has happened and is continuing to happen. It is therefore incumbent on us to do right by the teachers who help make the school what it is."**

29. The Tribunal does not find this to be a disclosure of information in the public interest and it therefore does not attract the protection of the Act.

Disclosure 4 – email to Deborah Cole of Department of Education on 21 January 2018

30. The Respondent accepts that this disclosure was made to a prescribed person as required under the provisions in the Employment Rights Act 1996. The Tribunal has examined this disclosure carefully. The Tribunal notes that this is the only disclosure made to Ms Cole and it did not include the previous disclosures he had made to the Respondent. This email starts **"I am writing to you as a teacher in a local authority school, concerning the allocation of directed time for teaching staff in my school".** He refers to **"the accumulation of excess directed time over and above the statutory 1265 hours a year for the periods mentioned is greater than 220 hours for all full-time teaching staff**". From this part it could be said, at first glance, that he is writing on behalf of all the teachers in the Respondent's employment. However, the focus of the remainder of the email relates to the Claimant's own personal situation. For example, he writes:

"I am a good teacher and work considerably harder than the statutory directed 1265 hours." This refers to him only and not to teaching staff more generally.

"Please could you advise me on the best way of securing the outcomes below?

- **Wages to be paid to me for time the head teacher has directed me to work in excess of the statutory 1265 hours each academic year and the first half term of this academic year.**
- **Historic performance/appraisal documents to include statements to indicate that they were written whilst contracted hours of being exceeded and by how many hours and to be reviewed in that light**
- **to be treated fairly and in line with policies and procedures going forward**"

- **"Please could you offer the best advice on how to secure the outcomes mentioned?"**

31. The Tribunal accepts the Respondent's submission that the language relates to the Claimant's personal claim for compensation rather than to a wider issue affecting all teachers. The outcome the Claimant wants is an outcome for him personally. As set out above, he was referring to "**wages to be paid to me…**" And not for wages to be paid for teachers more generally in the Respondent's employment.

32. The Tribunal does not find that this disclosure was made in the public interest but rather to further the Claimant's personal grievance with the Respondent. In the letter the Claimant asked for help in securing the "**outcomes mentioned**". The outcomes relate only to the Claimant's personal situation. The Tribunal does not find this disclosure to be protected as it is not in the public interest.

Disclosure 5 – Email to David Quirke Thornton, Strategic Director of Children and Adult Services and the Board Of Governors on 9 February 2018

33. This is an email written to advise the Respondents that the Claimant had engaged with the ACAS early conciliation process to resolve his issues which he then sets out briefly. The Tribunal finds that this was an email for information purposes only and in relation to the claim that the Claimant was proposing to bring in the Employment Tribunal and not for the benefit of the teachers more widely employed by the Respondent. The Tribunal does not find this disclosure to be protected as it is not in the public interest.

34. Both parties gave detailed submissions which have been considered by the Tribunal in some detail. The Tribunal wishes to thank both parties for the care they have made in the submissions made. In response to a comment made by the Claimant, the Tribunal just wishes to highlight that at a previous hearing employment Judge Freer declined to make a deposit or strikeout order but that this did not mean that he accepted that the disclosures were in the public interest. What it meant was that this was to be fully argued at the Tribunal which it has been.

35. The Tribunal has sympathy for the Claimant who clearly found himself in a difficult position at the Respondent. However, the nature of his claim means that he must show that the treatment for which he complains (which given the findings in relation to the protected disclosures, the Tribunal has not found it to be proportionate or necessary to make detailed specific findings) was because of disclosures which he made which were protected disclosures. However, by way of general comment and observation the Tribunal considers that the treatment complained of was not causally connected to the disclosures and therefore had the disclosure been protected this would not have changed the outcome.

36. For example, it was within Ms Hamilton's prerogative as Head Teacher to change procedures if she considered it to be necessary and that other staff were treated in the same way as the Claimant and what happened had nothing to do with him making a disclosure. This also applies to the detriments alleged about changing the opening hours of the school which the Tribunal accept were for work life balance reasons.

37. There is a link between some of the detriments that the Claimant has complained of. The Claimant accepted in evidence that he did not keep up to date teaching logs. Pupil evaluations were expected to be done daily and was something that all teachers were expected to do so that other teachers knew what teaching and other contact had happened. This is especially so given the special nature of this school. This in turn fed into Ms Hamilton sending the Claimant a 'Notice of concern email'. There was no evidence to suggest that the reason for the 'Notice of concern' email was because of any disclosure the Claimant made.

38. This in turn fed into the issues the Claimant had with his appraisal on 9 July 18. The Tribunal accepts the Respondent's evidence that this was the usual time for appraisals to be carried out. It is perhaps unfortunate that the Claimant was off work due to ill health and had only returned to work at the time of the appraisal. The Claimant says he suffered a detriment because he was not given notice of the appraisal, however as the Tribunal has found this happened at the normal time for appraisals in the school so he should have known it was going to happen. The Tribunal accepts the Respondent's evidence that the appraisal would be for the period when the Claimant had been in the school and not when he was absent. Part of the process is that the student logs were used, however as noted above the Claimant did not keep these up to date. This had a knock-on effect on his appraisal which, because he did not have up to date records meant it was difficult for him to get the information in time for the appraisal. The Tribunal accepts Respondent's evidence that if records are kept up-to-date, then the burden on a member of staff in preparing for a appraisal is not large as they already have the necessary data. The Tribunal also notes that Ms Hamilton tried to assist the Claimant by holding the appraisal one week later.

39. These are just a couple of examples of how the Tribunal says that the detriments set out in the agreed list of issues were not causally connected to any disclosure which the Claimant alleged were protected. Therefore even had the disclosures been found to be protected, the Claimant's claims would have failed.

