EMPLOYMENT TRIBUNALS

Claimant: **Mr R Moura de Araujo Faria**

Respondent: **Lycamobile UK Limited**

PRELIMINARY HEARING
Application for Interim Relief

Heard at: **East London Hearing Centre (by CVP)**

On: **Monday 3 August 2020**

Before: **Employment Judge W A Allen QC**

Representation

Claimant: Mr O'Dair, Counsel
Respondent: Mr Barnett, Counsel

This has been a remote video hearing which was agreed to by the parties. The form of remote hearing was V: video - fully (all remote) by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to are in the tribunal file, and in the written submissions, authorities and bundles of documents produced by the parties, which I had before me.

JUDGMENT

The judgment of the Tribunal is that:-

1. The application for interim relief succeeds.

Continuation of Employment Order

2. The Claimant's contract of employment shall continue in force for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and for the purposes of determining for any purpose the period for which the employee has been continuously employed.

a. In accordance with (2), the Respondent shall pay to the Claimant:- forthwith the sum of £44,615.40 in respect of salary between 6 May 2020 and 3 August 2020 (giving credit for one week's pay in lieu of notice);

b. on or before 31 August 2020, the sum of £15,897.44 in respect of the period between 4 August 2020 and 31 August 2020;

c. thereafter, the sum of £16,666.67 on or before the last working day of each month until determination or settlement of the complaint.

3. Further, in accordance with (2), the Respondent shall arrange for the Claimant to be re-enrolled into its private medical insurance scheme until determination or settlement of the complaint. In the event the Respondent's insurers refuse to re-enroll the Claimant, either party may apply for a reconsideration of this Order within 14 days of the insurer's refusal.

4. All sums under this order are subject to deduction of tax, national insurance and other normal payroll deductions (including an appropriate amount of tax in respect of the provision of the private medical insurance).

REASONS

1 This hearing was listed to deal with the Claimant's interim relief application made in his ET1 claim form presented on 11 May 2020 following his dismissal on 5 May 2020. The Claimant's position is that the reason or principal reason for his dismissal was that he made one or more protected disclosures and that this amounted to an automatic unfair dismissal contrary to Section 103A Employment Rights Act 1996 ('ERA').

2 At the outset of the hearing the parties agreed that the legal basis on which my decision today would be based was accurately summarised as follows:

2.1 Interim relief is available in appropriate protected disclosure dismissal cases where it appears to the employment judge determining the interim relief application that the claimant is "likely" to succeed in all the issues required to establish the claim. In *Dandpat v University of Bath* (UKEAT/408/09) (10 November 2009, unreported) and *Raja v Secretary of State for Justice* (UKEAT/0364/09/CEA) [2010] All ER (D) 134 (Mar) the EAT held that a claimant must show "a pretty good chance of success" applying *Taplin v C Shippam Ltd* [1978] IRLR 450 (EAT) – a trade union dismissal case under TULR(C)A, s 163. Following the reasoning of *Ministry of Justice v Sarfraz* [2011] EAT 562 and updating it to reflect the 2013 amendments to the ERA, in making an order for interim relief under ss 128 and 129 ERA, the employment judge in a whistleblowing case must find that it was "likely" that the employment tribunal at the final hearing would find five things:

(i) that the claimant had made a disclosure of information to his employer;

(ii) that he believed that that disclosure tended to show one or more of the things itemised at (a)–(f) under s 43B(1) of the 1996 Act;

(iii) that that belief was reasonable;

(iv) that he reasonably believed that the disclosure was made in the public interest (which need not be the only motivation); and

(v) that the disclosure was the principal reason for his dismissal.

For this purpose, the word "likely" does not mean "more likely than not" (that is at least 51% probability) but connotes a significantly higher degree of likelihood. It does not however amount to a 'beyond reasonable doubt test'.

3 I had before me: an agreed bundle running to page 204; written submissions from both parties submitted in advance of the hearing; a witness statement and slightly amended Particulars of Claim from the Claimant; and a witness statement from Mohammed Malique for the Respondent (a solicitor, former Group Legal Counsel, now Senior / Special Advisor to the Board) accompanied by a draft Grounds of Response. I heard oral submissions today from both parties' representatives. In the course of submissions, I was referred to parts of the agreed bundle. I did not hear evidence. The evidence contained in the witness statements was untested.

4 I noted that the Claimant in his witness statement and in his proposed amended Particulars of Claim accepted that, in a meeting on 22 April 2020 that the Claimant had covertly recorded, the Respondent's Chairman, Mr Subaskaran Allirajah, did not state "then you won't work here" but rather "then it won't work here" in response to comments by the Claimant about working from home.

5 I permitted the Respondent to rely on very late disclosure of an email from Nic Deo to the Claimant and Mr Malique dated 4 May 2020 at 6:29pm because it appeared to be relevant and because my decision today is whether it appears to me that a tribunal ultimately determining this matter is likely to find in favour of the Claimant. This document would be in front of that tribunal. The approach to late disclosure at an interim relief hearing is by necessity more 'rough and ready' than the approach at a final hearing. However, given that it was the very late disclosure (after the Claimant's submissions) of a document that should have been disclosed earlier and given that the Claimant was unable to confirm (or deny) the authenticity of the document, I was minded to approach the document with caution. In the end the existence of this email made no appreciable difference to my conclusions.

6 I was provided with a number of authorities:

6.1 Taplin v C Shippam Ltd [1978] IRLR 450

6.2 Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38

6.3 London City Airport v Chacko [2013] IRLR 610

6.4 Shinwari v Vue, EAT/0394/14/BA

6.5 Beatt v Croydon Health Services [2017] EWCA Civ 401

6.6 Arjoman-Sissan v East Sussex Healthcare NHS Trust, UKEAT/0122/17/BA

6.7 Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] IRLR 837

6.8 Qasimi v Robinson, UKEAT/0283/17/JOJ

6.9 Kilraine v London Borough of Wandsworth [2018] EWCA 1436

6.10 Wollenberg v Global Gaming Ventures and another, UKEAT/0053/18

I was also provided with first instance decisions on interim relief and then at final hearing in *Wharton v Ward Recycling* No 280817/2008 from the Sheffield Employment Tribunal in 2008. *El Megrisi v Azad University* UKEAT/0448/08, *Martin v Devonshires* [2011] ICR 352 and *Bolton School v Evans* [2007] IRLR 140 were also mentioned in submissions but not provided.

7 The following sections of the Employment Rights Act 1996 are relevant.

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.

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 of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

103A Protected disclosure

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.

128 Interim relief pending determination of complaint

(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or

(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met, may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

129 Procedure on hearing of application and making of order

(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or

(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and

(b) in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) fails to attend before the tribunal, or

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection

(3), the tribunal shall make an order for the continuation of the employee's contract of employment.

130 Order for continuation of contract of employment

(1) An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force—

(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and

(b) for the purposes of determining for any purpose the period for which the employee has been continuously employed, from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.

(2) Where the tribunal makes such an order it shall specify in the order the amount which is

> *to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.*
>
> *(3) Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—*
>
> *(a) in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and*
>
> *(b) in the case of a payment for any past period, within such time as may be specified in the order.*
>
> *(4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.*
>
> *(5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, goes towards discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.*
>
> *(6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.*
>
> *(7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.*

8 I make no findings on disputed facts. It is neither necessary nor desirable for me to do so at an interim relief hearing.

9 The outline chronology put forward by the Claimant, which is not in dispute, is that he was employed by the Respondent as Group General Counsel from 23 March 2020 until dismissed on 5 May 2020 with one week's pay in lieu of notice.

10 On 23 March 2020 'lockdown' was announced by the Prime Minister. The message from Central Government at that time was 'Stay at Home, Protect the NHS, Save Lives'.