40. In all the circumstances the Claimant's claims are dismissed.

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Employment Judge Martin

Date: 28 February 2020

AGREED LIST OF ISSUES

1. N/A

2. N/A

3. N/A

Whistleblowing

4. The Claimant relies on the following disclosures as protected qualifying disclosures for the purposes of s43B;
   (a) Disclosure to Anne Hamilton on 9 July 2017;
   (b) Disclosure to Ann Mullins, Chair of Governors, on 17 July 2017;
   (c) N/A
   (d) Disclosure to Dawn Hill, Ann Mullins, Oliver Coddington, Anne Hamilton and Marian Ridley on 16 October 2017;
   (e) Disclosure to Deborah Cole of DfE on 21 January 2018;
   (f) ~~N/A~~
   (g) Disclosure to David Quirke Thornton, Strategic Director of Children and Adult Services and the Board of Governors on 9 February 2018; ~~(h)~~

   ~~N/A~~

5. Were these disclosures disclosures of information which, in the reasonable belief of the member making the disclosure, were made in the public interest and tended to show that a person was failing to comply with a legal obligation to which she was subject, as required by s43B ERA 1996?

6. ***Does information tend to show a failure to comply with a legal obligation has been, is being or is likely to be deliberately concealed by Anne Hamilton.***

7. ***Does information tend to show a failure to comply with a legal obligation has been, is being or is likely to be deliberately concealed by Ann Mullins.***

8. ***Does information tend to show a failure to comply with a legal obligation has been, is being or is likely to be deliberately concealed by the Board of Governors of Evelina Hospital School.***

9. ***Does information tend to show a failure to comply with a legal obligation has been, is being or is likely to be deliberately concealed by Southwark Council.***

10. Where the individuals to whom C asserts he made qualifiying disclosures were not his employer, are the requirements of s43G ERA 1996 met?

11. The following detriments are alleged:
    (a) Anne Hamilton changing established classroom procedures for C, such that they were allegedly less favourable to C, because other teachers were not informed of the changes. The procedures concerned the situation when no students arrive for a classroom lesson, on 20 July 2017;
    (b) Anne Hamilton changing the opening and closing times of school from the first day back at the start of the academic year on 4 September 2017;
    (c) Anne Hamilton asking teachers whether they knew of the directed time email sent by C to Ms Mullins, Chair of Governors, in September and October 2017. C alleges she said her new times are her response to the email that had been sent by C.
    (d) N/A
    (e) Anne Hamilton sending an email to C entitled 'Notice of Concern' on 3 November 2017 and failing to respond to C's subsequent emails asking her to specify which Teachers' Standards.
    (f) Following Anne Hamilton telling C that she had received a complaint from colleagues about him on 1 December 2017 she subjected him to a detriment by the time she took to address the complaint and tell him in July 2018 that it was not being pursued;
    (g) Meeting Schedule not including C in the scheduled middle leadership meetings in January 2018;
    (h) Kate Bennett sending a disproportionately assertive email to C that was lacking in any corroborative evidence, accusing C of not following the instructions to all staff regarding testing of students on 20 February 2018;
    (i) Anne Hamilton asking C to carry out an audit of IT equipment across the whole school, considering C is a full time teacher, with an impractical deadline, on 21 February 2018;

(j) Kate Bennett not prompting C to attend a scheduled half hour one to one meeting on 9 March 2018, even though C was eight steps away in the same room at his desk, but instead producing documents to put him in a negative light, and circulating them to the Governing Body and the Pastoral and Curriculum Committee;

(k) Anne Hamilton at a Governing Body Meeting on 12 March 2018 stated that she was taking a member of staff through capability procedures;

(l) Anne Hamilton refusing to open the letter explaining C's grievance on 24 April 2018;

(m) Anne Hamilton treating C with scant regard to the principle of duty of care leading up to and during the return to work meeting on 24 April 2018 by standing up throughout the meeting and raising her voice to C;

(n) Anne Hamilton failing to satisfactorily address bullying events described by C in his letter of 24 April 2018 and refusing to distribute the last Return to Work Sickness Interview record in the Health Review Meeting on 23 May 2018;

(o) ***Anne Hamilton on 9 July 2018 asking C to take part in the appraisal process against medical advice after his immediate return after 13 weeks sick leave due to work related stress and giving C significantly less time to complete the task as all ;*** (p) ***Pui Man the School Business Manager asked C in a coercive manner to sign two inaccurate documents 11 July 2018;***

(q) ***C's work email account is suspended at the beginning of November 2018 two weeks after he raises a formal grievance.*** *C contends it was not standard practice for R to suspend an email account when an employee is off work through sickness and that he asked for confirmation of the document upon which that contention was based, but it was not produced.*

12. Did the incidents listed at paragraph 11 above happen as asserted by C?

13. Did they amount to acts of detriment (s47B ERA)?

14. ***If not, what is R's explanation?***

15. Were they done on the ground that C had made a protected disclosure as set out under paragraph 4 above (s47B ERA)?

16. ***N/A***

17. ***N/A***

18. N/A

19. Were the incidents listed at paragraph 11 above a series of similar acts?

20. If not, was it not reasonably practicable to present a complaint to the ET in respect of any that were presented more than three months before 8 June 2018 (date of EC Notification) within three months of the date on which they occurred?

21. If not, were they presented within such further period as the Tribunal considers reasonable?

22. If C succeeds in his claim under s47B ERA, what award of compensation does the Tribunal consider to be just and equitable?

23. ***Did Respondents follow the Evelina Hospital School Whistleblowing Policy***

24. Has either party unreasonably failed to follow the guidance set out in the ACAS Code of Practice for Grievance Procedure

25. Did R comply with education legislation at all times?