11 It is not in dispute: that the Claimant worked in the office in the week commencing 23 March 2020; that he then worked from home until Friday 17 April 2020; that on Friday 17 April 2020 the Respondent asked him to return to the office with some other members of the legal team; that issues were subsequently raised by the Claimant and some of his colleagues; that the Claimant worked in the office between Monday 20 April 2020 and part of Wednesday 22 April 2020; and that the Claimant left the office on Monday 22 April and did not return before his dismissal on 5 April.

12 It is not in dispute that in relation to the Covid-19 pandemic lockdown, the Claimant made a number of communications about his health and safety, that of his family and of his colleagues with reference to governments guidelines in relation to working from the office rather than working from home. It is not in dispute that: the Claimant brought a grievance; which was heard on 28 April 2020; that the outcome conveyed on 29 April

2020 was that it was not upheld; that the Claimant appealed against that decision; that the appeal hearing was on 4 May 2020; and that on 5 May 2020, his was informed of the outcome of his appeal which was that it was not upheld.

13 It is agreed that later the same day, the Claimant's employment was terminated by letter dated 5 May 2020 which stated (in full):

> Dear Rodrigo,
>
> **Termination of Employment**
>
> We have taken the decision to terminate your role in accordance with your contract of employment, paragraph 20.1, with one weeks notice. We shall make a payment of one weeks notice to your account in the usual month end payment. Your last day of employment will be effective today.
>
> We thank you for your time at Lycamobile and we sincerely wish you all the very best for the future.
>
> Kind regards,
>
> Mr Paul Mallett
>
> Global Head of Talent Acquisition & HR
>
> Lycamobile

14 Initially C was relying on 12 alleged protected disclosures as summarised in paragraph 55 of the Particulars of Claim:

> . *55.1. A disclosure to Baskaran Allirajah and Subashini Satkunarajahby email on 28 March 2020 (paragraph 14) that if employees could perform their job remotely, they must do so;*
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> . *55.2. A disclosure by the Claimant to Paul Mallett on a telephone call on 17 April 2020 (paragraph 19) and a further email to Mr Mallett on 19 April 2020 (paragraph 23) in which he expressed concern about the danger to his and his family's health and safety and that of others by working in the office rather than remotely from home;*
>
> *55.3. A disclosure by the Claimant to Indraprakash Jegatheesan in a conversation on 21 April 2020 (paragraph 26) in which the Claimant continued to express concern about the danger to the legal team's health and safety and breach of government guidelines on COVID-19;*
>
> . *55.4. A disclosure by the Claimant to Mr Mallett by email on 22 April 2020 (paragraph 27) to express concern about the management instruction ordering the legal team currently working from home to return to the office, even though their work could be carried out remotely, which was in breach of the government guidelines on COVID-19, which endangered the legal team's health and safety;*
>
> . *55.5. A disclosure by the Claimant to Subaskaran Allirajah in a conversation on 22 April 2020 (paragraph 32) expressing the danger to the health and safety of the Legal team, and breach of government guidelines on COVID-19;*
>
> . *55.6. A disclosure by the Claimant to Mr Mallett by email on 22 April 2020 (paragraph 35) in relation to the danger to the health and safety of the Claimant, his family and the legal team, breach of the government's guidelines on COVID-19, and bullying and intimidation of the Claimant by Subaskaran Allirajah;*
>
> . *55.7. A disclosure by the Claimant to Mohammed Malique by email on 27 April 2020*

(paragraph 39) in response to Mr Mallett's reply to the Claimant Grievance and in relation to the danger to the health and safety of the Claimant, his family, the legal team, other employees of the Respondent and the public at large; breach of the Respondent's legal duty of care; breach of the government's guidelines on COVID-19;

. *55.8. A disclosure by the Claimant to Mr Malique on 28 April 2020 (paragraph 40) of the matters listed above in paragraphs 55.1 to 55.7 at the Claimant's grievance hearing;*

. *55.9. A disclosure by the Claimant to Mr Malique and Mr Jegatheesan by email on 30 April 2020 (paragraph 43), where the Claimant reiterated advice from French counsel in relation to the danger to the health and safety of the Respondent's affiliates' French employees, and breach of French laws and guidelines on COVID-19;*

. *55.10. A disclosure by the Claimant to Mr Malique by email on 3 May 2020 (paragraph 46) of the matters listed above in paragraphs 55.1 to 55.9 in the Claimant's appeal against the grievance decision;*

. *55.11. A disclosure by the Claimant to Mohammed Malique on 4 May 2020 (paragraph 47) by email forwarding Nic Deo's concerns about the return to the office of an Italian employee; and*

. *55.12. Disclosure by the Claimant to Mohammed Malique and the Review Panel on 4 May 2020 at the Claimant's grievance appeal of the matters listed above in paragraphs 55.1 to 55.11.*

15 Following that numbering, those alleged disclosures are referred to below as alleged disclosures 1 to 12.

16 C now accepts that alleged disclosure 1 is not a qualifying disclosure because it falls under the section 43B(4) privileged legal advice exception.

17 In submissions before me, it was argued on behalf of the Claimant that, when making the other communications, they were disclosures of information by him; and that he reasonably believed that they tended to show that the Respondent had failed, was failing or was likely to fail to comply with a legal obligation (s43B(1)(b)); and / or that the health and safety of any individual had been, was being or was likely to be endangered (s43B(1)(d)); and that he reasonably believed that making them was in the public interest. The pleaded case includes a reference to a criminal offence (s43B(1)(a)) but that argument was not advanced before me today.

18 The Respondent does not accept that the communications were qualifying protected disclosures. Specific points are made in relation to each of the alleged disclosures as to why they were: (a) not disclosures by the Claimant; and / or (b) not disclosures of information; and / or (c) could not have reasonably been believed by the Claimant to have tended to show either a breach of legal obligation or endangerment of health and safety; and / or (d) could not have reasonably been believed to have been made in the public interest; and / or (e) fell within the s43B(4) privileged legal advice exception. Those arguments are set out as general points at paragraph 10 of the draft grounds of Response and were addressed in relation to each specific disclosure in the Grounds of Response and Mr Barnett's very able and helpful written and oral submissions. Paragraph 11 of the Grounds of Response very helpfully sets out the particular points taken in relation to each disclosure.

19 The Respondent accepted that if made and if qualifying disclosures, the disclosures were protected in that they had been made to the employer in accordance with s43C.

20 The Claimant says that individually or collectively those protected disclosures formed the reason or principal reason for his dismissal. The Respondent denies that.

21 Paragraph 2 of Mr Malique's witness statement states:

> We did not dismiss the Claimant because he had raised health and safety concerns. We dismissed him because he covertly recorded conversations with our Chairman and at least one other lawyer, to use as evidence against them, and the legal team did not trust him and did not want to work under him.

22. Paragraph 2 of the draft Grounds of Response states:

> He was dismissed, in the full knowledge he lacked two years' continuity of employment and hence no procedure need be followed, because of conduct. In particular, the principal reason for dismissal was that he was covertly recording his colleagues and the company chairman to gather evidence he could use against them in internal grievances and/or litigation.

23. It was not in dispute that the Claimant had covertly made recordings, albeit that he had declared the two that we know about on the same day that he had made them. In an email on 22 April 2020, he stated that he had recorded a conversation with the Chairman, which had taken place earlier that day. There was no evidence before me that this had caused any particular alarm within the Respondent at the time. On 4 May 2020 at 5.32pm (after the grievance appeal hearing) he stated that he had recorded a conversation with Nic Deo, a lawyer colleague, earlier that day. The evidence before me indicated that the Respondent, in the person of Mr Malique, had responded swiftly to express concern about lawyers recording their colleagues.

24. The Respondent's case is that on the evening of 4 May 2020, Mr Malique, Aswini Elanggho (Operations Director), Suba Satkunarahah (the Chairman's executive assistant) and Subaskaran Allirajah (the Chairman) met in the office and discussed the issue of the recordings but that no decision to dismiss was taken at that time. Other than Mr Malique's witness statement account, there is no record of that meeting or discussion in the evidence before me.

25. The Respondent's case is that following a further exchange of emails in which the Claimant was asked about recording of colleagues, on the afternoon of 5 May 2020, as set out in paragraph 75 to 77 of Mr Malique's witness statement:

> "75. Within the hour, the Chairman came into the management office, where Paul Mallet (Head of HR) and I were talking. He said: *"We've been thinking about the situation since yesterday"*. 'We' was a reference to him, Aswini & Subashini. He continued: *"We can't see how the legal team can function not knowing if they're being recorded. If he [Rodrigo] is still under probation, terminate him under probation."* (It sounds formal, but that is the way the Chairman speaks).
>
> 76. Since Rodrigo was six weeks into his six-month probationary period, that meant he could be dismissed with one week's notice (which we paid in lieu). 1 SEP
>
> 77. At no point did the Chairman refer to either working from home, to furlough, to complaints by Rodrigo, or to any health & safety issues. The sole reason was the loss of trust in Rodrigo because of his covert recordings, particularly that of Nic Deo."

Other than Mr Malique's witness statement account, there is no record of that meeting or of that reasoning before me. I have seen no note taken by either Mr Malique or Mr Mallet.

26. The email trails on 4 and 5 May 2020 were referred to extensively in submissions on both sides and I have annexed them to these reasons in full:

Chain 1

Appended as 'Appendix 1'

Chain 2

Appended as 'Appendix 2'

Chain 3 (the late disclosure)

Appended as 'Appendix 3'

Conclusions

25 I will take some general points first; then address the alleged disclosures one by one; and then address causation.

26 General points:

a. I reject Mr Barnett's general argument that it did not appear likely that a tribunal would find that, for someone in the Claimant's position in March and April 2020, to raise concerns that requiring people to work in the office was a breach of government guidelines, was a reasonable belief that the health and safety of any individual had been, was being or was likely to be endangered. The context in which the communications were made is very important – namely the challenging circumstances facing individuals, those managing people, and businesses following the announcement of the 'lockdown' on 23 March 2020 and the confusing and indeed frightening messages emanating from government and echoed in the media. It does not appear to me that *de minimis* arguments based on our current (itself incomplete) state of knowledge or the official state of knowledge in April 2020 (even less complete) are unlikely to get the Respondent far before the tribunal. In particular an argument based on official statistics about the likelihood that one individual in the entire population of England would be one of the new daily cases of coronavirus on a particular day is meaningless without considering that most of the population were at little or no risk at that point – having been 'locked down'; and without adjustment for age and other risk factors – in particular the actions requested of the individuals in this case (to come in to work in the office, which would have involved travel). Even if a meaningful statistical analysis could be carried out, given the stern government message at that time 'Stay at home, protect the NHS, save lives' it appears to me to be likely that a tribunal would find that in making some of the Claimant's communications (as identified below), he both (a) reasonably believed that they tended to show that the health and safety of any individual had been, was being or was likely to be endangered; and (b) when making a disclosure about the effect on a group of people wider than himself and his immediate family, that it followed ('protect the NHS, save lives') that he reasonably believed that making such disclosures was in the public interest.

b. It did not however appear likely to me, on the Claimant's case as presently formulated, that it was likely that a tribunal would find that he reasonably believed that his communications tended to show a breach of a legal obligation on the part of the Respondent. I accept Mr Barnett's argument that given the Claimant's job as Group General Counsel and the nature of the Respondent's business, at least as far as the UK position was concerned, a tribunal would be unlikely to consider it reasonable to believe that the various communications made by the Claimant tended to show that a legal obligation had been breached by the Respondent. Mr O'Dair was beginning to put a different argument forward at the end of his submissions – which may present the case in a different way based on a duty of care to the Claimant and / or other employees – but that argument was insufficiently articulated at this hearing to enable me to come close to finding that it would appear to me that a tribunal was likely to find that the Claimant reasonably believed that the information disclosed tended to show a breach of a legal obligation and in addition, that argument runs the risk of being focused on the Respondent's contractual or other legal duties to the Claimant and may well fall foul of the 'reasonable belief made in the public interest' requirement.

c. Section 43B(4) is not a blanket rule which prevents lawyers from the protection given to whistle-blowers. For the exception to apply, two conditions must exist:

   i. the information forming the subject matter of the privileged communication must have been communicated to a legal adviser in the course of obtaining legal advice and be covered by legal professional privilege, and

   ii. a subsequent disclosure of that information must have been made by the legal adviser.

   If these conditions apply, the right of the legal adviser to assert that the disclosure is a qualifying disclosure for the purpose of the protected disclosure provisions is lost.

   Save for the Alleged Disclosure 1 (which is now no longer relied upon) and Alleged Disclosure 9, it appeared to me to be likely that the tribunal would reject the Respondent's argument that the remaining alleged disclosures were disclosures of information communicated to the Claimant in the course of obtaining legal advice, but rather that (in the cases of Alleged Disclosures 2 to 8 and 10 and 12), that they were disclosures of information from the Claimant rooted in his own concerns about the health and safety of himself, his family and his colleagues and their families. Alleged Disclosure 11 is dealt with specifically below.

Protected Disclosures

27 Turning to the specific alleged disclosures and taking them disclosure by disclosure and asking in relation to each one, all of the questions (i) to (iv) set out at para 2.1 above:

a. Alleged Disclosure 1 – is no longer relied upon.

b. Alleged Disclosure 2 – it appeared to me likely that a tribunal would find that this was a disclosure of information by the Claimant and that the Claimant reasonably believed it to tend to show endangerment of health and safety but it did not appear to me to be likely that a tribunal would find that this communication was made *in the public interest* as it was a communication largely about the Claimant (and his immediate family). It does not appear to me that a tribunal would be likely to find that this communication was caught by the Section 43B(4) exception;

c. Alleged Disclosure 3 – it did not appear to me to be likely that a tribunal would find that this communication was a disclosure of information *by the Claimant* or that he reasonably believed it to tend to show endangerment of health and safety as it was merely the relaying of the concerns of others. It did appear to me to be likely that a tribunal would find that this communication was made in the public interest as it was a communication about the Claimant's colleagues and it references the government guidelines – which were for the benefit of the public as a whole. It does not appear to me that a tribunal would be likely to find that this communication was caught by the Section 43B(4) exception;

d. Alleged Disclosure 4 - it did appear to me to be likely that a tribunal would find that this amounted to a disclosure of information by the Claimant which the Claimant reasonably believed tended to show that the health and safety of those asked to return to work and the public at large has been, is being or is likely to be endangered; and that the Claimant reasonably believed that making the disclosure was in the public interest, given the wider number of people involved (the Claimant and his colleagues) and the wider public health background to such considerations at that time, which were the reason for the government guidance to work from home if possible – i.e. that people were asked to work from home if possible not only to protect individual workers but to stop the spread of the virus in general. It does not appear to me that a tribunal would be likely to find that this communication was caught by the Section 43B(4) exception;

e. Alleged Disclosure 5 - my reasoning is the same as for Alleged Disclosure 4;

f. Alleged Disclosure 6 - my reasoning is the same as for Alleged Disclosure 4;

g. Alleged Disclosure 7 - my reasoning is the same as for Alleged Disclosure 4. The reference within the email chain to legal advice does not place all of this communication within the Section 43B(4) exception.

h. Alleged Disclosure 8 - this is mere repetition of other alleged disclosures and where they amount to qualifying disclosures, so does this disclosure;

i. Alleged Disclosure 9 – it did not appear to me that this forwarding of an email about the situation under French law is likely to be found by the tribunal to be a disclosure *by the Claimant*. It also appeared to me that given that the mistake made in relation to the French position appeared to have already been corrected by the time of the Claimant's communication, it would be

unlikely to be found to have been reasonably believed by the Claimant to have tended to show either a breach of a legal obligation or an endangerment of health and safety or that it was made in the public interest. It did not appear to me that a tribunal would be likely to find that this communication would *not* be caught by the Section 43B(4) exception;

j. Alleged Disclosure 10 – there is not said to be anything new here - my reasoning is the same as for Alleged Disclosure 7;

k. Alleged Disclosure 11 – it appeared to me that it was likely that a tribunal would find that this was a disclosure of information by the Claimant (about the violation of laws in Italy) that the Claimant reasonably believed tended to show a breach of a legal obligation and endangerment of health and safety; and that the Claimant reasonably believed this to be made in the public interest. I did hesitate when considering the Section 43B(4) exception but the difference between this matter and the French law situation covered at Alleged Disclosure 9 is that this does not appear to be the communication by the Claimant of someone else's legal advice (as was the case with the French law matter); or the communication by the Claimant of information given to him for the purpose of seeking legal advice and therefore it appeared to me to be likely that a tribunal would reject the Respondent's argument that this fell within the Section 43B(4) exception.

l. Alleged Disclosure 12 - this is mere repetition of other alleged disclosures and where they amount to qualifying disclosures, so does this disclosure.

28 Therefore in summary, it appeared to me that a tribunal was likely to find that the qualifying (and in this case therefore protected) disclosures are 4, 5, 6, 7, 8, 10, 11 and 12 – albeit that 8, 10 and 12 are merely repetition.

Causation

29 The most fundamental question in the case seem to me to be the final question which was whether it appeared to me that the tribunal were likely to find that the Claimant's disclosures (or at least those that were qualifying and protected) were the reason or principal reason for his dismissal. This is where the Claimant concentrated his oral submissions and it also formed half of the time allocated by the Respondent to its oral submissions.

30 On the Claimant's side, the strongest potential arguments appeared to me to be:

a. that there was no reference to the reason for the dismissal in the dismissal letter;

b. that the dismissal letter was issued after a series of protected disclosures and mere hours after the determination of the Claimant's grievance appeal in which reference was made to protected disclosures;

c. that no process was followed and no right of appeal was granted to the Claimant;

d. that there was no internal record of any discussion of any other reason for the Claimant's dismissal – despite the involvement of senior legal and

human resources professionals. There has not even been a later record of the reason, nor a more detailed explanation sent to the Claimant.

31 On the Respondent's side, the strongest arguments appeared to me to be:

a. that compliance was part of the Claimant's role (as it had been Mr Malique's before him) and that any company would expect an employee in such a role to have raised concerns where appropriate;

b. that the Claimant had not been dismissed for an earlier disclosure of information which more easily fell within the 'classic' arena of whistleblowing;

c. that Mr Malique's emails do record concern and displeasure at the making of the second (albeit not the first) of the recordings;

d. that the making of covert recordings – especially by one lawyer of another lawyer could form a reason for an employer to dismiss an employee;

e. that the reason for the absence of process was that there was no comeback for the Respondent if it did not follow process, given the very short length of the Claimant's employment;

f. that there is no documented evidence pointing to whistleblowing as the reason for dismissal.

32 Mr Malique's witness statement at paragraph 2 (quoted in full above) said that "the legal team did not trust him and did not want to work under him"; and at paragraph 72 "Nic had said that he felt uncomfortable working with somebody when he wouldn't know what was being recorded". However the only evidence before me (other than that of Mr Malique) of the views of the Claimant's colleagues was the late disclosure email from Nic Deo, in which Mr Deo agreed with Mr Malique's expression of concern, stating only "Deeply concerning behavior. No consent."

33 The making of the recordings is clearly tied closely to the protected disclosures. The Claimant argued that based on the dicta of Underhill P (as he then was) in the discrimination case of *Martin v Devonshires* [2011] ICR 352, a tribunal should (and would) be slow to find that employer should be able to take steps against employees because of the manner in which they had made a complaint (i.e. in this case, involving the making of covert recordings).

34 The Respondent, relying on *Bolton School v Evans* [2007] IRLR 140, argued that the tribunal would be bound to find that an employee may be fairly dismissed for his or her misconduct even where that misconduct is closely connected to a protected disclosure where the principal reason for dismissal was not the disclosure but the misconduct and that an employee's conduct in making a protected disclosure may, in certain circumstances, be separable from the disclosure itself.

35 In *Bolton v Evans*, the employee hacked into his employer's computer system to demonstrate its security failings and then told his employer about what he had done and (as found by the Court of Appeal) was fairly dismissed not for whistleblowing but for the hacking misconduct.

36 The facts in the *Bolton v Evans* case did appear to be in a different league to this Claimant's covert recordings – particularly given that the Respondent did know of the first recording and took no action about it. However, whilst grateful to counsel for their submissions on this point, for my purposes, it appeared to me that the decision for me was whether it appeared to me that the tribunal was likely to find that the reason or principal reason for dismissal was the making of the disclosures or the making of the covert recordings (and the Claimant's colleagues' reactions to that).

37 Given the absence of any process whatsoever (which despite his short length of service, I would have expected to see for such a senior employee); the absence of any reason stated in the dismissal letter; the absence of any record of the reason for dismissal despite the involvement of legal and human resource professionals; the dismissal following swiftly on from the making of the disclosures and the conclusion of the grievance appeal; the evidence of mounting displeasure at the Claimant's insistence on raising concerns about his health and safety and that of his colleagues; and the absence of any evidence, aside from the late disclosed email, of any lack of trust on the part of the Claimant's colleagues, it appeared to me that the tribunal ultimately determining this matter was likely to find that the making of the protected disclosures was the reason or principal reason for the dismissal. Perhaps the making of the recordings tipped the balance or played some part in the decision to dismiss. I cannot say that I am certain, but it appeared to me that a tribunal was likely to find that the principal reason for the dismissal was the making of the protected disclosures.

38 In short, the Claimant has a pretty good chance of succeeding in this part of his claim under s103A.

39 I am grateful to the parties that in advance of the hearing, they had agreed that if I was to grant the Claimant's application, having announced my findings, I should make a continuation of employment order in agreed terms. That and the lateness of the hour when the decision and reasons were delivered meant that the process set out in Section 129(2) and (3) was short circuited and I moved straight to the process set out in Section 129(8) and made a continuation of employment order under Section 130 in the terms agreed by the parties.

40 My decision and reasons were delivered orally. The Respondent requested written reasons.

41 Given that I have made a continuation of employment order, the final hearing of this matter should be expedited. Sadly 'expedited' is currently a relative term. The soonest that this matter can be listed before a full tribunal for 4 days (which appears to me to be an appropriate listing) is **8 to 11 December 2020**.

42 Another case management hearing will be required in the case but I think that it is not right for me to set any dates for that at the moment because it will have to wait for the Respondent's ET3 to be presented. The matter will then be listed in the usual way for such a hearing in order to go through the issues in the substantive case and make case management orders. That case management hearing also needs to be expedited.

43 I was very grateful to the legal representatives on both sides in this matter for their preparation and presentation of the case and for the liaison between them that had clearly helped the matter be heard over the Cloud Video Platform.

Employment Judge Allen QC
Date: 10 August 2020